



**Friends of Oloolua Forest & 2 others v Kenya Nuclear Regulatory Authority & 5 others
(Environment & Land Case E263 of 2024) [2024] KEELC 6626 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E263 OF 2024**

MD MWANGI, J

JULY 23, 2024

BETWEEN

**FRIENDS OF OLOOLUA FOREST 1ST PLAINTIFF
PUBLIC INTEREST LITIGATION 2ND PLAINTIFF
ADVOCACY FOR THE ENVIRONMENT (PILAE) 3RD PLAINTIFF**

AND

**KENYA NUCLEAR REGULATORY AUTHORITY 1ST DEFENDANT
NATIONAL MUSEUMS OF KENYA 2ND DEFENDANT
KENYA FOREST SERVICE 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT
NATIONAL LAND COMMISSION 5TH DEFENDANT
DIRECTOR GENERAL OF PHYSICAL PLANNING AND LAND USE
PLANNING 6TH DEFENDANT**

RULING

Background

1. The 1st Plaintiff/Applicant in this case describes itself as a Community Based Organisation registered under the Community Groups Registration Act, actively involved in the conservation of Oloolua Forest, supporting the local community forest associations and ensuring the sound management and protection of the forest. The 2nd Plaintiff/Applicant on its part, is a company limited by guarantee registered under the *Companies Act* and involved in public interest litigation and advocacy for the conservation of the environment within the Republic of Kenya.



2. The Plaintiffs allege that the 1st Defendant, National Museums of Kenya, has unlawfully seized a staggering 183.76 hectares (450.2 acres) of Ooloolua Forest equivalent to 30% of the forest land and acquired a title No. 23268. The 1st Defendant has proceeded to lease a portion of that land to the 2nd Defendant herein, Kenya Nuclear Regulatory Authority, contrary to the express provisions of the purported grant issued in its favour. The Plaintiffs assert that the actions of the 1st Defendant amount to brazen land grab in violation of the rights of the Plaintiffs and the people of Kenya in general. The said activities are additionally a direct threat to the integrity and survival of Ooloolua Forest.
3. The Plaintiffs accuse the third Defendant, Kenya Forest Service (KFS) of complacency and failure to conserve and protect Ooloolua forest; which is its statutory responsibility under the *Forest Conservation and Management Act*. Its key function is the conservation, protection and management of all public forests. Ooloolua Forest is one such public forest that falls under the mandate of KFS.
4. The 4th, 5th and 6th Defendants on their part are accused of acting illegally and or abetting illegalities in alienating, allocating and registering the 1st Defendant as the owner of the illegally excised parcel of land despite protests from the public. The Plaintiffs further aver that the allocation, survey and issuance of a Deed Plan and eventually a title over the said parcel of land amounts to a neglect of duty and abuse of office by the 6th Defendant, the Director General of physical planning and land use planning and offends the *Physical and Land Use Planning Act* and the *Constitution*.
5. The 1st Defendant, the National Museums of Kenya, a statutory body established under Section 3 of the *National Museums and Heritage Act*, has the responsibility of protecting national natural and cultural heritage. It had through the Institute of Primate Research (IPR) initially entered into the Ooloolua forest as a ‘guardian of the forest’ undertaking primate research on monkeys, to give insight into the behaviour of early man but ended up being an ‘owner’ of 1/3 of the forest land.
6. The Plaintiffs further state that the impugned title, granted to the 1st Defendant, was granted subject to the special conditions therein, including one condition that the land was solely to be used for ‘the purposes of the National Museum’ as set out in the National Museums Act (now *National Museums and Heritage Act*). Having breached the said condition, the land ought to automatically revert to the public.
7. The 1st Defendant is further accused of building and developing corporate offices and conference halls on the subject property that it hires to the public at a fee. This activity not only damages the forest but also brings unnecessary traffic into the forest.
8. It is the Plaintiffs’ case that the 1st Defendant has already leased a chunk of the land allocated to it to the 2nd Defendant. The 2nd Defendant has, according to the plaintiffs, decimated the forest cover, erected fences and constructed permanent buildings therein. The 2nd Defendant has further set up what is referred to as a Central Radioactive Waste Processing Facility (CRWPF) and a Chemical, Biological, Radiological and Nuclear Reference Centre (CBRN) in the leased portion which is within Ooloolua forest. The Plaintiffs assert that the 2nd Defendant ferries nuclear and radioactive waste and other hazardous materials into the forest, purportedly to process and manage the waste which activity is highly detrimental to the forest. The waste processing facility and the CBRN Reference Centre pose a serious risk to the forest, animals within the forest and members of the public living near the forest and those who use the forest for recreation and tourism.
9. It is alleged that the nuclear waste stored in the CRWPF contains highly poisonous chemicals like plutonium and uranium pellets, which have harmful health effects to the present and future human generations. The seepage of radioactive waste water and effluent from the cleaning activities contaminates surface and ground water sources in Ooloolua forest.



