



Omari (On his own behalf and that of the Kisii Community at Kiabiraa) & 2 others v County Government Nyamira County & another (Environment & Land Case E004 of 2024) [2024] KEELC 7110 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E004 OF 2024**

**JM KAMAU, J
OCTOBER 24, 2024**

BETWEEN

**PIUS OMARI (ON HIS OWN BEHALF AND THAT OF THE KISII COMMUNITY AT KIABIRAA) 1ST PLAINTIFF
GIDEON NYANGOYA ONDIEK (ON HIS OWN BEHALF AND THAT OF THE KISII COMMUNITY AT KIABIRAA) 2ND PLAINTIFF
GEORGE NYAMBANE MOMANYI (ON HIS OWN BEHALF AND THAT OF THE KISII COMMUNITY AT KIABIRAA) 3RD PLAINTIFF**

AND

**THE COUNTY GOVERNMENT NYAMIRA COUNTY 1ST DEFENDANT
COUNTY EXECUTIVE COMMITTEE MINING NYAMIRA COUNTY 2ND DEFENDANT**

RULING

1. In this suit dated 8/3/2024 the Plaintiffs, on their own behalf and on behalf of the Kisii Community at Kiabiraa, sued the Defendants, the County Government of Nyamira, a devolved Government and her County Executive Committee Member of Mining for the following orders: -
 - a. A Declaration that the Defendants claim over the premise is unfounded and should be estopped immediately.
 - b. A declaration that the property L.R NO. CentralKitutu/ Mwabundusi/559 Kiabiraa Livingstone Factory is community land.
 - c. An order permanently restricting the Defendants by themselves or through their agents from interfering with the community property without proper cause to do so.



- d. An order to allow the re-opening of the quarry and the construction site on L.R NO. CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory.
 - e. General damages.
 - f. Costs of this suit.
 - g. Such further or other reliefs as this Honourable Court may deem fit and just to grant.
2. The grounds upon which the suit is brought are that the community at Kiabiraa have been the occupants of the parcel of land known as LR NO. CentralKITUT/ Mwabundusi/559 Kiabiraa Livingstone Factory where they aver that they have been engaging in economic activities such as construction and mining and where they have set up social institutions such as churches and schools. They aver that the Defendants have taken a misinformed position that the property belongs to the latter and as a result of which the community has been unfairly prejudiced as they have lost their land and source of livelihoods. No notice of closure of the mining of the quarry was served on the community. They claim the land is community land. This they say is unconstitutional. The Defendants denied all these claims in totality and asked the Court to dismiss the claim with costs. They claimed the suit land belongs to the 1st Defendant having been sub-divided into CentralKitutu/Mwabundusi 2177 and 2178 respectively on 13/7/2015 the 1st Defendant owning the former. The same was all along public land. The latter is registered in the name of Seventh Day Adventist church (E.A) Ltd. Hence the suit land does not belong to the Plaintiffs. The Defendants also by way of Counter-claim that all minerals wherever situated comprise public land pursuant to Article 62(1)(f) of the Constitution of Kenya, 2010 and Section 6 of the Mining Act (Cap 306 Laws of Kenya). She avers that none of the Plaintiffs have a legally recognized mineral right over the suit land. She equally says that there is no entity or community known as “Kisii Community at Kiabiraa.” She further avers that none of such people owns the suit land. There is also a suspension order against any quarrying activities at Kiabiraa Area by the National Environment Management Authority made on 8/3/2023 which order is still in force and also another order against Quick Fund Ltd on 26/6/2023. Consequently, the Defendants pray for orders that: -
- 14.1 A finding and declaration that the 1st Defendant is the lawful owner of all land in parcel Ref. No. CentralKitutu/Mwabundusi/2177;
 - 14.2 A declaration that all mining operations and dealing wherever the same are conducted within parcel Ref No. CentralKitutu/Mwabundusi/2177 and be conducted in strict adherence to the provisions of the Mining Act (Cap 306 -Laws of Kenya) and the Environmental Management and Co-Ordination Act (Cap.387- Laws of Kenya) and all other governing laws and regulations;
 - 14.3 A declaration that all mining operations and dealings wherever the same are conducted within Kiabiraa Area or any other area of the 1st Defendant-counterclaimers’ area jurisdiction must be conducted in strict adherence to the provisions of the Mining Act (Cap 306 - Laws of Kenya) and the Environmental Management and Co-Ordination Act (Cap.387 – Laws of Kenya) and all other governing laws and regulations;
 - 14.4 Costs of and incidental to this counterclaim together with interest thereon.
3. Contemporaneously with the Plaintiffs, the Plaintiffs filed a Motion of even date pursuing the following prayers, viz;
1. That this Application be certified as urgent and be heard ex-parte in the first instance



