



**Mac’s Investments Ltd t/a Mac’s Pharmaceuticals Ltd v CS Ministry of Interior & National Administration & 3 others (Environment and Planning Petition E015 of 2024) [2024] KEELC 13828 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13828 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING PETITION E015 OF 2024  
AA OMOLLO, J  
DECEMBER 9, 2024**

**BETWEEN**

**MAC’S INVESTMENTS LTD T/A MAC’S PHARMACEUTICALS LTD ..... PETITIONER**

**AND**

**THE CS MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL LANDS COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Petitioner’s (hereinafter ‘Applicant’) Notice of Motion dated 16<sup>th</sup> May 2024 and brought under Sections 1A, 2A & 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, Articles 22, 23, 40(3), 47, 50 and 159 of *the Constitution* and Rule 19 of *the Constitution* Practice and Procedure Rules 2012. The Applicant is seeking orders that:
  - a. Spent.
  - b. Spent.
  - c. Pending the hearing and determination of the Petition the Court be pleased to grant an order of temporary injunction restraining the Respondent jointly and severally, its employees, servants and/or agents or anybody else acting under their instructions more so the Nairobi Regional and County Security Teams and Multi Agency Team under the auspices of the National Disaster Operation Centre howsoever from dealing, entering into, breaking, destroying,



demolishing, trespassing or in any way whatsoever interfering with the Applicant's peaceful and quiet possession of the property known as Land reference Number 209/8889, Nairobi (hereinafter 'the suit property').

- d. Spent.
  - e. Orders of this Court be enforced by the OCPD, Industrial Area Police Station by ensuring compliance and providing police protection and supervision.
  - f. Costs of this application be in the cause at the Court's interest rate.
2. The application is based on several grounds and supported by an affidavit sworn by Mohamed Munir Chaudhri a director of the Applicant. It was averred that the Applicant is the registered owner of the suit property having acquired it on 7<sup>th</sup> May 1986 and has been in occupation of the same. It was further averred that on 2<sup>nd</sup> May 2024 the Applicant received a document signed by the 1<sup>st</sup> Respondent. The document was to the effect that the 1<sup>st</sup> Respondent intended to demolish some buildings on the suit property for being on riparian land. There was also a press release to the same effect.
  3. The deponent averred that the issue of the buildings being on riparian land never arose as the Applicant has never received a notice from the National Environment Management Authority nor been summoned by the National Environment Tribunal. The deponent further averred that according to the Deed Plan, the suit property is not in riparian land. The deponent stated that the Respondents have been threatening to demolish the building. The deponent stated that such conduct is unjust, it interferes with the Applicant's enjoyment of its property and it should consequently be stopped by the Court.
  4. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition on 12<sup>th</sup> June 2024 which averred inter alia that the law provides that a riparian reserve is set at between 6metres and 30 metres from the highest mark. It also stated that the suit property was on riparian land so the actions of the 1<sup>st</sup> Respondent were not in breach of the Applicant's rights as riparian land cannot be privately owned. It was further stated that as per Chapter 3 of the National Land Use Policy, the government has the mandate to reclaim riparian areas. The directive given to the Applicant was stated to have been in furtherance of that mandate.
  5. The 2<sup>nd</sup> Respondent filed grounds of opposition on 26<sup>th</sup> June 2024. It was averred that the Applicant had approached the Court with unclean hands as it has breached the conditions of the Environment Impact Assessment as well as the provisions of Article 69(2) of *the Constitution* by putting up buildings on sections of the suit property that are riparian land. It was further averred that the 2<sup>nd</sup> Respondent alongside other government agencies is under obligation to ensure that no development is undertaken on the riparian reserves of Nairobi River.
  6. The 4<sup>th</sup> Respondent filed grounds of opposition on 23<sup>rd</sup> September 2024. It was averred that under Article 62 of *the Constitution*, riparian land is identified as public land. It was further averred that Section 12 (2) (c) of the *Land Act* prohibits the allocation of riparian land. In view of the foregoing it was averred that the Applicant could not have rightfully acquired riparian land and cannot claim ownership rights under Article 40.
  7. The Applicant filed a supplementary affidavit dated 1<sup>st</sup> October 2024 and reiterated the contents of his supporting affidavit. He further stated that the floor plans for the buildings on the suit property were approved by the Nairobi City Council on 20<sup>th</sup> June 1990. He also stated that the construction of the buildings was approved under the Local Government Adoptive By Laws Building Order (1968) L.N 15/1969 City of Nairobi Building By Law 1948 G.N 313/1949 dated 5<sup>th</sup> February 1979 and signed by the then County Head (the town clerk).



