



**Mwaura & 3 others v Cabinet Secretary Ministry of Land, Public Works
Housing and Development & 3 others (Environment & Land Petition
E003 of 2024) [2024] KEELC 6101 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION E003 OF 2024
JG KEMEL, J
SEPTEMBER 24, 2024**

BETWEEN

**JULIUS KIIRU MWAURA 1ST PETITIONER
JULIA WATIRI NDIRANGU 2ND PETITIONER
GEORGE NGOTHO 3RD PETITIONER
GEORGE KARIUKI NDUNG’U 4TH PETITIONER**

AND

**CABINET SECRETARY MINISTRY OF LAND, PUBLIC WORKS HOUSING
AND DEVELOPMENT 1ST RESPONDENT
THE HONORABLE ATTORNEY GENERAL 2ND RESPONDENT
KIAMBU COUNTY GOVERNMENT 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT**

RULING

1. The Petitioners/Applicants filed the instant Notice of Motion dated 19/2/2024 seeking Orders that;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of this Petition, the Honorable Court be and is hereby pleased to issue an ex parte interim injunction Order stopping, prohibiting and forbidding the Respondents jointly and severally, restraining them whether by themselves, their agents, servants, representatives, assignees and/or whosoever acting under the instructions/direction



from entering, mapping, surveying, Sub dividing and delineating, carrying out excavation or constructions on ancestral community land parcel number Muguga/Gitaru 382 or on any subsequent sub-divisions made on Muguga/Gitaru 382.

- d. A Conservatory Order do issue restraining the Respondents from acquiring, alienating, disposing and in any way dealing with the land parcel number Muguga/Gitaru 382 or on any subsequent sub-divisions made on Muguga/Gitaru 382 except in accordance with the provisions of Article 63 of *the Constitution*, the *Community Land Act*, 2016 and the regulations thereto.
 - e. A declaration that land in Muguga/Gitaru/382 is a community Land and should be dealt with only in accordance with Article 62 of *the Constitution* of Kenya, 2010 and the *Community Land Act*, together with the Regulations thereto.
 - f. The costs of this Application be awarded to the Petitioners/Applicants.
2. The Application is based on extensive grounds that; On 9th, 11th, 14th and 16th February 2024, the 1st Respondent without any approval or consent from Mbari ya Mutego or without any Court order invaded the land registered as Muguga/Gitaru 382 (the suit land) termed as ancestral land. That the suit land belongs to Mbari ya Mutego and the 1st to 4th Petitioners ancestral land which is in danger of being wasted and damaged by the Respondents who descended on it and demolished houses, fenced it off and commenced excavations thereon; Neither the Petitioners nor Mbari ya Mutego community were involved in public participation as envisaged under Article 10 of *the Constitution* of Kenya and Article 32(1) & (2) of the UN Declaration of Rights of Indigenous People. That the Petitioners and Mbari ya Mutego's proprietary rights under Article 40 of *the Constitution* of Kenya have been violated; The 1st Respondent has failed to follow the laid down legal procedure on converting community land to public land for the construction of housing units pursuant to Article 63 of *the Constitution* of Kenya and the *Community Land Act*.
 3. Further, the deponent avers that the intended construction of 700 units within a controlled development area with a low-density population poses a high risk contrary to the provisions of the 2nd Schedule of Environmental Management and Coordination Act (EMCA) and Legal Notice 31 Environmental Impact Assessment and Audit Regulations 2016 (hereinafter the EIA Regulations).
 4. He added further that the Respondents have failed to undertake social and environmental impact assessment before the commencement of the project in Compliance with the EIA Regulations.
 5. That in light of the forgoing, the Petitioners are apprehensive that if the Application is not heard and determined expeditiously, their constitutional right to property and right to ancestral community land shall continue to be violated.
 6. The Application is further supported by a lengthy Affidavit of even date sworn by Julius Kiiru Mwaura. Rehashing the above grounds, the deponent averred that Mbari ya Mutego are the indigenous Kikuyu community who lived in native reserves, the current Kikuyu township for which the suit land is part of. He annexed copies of the alleged demolitions taken on 10/2/2024 as LRA1(a & (b) and LRA-2a, a copy of the letter authored by the office of the Secretary to the Land Enquiry Commission to the District Commissioner, Kiambu in 1932 calling for memoranda on the land claims by the various clans living in the area.
 7. That during adjudication and demarcation, Mbari ya Mutego donated part of the ancestral land to be preserved as communal utility land for use by various sub clans as grazing areas and the reserved area