2. That pending hearing and determination of this application, this Honourable Court be pleased to order for the immediate re-opening of the quarry/mining firm situate at the parcel of land known as L.R NO. CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory.
 3. That pursuant to the grant of prayer 2 above, this Honourable Court be pleased to issue an order restraining the Defendants/Respondents herein whether by themselves, their servants, agents or anyone acting under their instructions from shutting down, harassing, evicting, intimidating and/or interfering with the Community's ownership and occupation of the property known as L.R NO. CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory.
 4. That pending hearing and determination of this application, this Honourable Court be pleased to issue orders restraining the Defendants/Respondents from altering and/or interfering with the records or registration details of all that parcel of land known as L.R CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory.
 5. That pending hearing and determination of the main suit, this Honourable Court be pleased to order for the immediate re-opening of the quarry/mining firm situate at the parcel of land known as L.R NO. CentralKitutu /Mwabundusi/559 Kiabiraa Livingstone Factory.
 6. That pursuant to the grant of prayer 5 above, this Honourable Court be pleased to issue and order restraining the Defendants/Respondents herein by whether or themselves, their servants, agents, or anyone acting under their instructions from shutting down, harassing, evicting, intimidating and/or interfering with the community's ownership and occupation of the property known as L.R NO. CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory.
 7. That pending hearing and determination of the main suit, this Honourable Court be pleased to issue orders restraining the Defendants/Respondents from altering and/or interfering with the records or registration details of all that parcel of land known as L.R CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory.
 8. That this Honourable court do issue any other orders it may deem just, fit and expedient to issue in the interests of justice.
 9. That the cost of this application be provided for.
4. The Grounds advanced to buttress the Application are;
- a. That at all material times relevant to this application and suit filed herewith, the community at Kiabiraa have been the occupants of all that parcel of land known as L.R CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory (hereinafter referred to as "the property" or "parcel of land").
 - b. That the members of the community have been engaging in several economic activities like construction and mining and have also set up social institutions like churches and schools on the said property.
 - c. That as such, the said parcel of land is serving the community on quite a number of fronts.
 - d. That however, without any colour of right, the Defendants/Respondents herein have interfered with the community's quiet possession and occupation of the said property as they have caused the mining firm/site situate at the property to be shut down on the allegation



that the property is public land and consequently, the said parcel should be ceded to the Government.

- e. That however, the Defendants/Respondents claim over the said parcel is misinformed as they are laying claim over L.R NO. CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory(which is community land) while referring to it as L.R NO.CentralKitutu/Mwabundusi/599,(which indeed public land). Indeed, these are two separate and distinct parcels of land.
 - f. That on basis of this misinformed position, the community has been unfairly prejudiced as they have lost their parcel of land and consequently, quite a number of people have lost their source of livelihoods on account of the closure of the quarry.
 - g. That it is imperative to note that the very least, no closure notice whatsoever was served upon the Community prior to the closure of the quarry/mining firm.
 - h. That the Plaintiffs/Applicants maintain that the property is Community Land and is consequently protected under the provisions of the Constitution of Kenya, 2010. Therefore, the invasion by the Defendants/Respondents amounts to violation of the Community's right to property as guaranteed by Articles 40 and 63 of the Constitution of Kenya.
 - i. That all efforts to try and rectify this position with the relevant authorities have proved to be an exercise in futility and it is therefore on this basis that the Plaintiffs/Applicants have filed this application and suit on behalf of Community at Kiabiraa, seeking the urgent intervention of this Honourable Court.
 - j. That it is on this basis the Plaintiffs/Applicants herein have filed this application (on behalf of the Community at Kiabiraa) seeking the urgent intervention of this Honourable Court.
 - k. That the Respondents will not suffer any prejudice in the event this Honourable Court intervenes and grants the orders sought.
5. The said grounds were expounded in the Affidavit of Pius Omari, the 1st Plaintiff in support of the Application sworn on the same date.
6. In her lengthy response by way of the Replying Affidavit of one Ombogo Marwanga, the 1st Defendants' Chief Officer in the Department of Environment, Water, Mining and Natural Resources sworn on 16/4/2024 the 1st Defendant deposes that if the orders prayed for are granted, this would result in perpetuating continued hazardous, wild, unregulated and unchecked excavation and mining excavation at Kiabiraa, that the Plaintiffs have no known interest in the suit land, the Plaintiffs are not members of a community Land Management Committee of any Community under Sections 7 &15 of the Community Land Act or under Article 63 of the Constitution of Kenya, 2010, the parcel of land CentralKitutu/Mwabundusi/559 is public and not community land and that the Plaintiffs have brought an Application seeking orders in respect to a non-existent parcel of land and that the parcel of land mentioned in the Plaint no longer exists having been sub-divided into CentralKitutu/Mwabundusi/2177 and CentralKitutu/Mwabundusi/2178 respectively on 13/7/2015 of which none of the Plaintiffs nor any of the persons they allege to represent claims ownership thereof. The Respondents also state that no element of irreparable harm or loss whatsoever has been pleaded or demonstrated by the Applicants.
7. I allowed both parties to file their written submissions which I have considered before retiring to write this Ruling.