## Submissions

8. The Applicant filed submissions on 16<sup>th</sup> October 2024 and submitted that the Applicant had met the requirements set out in the case of *Giella v Cassman Brown Ltd 1973 E.A* thus: it is the registered owner of the suit property; it has had unchallenged possession of the suit property since 1979; it has made substantial improvements to the suit property; if the demolition is carried out it will suffer irreparable harm to its business operations and the Respondents will suffer no harm if the orders are issued. The cases of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd*, Chairman, Verification Committee for Gathuthi Tea Factory Directors Elected & Chairman, Dispute Resolution Committee for Gathuthi Tea Factory Company Ltd [2016] KEHC 7263 (KLR) and *Banis Africa Ventures Limited v National Land Commission [2021] KEELC 4243 (KLR)* were relied upon.
9. On the issue of whether the suit property is on riparian land, it was submitted that the Respondents had alleged that the same was true but had not led any evidence to support their claims. This, in the view of the Applicant rendered the claims speculative and unsubstantiated. Sections 107 and 108 of the *Evidence Act* and the cases of *Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR)* and *Kenya Power & Lighting Company Limited v Pamela Awino Ogunyo [2015] KECA 761 (KLR)* were relied upon.
10. The Applicant also submitted that while the Respondents have a duty to protect water sources, such duty should be carried out in a reasonable and justified manner that follows the law. It should not be carried out arbitrarily as the Respondents are attempting to do in the instant case. Regulation 116(2) of the Water Rules 2005 and the case of *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd), Africa Oil Corporation, Africa Oil Kenya BV (previously known Lundin Kenya B.V & Keith Hill v Permanent Secretary, Ministry of Energy, Minister of Energy, Minister of Planning & Development, National Oil Corporation of Kenya, Environment Management Authority, Geothermal Development Company, Centric Energy Corporation, Platform Resources Inc, Tullow Oil PLC, 0903658 B.C. Ltd, Alec Edward Robinson, Angus Mccoss, Sumayya Athmanu (Md Nock), Patrick Mwaura Nyoike, China National Offshore Oil Corp, Interstate Petroleum Company Ltd, Monena M. Kengara, Edward Kings Onyancha Maina [2016] KECA 321 (KLR)* were relied upon.
11. The Applicant further submitted that in the absence of any conclusive evidence that the suit property is on riparian land the Court should rely on the presumption that the Applicant holds a valid and legal title to the suit property.
12. The 2<sup>nd</sup> Respondent filed submissions on 21<sup>st</sup> November 2024 and submitted that the Applicant had not demonstrated a prima facie case with a probability of success as: the actions of the Respondents were lawful, the Applicant was illegally occupying riparian land and the Respondents are mandated to protect public land. It was further submitted that when irreparable harm is considered, the damage to the environment was irreparable harm that affected the larger public and superseded the Applicant's interest. It was also submitted that the balance of convenience tipped in favour of the 2<sup>nd</sup> Respondents as they are protecting the ecological public interest which could be harmed if injunctive relief is granted. The cases of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)* and *Nguruman Limited v Jan Bonde Nielson [2014] KEHC 1718 (KLR)* were relied upon.
13. On the issue of whether the suit property falls on riparian land, it was submitted that as per the law, riparian land on each side of a watercourse shall be defined as a minimum of six metres or equal to the full width of the watercourse up to a maximum of thirty metres on either side of the bank. It was further submitted that activities are prohibited within riparian land. The 2<sup>nd</sup> Respondent stated that the Applicant is in breach of the law by constructing a building on sections of the suit property that are riparian land. Article 69(2) of *the Constitution*, Section 69 (1) of the Environmental Management and



Coordination Act, Section 12(2) of the *Land Act*, Regulation 116 of the Water Rules 2005 and the cases of *Aloys Mataya Moseti v National Environment Management Authority & Attorney General* [2020] KEELC 281 (KLR) and *Watamu Association (Suing through its Elected Officials - Clare Taylor, Bea Anderson & Damian Davies) v Wood & 3 others* [2024] KEELC 1236 (KLR) were relied upon.

### **Analysis And Determination**

14. Based on the foregoing, the main issue arising for determination is; Whether the Applicant is Entitled to the Injunctive Relief.
15. The conditions for the grant of a temporary injunction were set out as follows in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358:

First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the 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.

16. In the case of *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 the Court defined a prima facie case as follows:

In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

17. The Applicant averred that it is the rightful owner of the suit property and the buildings thereon. That there is a threat to that right based on the conduct of the Respondents who intend to demolish the buildings on the suit property. On the other hand, the Respondents have argued that the Applicant cannot have ownership rights in the suit property as it is on riparian land which cannot be privately owned. They have further argued that their actions were justified as they are mandated to protect riparian land.
18. The Applicant's claim of ownership has been supported by a Certificate of Title, the Deed Plan and Survey Map on record. The Applicant has also adduced evidence that the construction on the suit property was approved by the 2<sup>nd</sup> Respondent's predecessor way back in the 1990s. These averments have not been contradicted by way of replying affidavits. Further, the Respondents claim that the suit property is on riparian land cannot be ascertained until evidence is led to that effect.
19. Based on the foregoing, I find that the Applicant has demonstrated that it has a prima facie case, that it has a right of ownership in the suit property and the buildings thereon. The Respondents having admitted to issuing demolition instructions addressed to the Applicant, which if implemented will cause loss to the Applicant. The Court in the case of *Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn also known as Hermannus Phillipus Steyn & Hedda Steyn* [2014] KECA 606 (KLR) stated as follows:

The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that



cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

20. The Applicant has stated that damages would not be an adequate remedy as its business operations which support the livelihoods of many Kenyans will be affected. The Respondents argued that more harm would be caused to environment if the injunction is not issued. However, the Respondents have not pleaded how the buildings on the suit property are causing harm to the environment that cannot wait for the determination of this case on merits.
21. Consequently, when all factors are considered I find that the balance of convenience tips in favour of the Applicant as it has proven ownership, has been in occupation over time, and invested substantially in the suit property. In conclusion, I find that the claim for injunctive relief has been proven on a balance of probabilities. I allow the application in terms of prayer 3 and 5 of the motion. The costs to abide the winner of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2024 VIA EMAIL.**

**A. OMOLLO**

**JUDGE**

