



REPUBLIC OF KENYA



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Ethics and Anti-Corruption Commission v Mwangi & 11 others (Environment & Land Case E081 of 2024) [2024] KEELC 13256 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13256 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E081 OF 2024
SM KIBUNJA, J
NOVEMBER 20, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

STEPHEN MWANGI 1ST DEFENDANT

PETER MURIITHI NYAGA 2ND DEFENDANT

ELIJAH KIMALEL KOSKEI 3RD DEFENDANT

JOSEPH NGETICH 4TH DEFENDANT

**MWENDA KINYINGA MBOGORI T/A LUMDA ENTERPRISES 5TH
DEFENDANT**

**LUCY GAKI MWENDA MBOGORI T/A LUMDA ENTERPRISES 6TH
DEFENDANT**

GLASCO ENTERPRISES 7TH DEFENDANT

OSMAN HAJI TALAB 8TH DEFENDANT

ZERA OSMAN TALAB 9TH DEFENDANT

MAHESH KANTILAL SAGHRAJKA SHAH 10TH DEFENDANT

AASHET MAHESH SAGHRAJKA SHAH 11TH DEFENDANT

WILSON GACANJA 12TH DEFENDANT



RULING

1. The plaintiff moved the court through the notice of motion dated 13th September 2024 seeking for inhibition order restraining the 10th and 11th defendants from alienating, transferring, charging, leasing, subdividing, consolidating, disposing of, wasting, or undertaking any construction or development of any nature thereon or any part thereof of parcel of land described as Mombasa Island/XLV11/163 to 168, or from howsoever dealing with the said properties, pending the hearing and determination of this application and suit.
2. The application is premised on ten grounds marked (1) to (10) and supported by the affidavit of Lamek Okun sworn on the 13th September 2024, inter alia deposing that the suit properties were reserved as a railway sliding by the Kenya Ports Authority, hereinafter referred to as Authority, upon survey of the adjoining land. Further, the suit properties were previously vested in the General Manager of the defunct East African Railways and Harbours Administration vide legal notice No. 440 of 1963 and was subsequently vested in the defunct East African Harbours vide legal notice No. 19 of 1969 issued under the East African Harbours Corporation Act, 1967. After the dissolution of the East African Community in 1977, the suit properties were vested in the Authority vide legal notice No. 160 of 2001, issued under the *Kenya Ports Authority Act* Chapter 391 of Laws of Kenya. That vide a letter of allotment dated 13th November 1997, the 12th defendant granted unsurveyed parcels of land described as plots A to F, in favour of the 1st to the 6th defendants respectively. That the physical development plan [PDP], number 12.2.CT.15.97 attached to the allotment letters had not followed the due procedures for approval of a PDP, as it did not have an approved PDP number as required under section 15(1)(d) of the Land Planning Act, chapter 303, repealed. And that despite an objection raised on 3rd February 1998, the 12th defendant went ahead and issued the 1st to 7th defendant with leases on 19th December 1997. He also stated that there were further transfers on 5th March 1998 where all the suit properties were transferred to 8th and 9th defendants, and finally on 27th May 2002 they were transferred to the 10th and 11th defendants. That the private use of the suit properties pose a security risk to the port of Mombasa and interfere with the planned installation of an integrated security system, with the likely consequence of making the port non-compliant with international standards under the international ship and port facility security code (ISPS).
3. The 3rd, 8th and 9th defendants entered appearance but never put in a reply. The 10th and 11th defendants, opposed the application through the replying affidavit of Mahesh Kantilal Sanghrajka Shah, the 10th defendant, sworn on 25th September 2024 inter alia deposing that the plaintiff has not met the threshold required for an interlocutory injunction to issue, and that preservation and civil forfeiture proceedings under the *Anti-Corruption and Economic Crimes Act* are sui generis; that similarly the reliefs sought through the application can only be granted by the High Court and not this court in line with gazette notice 10263 published on 9th December 2016; that the jurisdiction of this court is challenged and no prima facie case has been established. That the plaintiff's main grievance is with the manner of alienation of the suit properties by the 1st to the 7th defendants and that the impropriety committed 27 years ago by the same can be addressed by the plaintiff's right to forfeiture, and that there is no irreversible consequence. That no evidence has been provided to show that the suit properties are at risk of being wasted away, and that issuing orders of injunction is wide enough to stop carrying out of repairs, and maintenance works and any long-term lease currently running.
4. Ms. Songole and Mr. Anangwe, the learned counsel for the plaintiff, 10th & 11th defendants, made their oral submissions for and against the application on 26th September 2024, which the court has considered.