8. The interim injunction sought herein is mandatory in nature but not prohibitory. A “mandatory” injunction requires something be done, i.e., a change in circumstances. A “prohibitory” injunction on the other hand requires something not be done, i.e., preserving the status quo. What is the meaning of the word “Mandatory”? A binding, compulsory, de rigueur, essential, forced, imperative, indispensable, involuntary, obligatory.
9. Mandatory injunctions whose wording obfuscates their true nature have persisted over time. A fairly subtle nineteenth century version of this type of injunction can be seen in *Stewart v. Superior Court of San Diego County* (1893) 100 Cal. 543 where the Court held that the Defendants (owners of a water pipe) must “desist and refrain from interfering” with the Plaintiff’s connection of his pipe to theirs, and from “interfering with or preventing the flow of water from” their pipe to his. The Supreme Court did not accept this as a mere prohibition. It saw the injunction as in reality compelling an affirmative act, i.e. requiring the Defendants to deliver water to the Plaintiff – and deemed it a mandatory injunction.
10. An Applicant needs to pay more attention to what an injunction does than to what it says. If the injunction will force a change in the parties’ status (i.e., alter the status quo), then the injunction most likely is mandatory, rather than prohibitory. By contrast, an injunction is prohibitory if its effect is to leave the parties in the same position as they were prior to the entry of the order. An observable difference in the cases where an injunction has been deemed mandatory is that such orders requiring affirmative action are aimed at remedying a future harm. By contrast, a prohibitory injunction can be read as stopping the continuing infringement or one that is about to be committed and restraining the aggrieving party from committing further harm. In *Johnston v. Superior Court of Los Angeles County* (1957) 148 Cal.App.2d 966, the Plaintiff sued the County to be allowed to operate an automobile dealership in a location where the zoning was in dispute. The Judgment sounded prohibitory – it enjoined the county from “interfering in any manner with the Plaintiffs, . . . in the said Boulevard Frontage for an automobile dealership.” The Court of Appeal saw this as compelling the County to issue the Plaintiff a permit to operate his business, and therefore decreed that it was a mandatory injunction.
11. Back at home, in *Shariff Abdi Hassan Vs Nadhif Jama Adan* [2006] eKLR the Court stated that:

The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”
12. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. In granting a Mandatory Injunction the bar is certainly higher than in prohibitory Injunctions.
13. In *Kenya Breweries Limited & Tembo Co-Operative Savings & Credit Society Limited v Washington O. Okeyo* (Civil Appeal 332 of 2000) [2002] KECA 284 (KLR) (Civ) (31 May 2002) (Judgment) the Court of Appeal said as follows: -

‘The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:



A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application.....Also in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to 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 march on the plaintiff. Moreover, before granting a mandatory interlocutory 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 a different and higher standard than was required for a prohibitory injunction.”

14. I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction at this stage. I am also not convinced that this case is so clear that it ought to be decided at once. There are competing claims by both parties and these require further interrogation. At this stage I cannot tell for sure that the Defendants/Respondents have no claim over the suit parcel of land or that the same belongs to the community. In fact, the Plaintiffs do not claim ownership of the land in Question.
15. In the current case, if the Mandatory Injunction is granted at this stage and the same acted upon and when the case comes up for Hearing it turns out that the same was not merited, then the subject matter, viz. the minerals in Question, will have been harvested and there will be nothing remaining to protect. The Court may be left regretting why such Orders were granted in the first place and there would be no way of reversing the loss. But if we wait until the final determination of the case and the Applicants are successful, the minerals will still be available for the Applicants. Accordingly, the substratum, the quarry situate at the parcel of land known as L.R NO. CentralKitutu/Mwabundusi/559 Kiabiraa Livingstone Factory shall be preserved against all the parties herein until the Hearing and final determination of this Suit or until further Orders of the Court. And it is hereby so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 24TH DAY OF OCTOBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff present in person

Defendants' Counsel: Mr. Maranga