10. The Plaintiffs further state that, in a bid to mitigate the risks of escaping radiation, the 2nd Defendant has resorted to felling trees, trenching, walling and erecting masonry walls. Such activities however, are incompatible with the participatory forest management plan (2023-2027) adopted for the Oloolua forest. The continued presence of the 1st and 2nd Defendants in the forest therefore poses an existential threat to the forest. They have greatly disturbed the forest ecosystem through their activities.
11. The Plaintiffs urge the court to urgently intervene to stop the illegal activities and protect the forest, pending the hearing at the determination of this suit. Ultimately, the Plaintiffs pray for a declaration that the title issued to the 1st Defendant was illegal, its cancellation and eviction of the 1st and 2nd Defendants from the Oloolua forest amongst other orders.
12. Despite service in accordance with the Court's Order of 9th July 2024, none of the Defendants entered appearance and or filed a response to the Plaintiffs' Notice of Motion dated 1st July 2024.

Court's Directions

13. The Plaintiff's moved the Court under certificate of urgency. On 9th July 2024, the Court certified the Notice of Motion dated 1st July 2024 as urgent and issued interim preservation orders ex parte. The court further directed service of the application and all the pleadings filed in this case upon all the Defendants for inter partes hearing on 18th July 2024.
14. On 18th July 2024, the Advocate for the Plaintiffs confirmed serving the application. He had indeed filed an Affidavit of Service confirming service of the application upon the Defendants. None of the defendant had entered appearance and or filed a response to the Notice of Motion application. The plaintiffs' Advocate therefore urged the court to allow the application as prayed and particularly to grant the interim orders to preserve the Oloolua forest pending the hearing and determination of the suit.

Issues for Determination

15. The key issue for determination in this matter is whether the Court should issue the interim orders sought in the Plaintiffs' application pending hearing and determination of the suit.

Determination.

16. In enacting the *Constitution* of Kenya, 2010, the People of Kenya undertook to be respectful of the environment, acknowledging it as our common heritage and committing to sustain it for the benefit of future generations.
17. Article 69 of the *Constitution*, in accord with this undertaking, spells out the obligations of the State in respect of the environment. The Article obligates the state to: -
 - a. ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - b. work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya;
 - c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - d. encourage public participation in the management, protection and conservation of the environment;
 - e. protect genetic resources and biological diversity;



- f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - g. eliminate processes and activities that are likely to endanger the environment; and
 - h. utilise the environment and natural resources for the benefit of the people of Kenya.
18. Article 69 of the [Constitution](#) further obligates every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
 19. Article 70 of our [Constitution](#) on the other hand allows any person who alleges that a right to a clean and healthy environment is being or is likely to be denied, violated, infringed or threatened to apply to a court for redress. Such a person is not required to demonstrate that he or she or any other person for that matter has incurred loss or suffered injury. The Article is augmented by the provisions of Article 22 and Article 258 of the [Constitution](#) which emphasize n the right of every person to institute court proceedings on his/her own behalf, on behalf of another person or a group or class of persons or even in public interest.
 20. The Plaintiffs in this case therefore have a constitutional right to initiate this suit as they have done.
 21. The Court on its part is empowered to make any order or give directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment and or to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.
 22. The Plaintiffs herein allege, as I have analysed above, ongoing senseless destruction of Oloolua forest's flora and fauna through the activities of the 1st and 2nd Defendants that further pose risks and threats to the forest, the animals and vegetation therein and members of the public living near the forest and those who visit the forest for recreational and tourism activities. It is further alleged that the nuclear waste stored by the 2nd Defendant contains highly poisonous chemicals with harmful health effects to the present and future human generations. The seepage of the radioactive waste water and effluence from the cleaning activities undertaken by the 2nd Defendant contaminates surface and ground water sources within the Oloolua forest further spreading the risks beyond the environs of Oloolua forest.
 23. The plaintiffs describe Oloolua forest as a gazetted forest located in Karen, Nairobi, measuring approximately 1650 acres. The forest has not been degazetted and is therefore protected under the [Forest Conservation and Management Act](#). It is not available for allocation and alienation to any person.
 24. The forest is one-of-a-kind ecosystem and home to a diverse array of birds and wildlife in addition to scenic waterfalls, nature trails, historic caves and swamps. It is a critical water catchment area, a biodiversity hotspot and a vital carbon sink that absorbs carbon emitted in the city of Nairobi and the satellite towns of Ngong, Ongata Rongai and Kiserian. It is the source of numerous rivers and streams including the Mbagathi River.
 25. In addition to the Constitutional provisions cited above, Kenya is a signatory to numerous International Treaties/Conventions on environmental conservation and climate change, including but not limited to the [United Nation Framework Convention on Climate Change](#) and the [Kyoto Protocol](#), the [Paris Agreement](#), the [Ramsar Convention on Wetlands](#), the [Convention on International trade in Endangered Species](#), the [Convention on Biological Diversity](#), the [African Convention for the Conservation of Nature and Natural Resources](#), the [Protocol \(to the Nairobi Convention\) concerning Protected Areas](#)



and Wild Fauna in the Eastern African Region, International Convention for the Protection of New Varieties of Plants, amongst others.

