



REPUBLIC OF KENYA



**Kibera v Kamata & 2 others; Mutemi (Interested Party) (Environment and Land Appeal E030 of 2022) [2024] KEELC 7279 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E030 OF 2022  
OA ANGOTE, J  
OCTOBER 31, 2024**

**BETWEEN**

**JOSEPH KIGURU KIBERA ..... APPELLANT**

**AND**

**GEORGE GICHUHI KAMATA ..... 1<sup>ST</sup> RESPONDENT**

**HANNAH WATHITHI KAMATA ..... 2<sup>ND</sup> RESPONDENT**

**NANCY KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MICHAEL MUTINDA MUTEMI ..... INTERESTED PARTY**

**RULING**

1. The Appellant has filed a Notice of Motion application dated 25<sup>th</sup> April 2024 under Section 3 and 3A of the *Civil Procedure Act*. He has sought the following orders:
  - a. That pending the hearing and determination of the appeal, the appellant/applicant be granted leave to remove every structure that has been erected by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on this suit properties Dagoretti/ RIRUTA/5818 and Dagoretti/RIRUTA/ 5819, and the respondents to bear the costs of the exercise.
  - b. That the honourable court be and is hereby pleased to order the Officer Commanding Kabete Police Station to provide security in enforcement of the orders herein above.
  - c. That cost of the application be on the respondents.
2. The application is supported by the Affidavit sworn by Joseph Kiguru Kibera, who deposed that on 26<sup>th</sup> October 2023, the Appellant secured cease and desist orders against the Respondents herein from erecting any structures on the suit properties but the respondents have erected structures on the suit



properties in disregard to the court orders herein and as such, he seeks the court's leave to have the said erected structures removed and for police security during the exercise to keep peace.

3. George Gichuhi Kamata, the 1<sup>st</sup> Respondent, opposed the application through a Replying Affidavit dated 20<sup>th</sup> May 2024. He deponed that the application is frivolous, incompetent and an abuse of the court process and the orders sought cannot be granted because the appeal against which the Appellant claims to seek orders from was dismissed following the ruling delivered by this court on 26<sup>th</sup> October 2023.
4. The 1<sup>st</sup> Respondent asserted that the Appellant has not demonstrated his interest in the suit property to justify this application; that the Appellant was not a party in MCELC No. E160 of 2021 between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Alfred Nyabutu & others; that the matter before the lower court does not involve the Appellant in anyway and that there is no issue of law or fact involving the Appellant and Respondents to be determined in the lower court to justify the application or the intended appeal herein.
5. Counsel for the Appellant submitted that the Respondents have not disputed the Appellant's claim that they have contravened the court orders and erected structures on the suit property; that the orders of this court are to be respected, and are to be protected and that the Appellant is seeking this court to enforce the said orders so that the Applicant and other beneficiaries of the orders may enjoy the orders of this court in peace.
6. Counsel for the Respondents submitted that the Appellant has no legal or equitable rights over the Respondents' properties to warrant grant of the prayers sought in the application; that this court dismissed this suit through its orders issued on 26<sup>th</sup> October 2023, ordering the appeal to be filed within thirty days, and no appeal has been filed to date and that interlocutory orders cannot be granted without a substantive suit.
7. Counsel argued that the Appellant has moved this court following a decision by the lower court not to enjoin him as an interested party having failed to prove his interest in the suit properties and that he has further failed to present any document before this court to prove that he has a prima facie case.

### **Analysis and Determination**

8. The Appellants have sought interlocutory mandatory orders to remove structures allegedly erected on the suit property by the Respondents, contrary to this court's order date 26<sup>th</sup> October 2023. The orders of this court dated 26<sup>th</sup> October 2023 read as follows:
  - a. That an order of stay of proceedings in MCELC/Ei160/2021 Milimani Commercial Chief Magistrate Court pending the hearing and determination of the appeal be and is hereby issued.
  - b. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves, agents or servants are hereby restrained from evicting the estate of the deceased John Kibera Njoroge and his beneficiaries from the suit properties known as Dagoretti/ Riruta/5818and Dagoretti/Riruta/5819, and further, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do cease and desist from erecting any structures on the suit properties pending the hearing and determination of the appeal.
9. The court further ordered that the record of appeal be filed and served within 30 days. The Respondent has alleged that this appeal does not exist as the Appellant is yet to file a record of appeal. This court however takes judicial notice that the record of appeal was filed on 24<sup>th</sup> April 2024.



10. A mandatory order is defined in Halsbury's Laws of England/ Judicial Review (Volume 61 (2010) 5th Edition)/5. Judicial Remedies at page 703 as follows:

“A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

11. A mandatory injunction is distinct from a prohibitory injunction, which requires abstention from acting. A mandatory injunction requires the taking of positive steps. This was aptly articulated in “Shepard Homes vs Sandham (1970) 3 WLR Pg. 356 Case” as quoted in Bandari Investments & Co. Ltd vs Martin Chiponda & 139 others [2022] KEELC 1469 (KLR) as follows:

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection.”

12. It is trite that a mandatory order of injunction is final in nature and should be granted in very clear cases as was held in the case of Kenya Breweries Limited vs Okeyo EA LR 2002 1EA page 110 in which the Court of Appeal stated as follows:

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction”

13. In the case of Washington Okeyo vs [Kenya Breweries Limited Civil Appeal No. 332 of 2000](#) the Court of Appeal similarly held as follows:

“A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and the court thinks it is one which ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant tries to steal a match on the plaintiff, a mandatory injunction will be granted at an interlocutory stage.”

14. In support of this application, the Appellant has annexed to his affidavit a copy of the order of this court given on 26<sup>th</sup> October 2023; a letter from the Appellant’s advocates forwarding the said orders to the Respondents herein and an email to the Respondents forwarding the orders above.

15. The Appellant has failed to adduce any evidence of the alleged structures on the suit property, constructed contrary to the orders of this court. He has not shown, first, that the structures have been



constructed by the Respondents on the suit property, and that such structures were constructed after this court issued its orders on 26<sup>th</sup> October 2023.

16. The Appellant has neither indicated his interest in the suit property, nor has he laid any evidentiary foundation for this court to find that, prima facie, he has a right to property which has been infringed by the Respondents. He has consequently failed to lay sufficient basis to inspire this court to issue mandatory injunction orders in his favour.
17. As noted above, mandatory injunctions are only granted in special circumstances as they will result in a consequent waste of time, money and materials. The Appellant has not set out any special circumstances that would move this court to issue the orders sought.
18. This application therefore lacks merit and is hereby dismissed. Costs of the application shall be borne by the Appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Nyangoro for 1<sup>st</sup> – 3<sup>rd</sup> Respondents

Mr. Michael Mutinda for interested Party

Court Assistant: Tracy