5. The issues for determinations by the court are as follows:
 - a. Whether the plaintiff has met the threshold for the temporary order of injunction/inhibition sought to be issued at this interlocutory stage.
 - b. Who will pay the costs?
6. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel for the parties, the pleadings and come to the following determinations:
 - a. The prayer by the plaintiff is for an order in the nature of temporary injunction, in the form of an inhibition order. The threshold for an inhibition orders were discussed in the case of Japhet Kaimenyi M'ndatho versus M'ndatho M'mbwiria (2012) eKLR, where the court held that;

“In an application for orders of inhibition in my understanding, the applicant has to satisfy the following conditions; -

 - a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.
 - b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
 - c. That the applicant has an arguable case”.

In the case of Philip Mwangi Githinji versus Grace Wakarima Githinji (2004) eKLR, the court held that:

“An order of inhibition issued under section 128 of the Registered [land Act](#) is akin to an order of prohibitory injunction for it instructs the registered owner and any other person from having their transactions regarding the land in question registered against the title. Before the court can issue such an order, it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition. Such grounds would normally be in the form of a sustainable claim over the suit land”.

- b. In the case of Dorcas Muthoni 2 Others Vs Michael Ileri Ngari (2016) eKLR, the court held that:

“An order of inhibition issued under Section 68 of the [Land Registration Act](#) is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.

Guided by the principle that the Court should always take the course that carries the lower risk of injustice Films Rover International & Others Versus Cannon Films Sales Ltd 1986 3 All E.R 772 it is my view that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs



the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Balancing the two competing interests, the cause of justice will best be served if the order of inhibition is granted. "

- c. Further, in the case of *Victoria Wangui Oganga Ogada versus Mwangi Kihara 2 Others* [20181] eKLR the court held that;

“ 8. Pursuant to paragraph 32 of Gazette Notice No. 5178 titled "Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts", this court has jurisdiction to order maintenance of status quo so as to preserve the suit property pending hearing and determination of the main suit. The said paragraph provides:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

9. So as to preserve the suit property and to maintain status quo pending hearing and determination of the suit, I order that an inhibition be registered in respect of Nakuru Municipality Block 2/114 pending hearing and determination of this suit. Costs in the cause.”

- d. Based on the foregoing, the plaintiff has established the need for the court to preserve the suit properties pending the hearing and determination of the suit. The plaintiff has laid out an arguable case as can be seen from the documents annexed in the plaintiff's list of documents dated 13th September 2024, and there is a risk of the suit properties being alienated or transferred to third parties to the detriment of the plaintiff.
- e. The fear expressed by the 10th & 11th defendants that the inhibition would affect the long term leases and any repairs needed can only be taken to be indicative of there being lessees on the suit properties. Such lessees are not under the control of the Authority or plaintiff. Upon the court considering the two competing interests, there are two competing likely injustices whereby on one hand the 10th and 11th defendants would not be able to extend or register new long-term leases or conduct repairs if the orders for inhibition orders are granted, and on the other hand, where the 10th and 11th defendant may be able to charge, sell, transfer the suit properties while the suit is going on, if the orders were not granted. The court upon appreciating and applying the *Films Rover* case, [supra], finds the injustice will definitely be greater if the inhibition orders are not granted. Issuing the injunction orders is definitely the option with the lower risks.
- iv. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the costs follow the events unless where otherwise ordered for good reasons. In this instance, I find no good grounds to depart from that rule.
7. Having come to the foregoing determinations, the orders that commends themselves to be issued are as follows:
- a. That the application has merit and is hereby allowed in its entirety.



b. That the 10th and 11th defendants will bear the plaintiff's costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Songole

Defendants : Mr. Anangwe for 10th and 11th Defendants.

Leakey – Court Assistant.

