



**Mbuthia & 2 others (Suing for and on Behalf of Mpeketoni Jua Kali Savings and Credit Cooperative Society Limited) v Kilonzi & 4 others (Environment & Land Case 16 of 2020) [2024] KEELC 7528 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7528 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 16 OF 2020  
FM NJOROGE, J  
NOVEMBER 13, 2024**

**BETWEEN**

**BENSON CHEGE MBUTHIA ..... 1<sup>ST</sup> PLAINTIFF  
SIMON MUCHIRA GATHOKI ..... 2<sup>ND</sup> PLAINTIFF  
LUCAS NG'ANG'A JOHN ..... 3<sup>RD</sup> PLAINTIFF  
SUING FOR AND ON BEHALF OF MPEKETONI JUA KALI SAVINGS AND  
CREDIT COOPERATIVE SOCIETY LIMITED**

**AND**

**DANIEL KILONZI ..... 1<sup>ST</sup> DEFENDANT  
CHARLES MAINA MTIVA ..... 2<sup>ND</sup> DEFENDANT  
PETER IKENYA KWERI ..... 3<sup>RD</sup> DEFENDANT  
JOHN MACHARIA ..... 4<sup>TH</sup> DEFENDANT  
PETER NJAU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The application for determination in the present ruling is dated 26/9/2024, in which the Plaintiffs sought the following orders:
  - a. Spent.
  - b. Spent.
  - c. That upon inter-parties hearing, this honourable court be pleased to issue an order of temporary injunction restraining the Defendants/respondents by themselves, their agents,



servants, representatives, assigns and any other person claiming under them from interfering with trespassing on, constructing, setting up structures, fencing, digging out foundation and/or from adversely dealing with the suit property being Plot No. 707 measuring approximately 0.01 hectares situated at Jua Kali area in Mpeketoni within Lamu County pending the hearing and determination and final disposal of the suit herein.

- d. That this honourable court be further pleased to make such other interlocutory orders as may appear to the court to be just and convenient.
  - e. That costs of this application be provided for.
2. The application which is supported by the affidavit sworn on 26/9/2024 by Lucas Ng'ang'a John, the 3<sup>rd</sup> Plaintiff, is based on the following grounds:
- a. That the subject matter of the suit is a parcel of land known as Plot Number 707 measuring approximately 0.01 hectares situated at Jua Kali area in Mpeketoni within Lamu County which belongs to the Plaintiffs/Applicants;
  - b. That the instant suit was actually determined in a judgment delivered on 6<sup>th</sup> February 2013 which was in favour of the Plaintiffs/Applicants and against the Defendants/respondents who, despite having been served with the summons to enter appearance together with other pleadings failed to do so within the prescribed timelines.
  - c. That the defendants immediately after the judgment was served upon them, filed an application seeking to set aside the judgment and for leave to be allowed to file a defence out of time giving reasons for their delays;
  - d. That the court out of abundance of mercy and leniency allowed the Defendants to file their defence which was filed and served upon the Plaintiffs and is dated 8<sup>th</sup> January 2024;
  - e. That despite the pendency of the suit and after the defence was filed out of time, the Plaintiffs/applicants have recently established that the Defendants/respondents have maliciously acted in speed and have erected permanent structures which are nearing completion which action is adverse to the Plaintiffs/applicants' interest and amounts to trespass to land;
  - f. That the unlawful trespass by the Defendants/respondents has been made during the pendency of the instant suit which this honourable court is seized of and it is therefore proper, fair and just that this honourable court stamp its authority by restraining the Defendants/respondents from going on with the illegal activities until this Application and in deed the entire suit is heard, determined and finally disposed of on its own merits.
3. In the supporting affidavit, the Plaintiffs rehashed the contents in the notice of motion and annexed a copy of authority to plead together with photographs showing the structures allegedly constructed by the Defendants.
4. On 27/9/2024, the court issued ex-parte orders directing the Plaintiff to serve the Defendants forthwith and file an affidavit of service thereto. The court also ordered the Defendants to file a response within 8 days of service. The affidavit of service sworn by Mary Njeri Mungai on 7/10/2024 indicates that the 1<sup>st</sup> Defendant was served on behalf of the other Defendants, on the same date. The said 8 days have since lapsed and no response has been filed. In the foregoing, I find that the application is unopposed.



## Determination

5. I have keenly perused the submissions filed by the Plaintiff. The only issue for determination is whether an order for interlocutory injunction should issue.
6. The conditions for granting an order for interlocutory injunction are now settled. Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless an applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
7. Order 40 rule 1 of the [Civil Procedure Rules](#) provides as follows: -
  - “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.”
8. In the present case, the dispute is over ownership of land, and it is not disputed that the Defendants have commenced construction on the suit property. The Defendants successfully sought to set aside ex-parte judgment in this case and filed a defence to the Plaintiffs’ claim. The suit is therefore yet to be heard and determined afresh. The Plaintiffs now claim that despite the aforementioned, the Defendants have commenced construction of permanent structures in the suit property. This allegation has not been refuted and there are photographs to show that there are such activities being undertaken on the site. In the circumstances, and bearing in mind the provisions of the Civil Procedure Rules above, it is this court’s view that it is necessary that the Defendants be stopped from continuing with any form of construction within the suit property, pending the determination of this suit.
9. In the ultimate, I allow the application dated 26/9/2024 and I order as follows:
  - a. That an order of temporary injunction is hereby issued restraining the Defendants/respondents by themselves, their agents, servants, representatives, assigns and any other person claiming under them from interfering with trespassing on, constructing, setting up structures, fencing, digging out foundation and/or from adversely dealing with the suit property being Plot No. 707 measuring approximately 0.01 hectares situated at Jua Kali area in Mpeketoni within Lamu County pending the hearing and determination and final disposal of the suit herein;
  - b. The defendants shall bear the costs of this application;
  - c. The plaintiffs shall ensure that their trial bundle is properly filed and if any further documents are needed, leave is granted for the plaintiffs to file and serve them within 21 days hereof;



- d. The defendants are also granted leave to file any additional documents they may require to within 21 days of service or in any event file such documents within 42 days from the date hereof;
- e. Parties shall strictly observe these timelines and the suit shall be mentioned on 22/1/2025 for issuance of a hearing date.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