26. In signing and ratifying the International Treaties and Conventions, Kenya committed to take appropriate steps and measures to conserve and protect the environment and safeguard, protect, rehabilitate forests, wetlands, ecologically sensitive areas and other environmental resources amongst other issues. the Constitution under Article 2(6) recognizes such International Treaties and Conventions that Kenya has ratified as part of the Law of Kenya. We are obligated to uphold the provisions of such International Treaties and Conventions and the Constitution , in addition to the laws enacted by Parliament. We must talk the talk and walk the walk.
27. It is in the public domain that the President of Kenya has committed the Country to an ambitious program of growing 15 billion trees by 2032. The program is in fulfilment of part of Kenya's commitments to reducing greenhouse gases emissions, stopping and reversing deforestation and restoring degraded landscapes.
28. The kind of activities described by the Plaintiffs in this case, if true, are not in consonance with our Constitutional, Legal and International commitments to the protection of the environment. They negate the efforts aimed at reversing deforestation.
29. Looking at the Plaintiffs' application even from the perspective of the established principles for the grant of an order of temporary injunction, I am persuaded that the Plaintiffs' case is a proper case for the grant of temporary injunction orders.
30. The law is well settled since the *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 case. The conditions for the grant of orders of temporary injunction are:
 - a. The Applicant must show a prima facie case.
 - b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not be adequately compensated by an award of damages.
 - c. If the Court is in doubt, it will decide the application on a balance of convenience.
31. In the case of *Nguruman Ltd v John Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal stated that the three conditions (stipulated in the Giella case) are to be applied as separate, distinct and logical hurdles which are to be surmounted sequentially. Meaning that, an Applicant must establish all the conditions one after the other.
32. In the case of *Nicholas Njeru Muturi v Thome Dynamics Limited & another* [2022] eKLR, this court analysed the import of the holding in the Nguruman case and found that;

‘...if a prima facie case is not established, the Court need not go farther to consider if the Applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’
33. On a prima facie case, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*) stated that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We



reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

34. The Plaintiffs have established a prima facie case for the protection of Oloolua forest.
35. I agree with the Plaintiffs' assertion in their application that no amount of financial compensation can restore the forest if destroyed. The forest's survival is critical in the interest of the current and future generations. That is irreparable harm.
36. The need to protect and conserve our forests including Oloolua forest, the subject matter of this case, and other ecologically sensitive areas cannot be overemphasised. We owe it to ourselves and to the future generations. We are living in perilous times; a time of monumental environmental challenges, climate change, biodiversity loss, amongst other challenges. From the allegations in the Plaintiffs' application, and applying the precautionary principle, my finding is that the balance of convenience is in favour of the issuance of the orders sought by the Plaintiffs, pending the hearing and determination of the main suit.
37. The pre-cautionary principle which is also embraced by Section 2 of the [Environmental Management and Co-ordination Act](#) (EMCA), dictates that where there are threats of damage to the environment, lack of full scientific certainty shall not be used as a reason to postponing measures to prevent environmental degradation.
38. This court was established pursuant to the provisions of Article 162 (2) of the [Constitution](#) with the mandate to hear and determine environmental and land disputes. The statute that established this court, the [Environment and Land Court Act](#), commands the court in exercising its jurisdiction to adhere to the principles of the sustainable development including the principles of [intergenerational and intragenerational equity, the polluter pay principle and the pre-cautionary principle](#) (emphasis mine).
39. This court will rise to its calling. Therefore, exercising its mandate under the [Constitution](#) and the law and guided by the pre-cautionary principle, and to prevent any further degradation of the Oloolua forest, pending the hearing and determination this suit, the Court hereby issues orders of preservation of Oloolua Forest and orders; -
 - a. That pending the hearing and final determination of this suit, an Order of preservation of Oloolua Forest be and is hereby issued restraining the 1st and 2nd Defendants from undertaking any works in the Oloolua Forest, including the felling of trees, digging of foundations, trenching, building, walling, roofing or erecting structures of whatever form and in any way from entering and disturbing the forest ecosystems in Oloolua Forest or on the portion Title No.23268 excised therefrom.
 - b. That pending the hearing and final determination of this suit, an order be and is hereby issued restraining the 2nd Defendant, its transporters, and its agents from ferrying and delivering nuclear and radioactive waste or other hazardous material into Oloolua Forest and storing the waste on the property known as Title No.23268 excised from Oloolua Forest.



- c. That pending the hearing and final determination of this suit, an interim order of preservation of Ooloolua Forest be and is hereby issued restraining the 1st Defendant from further leasing, selling, transferring, charging, alienating, or otherwise disposing the property known as Title No. 23268 excised from Ooloolua Forest.
- d. That pending the hearing and final determination of this suit, an order of preservation of Ooloolua Forest be and is hereby issued prohibiting the 3rd to 6th Defendants from further alienating, allocating, and excising any part of Ooloolua Forest to private land or private use.
- e. That the costs of this application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF JULY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Court Assistant: Yvette

Mr. Ojiambo for the Plaintiffs/Applicants

N/A for the Defendants/Respondents