- was registered as Muguga/Gitaru 382 and held in trust by the defunct Kiambu county council. See annexures LRA-3a – c copies of maps indicating the location of the suit land.
8. That in the year 2016, the 4th Respondent upon complaint by the community commenced the process for review and disposition of the said illegal titles (See LRA-4 copy of National Land Commission notice dated 17/11/2015) and later decided that all subdivisions be cancelled and the suit land title to revert to the mother title Muguga/Gitaru 382. The Court was urged to grant conservatory orders sought.
 9. Opposing the Application, the 3rd Respondent through its land administrator Patrick Mbari filed a detailed Replying Affidavit sworn on 15/4/2024. He averred that historically the entire public land known as Muguga/Gitaru 382 was earmarked as native land with many families settled thereon. That during adjudication each family contributed land to be preserved as public utility for the benefit of the community and therefore it is public land. That the families settled on the suit property were asked to relocate to pave way for utilization of the public land. That these families were moved to the nearby Mutego Tiebae, Gitaru, acre 5 and Gatwanyaga villages.
 10. Subsequently that the suit land was mapped and named Kiambu Trust Land or Kikuyu Trust Land and it hosted various government offices. That recently the 4th Respondent granted a review and disposition of titles of the entire suit land revoking titles arising from the subdivision of the land vide a Gazette Notice No. 4274 dated 17/7/2017 annexed as PM1.
 11. He added that the suit land also known as Kiambu Trust land was reserved for public utility and social amenities and was subdivided into Muguga/Gitaru 482-487 in the year 1977 and some of the subdivisions were also further subdivided but the subdivisions have been cancelled and restrictions placed.
 12. The deponent concluded that the Petitioners never submitted their memorandum to validate their claim and, in any event, it is a falsehood that the suit land is community land as alleged. That the legal process for conversion of community land to public land is inapplicable because the suit land has always been vested with the National and County Governments. That there is no trust between the Petitioners and the 3rd Respondents and their claims ought to be dismissed. The 3rd Respondent asked the Court to dismiss the Application and Petition with costs.
 13. In a rejoinder, the Petitioners filed a Supplementary Affidavit dated 22/4/2024. They maintained that the suit land is community land and posited that the 3rd Respondent has not tendered evidence to show that the suit land is public land. They contended that the suit land is Trust land and the Respondents have no legal right or mandate to allocate the suit land to any Government institution without the consent and approval of Mbari ya Mutego. Lastly the Petitioners averred that the 3rd Respondent's affidavit is defective for non-compliance with Section 5 of *Oaths and Statutory Declarations Act* on account of being undated and not sworn before a Commissioner. That as such their Application remains unopposed.
 14. The Application was canvassed by way of written submissions and the firm of Mwaura & Mburu Advocates filed two sets of submissions dated 4/4/2024 and 23/4/2024 on behalf of the Petitioners.
 15. Reciting the principles of grant of temporary injunction as laid down in the case of Giella Vs. Cassman Brown (1973) EA 358, the Petitioners submitted that they have established a prima facie case with high chances of success. That the suit land is community land within the meaning of Article 63 of *the Constitution* of Kenya. That their indefeasible ownership rights over the suit land have been entrenched under Art 32(1) and (2) of the UN Declaration of rights of indigenous people. Further that the



Respondents having failed to comply with Sections 58, 59 and 60 of the EMCA, the proposed housing project pose a high risk to the surrounding community and should not be allowed to proceed.

16. On irreparable loss, it was submitted that the negative impacts of the project cannot be compensated by monetary damages. That air pollution will plummet as a result of increase of human and surface transport leading to adverse climate change.
17. That on the balance of convenience, the housing project is literally a vertical slum and will negatively affect the privacy, peace and serenity of the surrounding community and unless the Respondents are enjoined, the Petitioners will suffer greater inconvenience.
18. In the supplementary submissions, the Petitioners reiterated that the 3rd Respondent's Replying Affidavit is defective for want of compliance with section 5 of the *Oaths and Statutory Declarations Act*. Reliance was placed on the case of CMC Motors Group Limited Vs. Bengeria Arap Korir Trading as Marben School and Another [2013] eKLR.
19. The Respondents did not file any submissions.

Analysis & Determination

20. The main issue for determination is whether the Application is merited.
21. Before I delve into the main issue I would like to address the objection with respect to the competence or otherwise of the 3rd Respondents Affidavit sworn on the 15th day of the undisclosed month in 2014.
22. In the said objection, the Petitioners urged this Court to strike out the 3rd Respondent's Replying affidavit for being defective for want of Commissioning. The Court has perused the said pleading and finds that though it is stated to have been sworn at Kiambu, the same was commissioned in Nakuru before one commissioner for oaths J J Cheserek. If the deponent signed the affidavit before a commissioner of oaths in Kiambu, then the said commissioner ought to have signed it in Kiambu and not Nakuru. I find that the affidavit fails to conform with the provisions of Section 5 of the Act and the same is incompetent and is hereby struck out.
23. The relevant law on temporary injunction is stipulated in Order 40 rule 1 of the Civil Procedure Rules that; -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”
24. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella Vs. Cassman Brown (supra). This position has been reiterated in



numerous decisions from Kenyan Courts and more particularly in the case of Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction Application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

25. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of Mrao Ltd Vs. First American Bank of Kenya Ltd (2003) eKLR in which the Court of Appeal gave a definition of a prima facie case. The Court stated that:

“... in civil cases, it is a case in which, on the material presented to the Court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. The Petitioners accuse the Respondents of unlawfully and irregularly acquiring their land for the impugned housing project. They contend that the suit land is communal utility land inter alia reserved for grazing purposes and registered as Muguga/Gitaru 382. That the National Land Commission canceled previous illegal subdivision and the suit land reverted to Kiambu County Government to hold in trust for the community.

27. On their part the 3rd Respondent averred that the suit land has been public land held initially by the national government and now the county government. That the issue of trust cannot arise. That the families that occupied the suit land were relocated and the land used to host government offices. In any event the 3rd Respondent avowed that the Petitioners claim cannot stand since the Petitioners never submitted their memorandum to validate their claim, if any.

28. Have the Petitioners established a prima facie case in their favor? I am afraid not. Except for the maps annexed in the Supporting Affidavit showing the location of the suit land, no evidence has been tendered before Court to demonstrate that the suit land is community land as claimed.

29. The Court has had a chance to peruse the letter of 1932 in which the office of the Secretary to the Land Enquiry Commission asked the District Commissioner to among other things request clans to send their claims through memoranda to his office. In the said letter he noted that;

.... that the only Mbari I have received memoranda are those shown on pages 1-4. If those shown on page 5-7 wish to submit memoranda they had better set about doing so at once.”

30. The Court has not been shown any evidence to show that the Petitioners through Mbari Ya Mutego did submit the memoranda and that their claim was validated. The Court will have to answer the question during the trial as to whether or not the clan was the owner of the land together with others and if the answer is in the affirmative then the question on to whether they surrendered part of their entitlement for public purpose is best left to the trial Court.

31. The Applicants have led evidence that the 4th Respondent revoked the subdivisions of the titles and the suit land reverted to the mother title Muguga/Gitaru/382. The Court has perused the gazette notices



of 17/7/2017 wherein several titles were revoked and the land vested in the National and County Government for re-planning to accommodate public utilities and bonafide allottees.

32. Is the land public or clan land? This being a preliminary Application, the Court notes that these are part of the questions in the main suit which the trial Court ought to determine. I say so because the Court is not required to determine the issues in controversy to its logical conclusion at the preliminary stage of the suit.
33. Applying the definition of prima facie case as stated in the case of Mrao (supra), an Applicant has to place material before the Court upon which the Court will decide whether or not a prima facie case has been established. It is evident therefore that it is not enough for a party to merely state that it has a prima facie case. That alone will not bring it within the ambit of a prima facie case as required by law. See the case of Stek Cosmetics Limited Vs. Family Bank Limited & another [2020] eKLR. The Petitioners bear the burden of proving a prima facie case in its favor. The Petitioners must show that their rights are being violated or are likely to be violated by the Respondents which would shift the burden onto the Respondents to explain or rebut the Petitioners' claims.
34. The Court finds that the Applicant has not demonstrated a prima facie case with a probability of success.
35. On irreparable harm, it was posited that the negative impacts of the project cannot be compensated by monetary damages. That air pollution will soar as a result of increase of human and surface transport leading to adverse climate change. Further the Petitioners contended that the Respondent's failure to comply with EMCA provisions, the proposed housing project poses massive risks to surrounding community.
36. The Court finds that no irreparable case has been established to persuade the Court to grant the injunction. What is cited are risks capable of damages being calculated for monetary compensation.
37. The Court having not been in doubt on the balance of convenience, the Court finds that in the overall and for the reasons given above it is not persuaded that it should exercise its discretion in favour of the Applicants.
38. The upshot of the forgoing is that the Application is not merited.
39. It is dismissed with costs to be borne by the Petitioners.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwaura for 1st, 2nd, 3rd and 4th Petitioners

Ms. Njuguna for 1st and 2nd Respondents

Ms. Muchiri for 3rd Respondent

4th Respondent – Absent

Court Assistants – Phyllis/Oliver

