



**Kitheka (Suing as Administrator of the Estate of Kitheka Mweta) v Mwova & 8 others
(Constitutional Petition E001 of 2021) [2023] KEELC 359 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
CONSTITUTIONAL PETITION E001 OF 2021**

LG KIMANI, J

JANUARY 26, 2023

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOM UNDER
ARTICLES 25(C); 47(1) AND 50(1) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ARTICLES 2(1); 19(1); 19(2); 19(3)(A),(B) AND (C);
20(1); 20(2); 20(3);20(4)(A) AND (B); 22(1);23(3);
25(A); 47(1); 159 2(B)(D) AND 162(2)(B) OF THE
CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 AND
IN THE MATTER OF THE SPECIAL MINISTER
APPOINTED FOR PURPOSES OF APPEALS UNDER
SECTION 29 OF THE LAND ADJUDICATION ACT
CAP 284.**

AND

**IN THE MATTER OF: THE RULING AND/OR AWARD OF THE DEPUTY
COUNTY COMMISSIONER, KYUSO IN LAND
APPEAL NO.395 OF 2011 DATED 13/8/2018**

BETWEEN

KILONZO KITHEKA PETITIONER



SUING AS ADMINISTRATOR OF THE ESTATE OF KITHEKA MWETA

AND

ALEXANDER MWENDWA MWOVA	1 ST RESPONDENT
THE LAND ADJUDICATION OFFICER-KYUSO	2 ND RESPONDENT
THE DEPUTY COUNTY COMMISSIONER, KITUI KYUSO	3 RD RESPONDENT
THE LAND REGISTRAR (MWINGI)	4 TH RESPONDENT
THE SURVEYOR, MWINGI KYUSO	5 TH RESPONDENT
THE ATTORNEY GENERAL REPUBLIC OF KENYA	6 TH RESPONDENT
RUKIA IKUTHU MULUKI	7 TH RESPONDENT
JOHN KYALO MUNYITHYA	8 TH RESPONDENT
ESTHER KAMOLI MWOVA	9 TH RESPONDENT

RULING

1. The Petitioner also moved the Court vide his application filed under Notice of Motion dated June 10, 2022 seeking for the following Orders:
 1. Spent.
 2. Spent
 3. That this court do issue an order of temporary injunction against the Respondent, his agents, servants, or anyone claiming under or through him from cutting down trees, partitioning, fencing, digging a dam or in any manner amounting to destruction and damaging of the parcels of lands which are subject matter before this court pending the hearing and determination of the main suit.
 4. Costs.
2. The background to this petition is a dispute between Nyamu s/o Kitheka and Kitheka s/o Mweta who are claimed to be predecessors in title to the suit land to the Petitioner and the 1st Respondent which started from 1977 and led to filing of suits being Migwani District Magistrate's Case No 31 of 1978 Nyamu S/O Nzeka v Kitheka S/O Mweta and Mwingi Resident Magistrates court case No 68 of 1994. When the area where the suit land is located was declared an adjudication section land parcel No 179 and later 597 and 734 became the subject of the dispute between Alexander Mwenda Mwova and Francis Kitheka Mweta in committee Case No 20 of 2009, Arbitration Board Case No 11 of 2010 and finally the Appeal to the Minister Case No 395 of 2011.
3. The Petitioner claims in the petition that he exercised his rights of appeal under section 29 of the [Land Adjudication Act](#) in filing the appeal to tat Minister but his rights to fair hearing under Article 50 (1) and right to fair administrative action under Article 47 (1) of the [constitution](#) were violated and in the process he was denied what he believes to be his right to the properties cited.
4. The grounds relied upon in support of the application are to be found in the supporting affidavit wher the petition claims that he is acting on behalf of the estate of Francis Kitheka alia Kitheka s/o Mweta



who is a beneficiary of two court orders over the same subject matter before this court that is land case L 31 of 1978 at Migwani and land case No 68 of 1994. He claims that the 1st Respondent of filing this application and that the Notice of Preliminary Objection to buy more time for his wanton destruction and the use of the suit lands and to defeat the ends of justice. He has accused the 1st Respondent of cutting down indigenous trees to burn charcoal and selling the firewood at a very low price.

5. The Applicant claims that he intended to apply for an order of maintenance of the status quo pending hearing and determination of the suit when the matter was scheduled for mention on March 23, 2022 only to find the matter had been listed for mention on March 22, 2022
6. The Petitioner also states that the Respondents have started fencing a big chunk of the disputed land to bar the applicant's family from accessing one part of the lands. Further to that, he states that the Respondent has started construction of an earth dam in the suit land. The Applicant claims that if not stopped by an order of the court the suit land will deteriorate to his detriment.
7. In response, the 1st Respondent filed a Replying Affidavit stating that the Petitioner does not have a prima facie case since he has the title deeds for all the parcels of land that the Petitioner cited in his petition.
8. He stated that his other parcels of land that were never the subject of the dispute during the adjudication process were introduced to the Petition. It is his contention that the application is a fishing expedition that is intended to ensure that he does not develop his properties.
9. According to him, there is no dam under development and the Petitioner's allegations are mere exaggerations. He also pointed out that the Land Case L31 of 1978 did not involve him at all and also RMCC Land Case No 68 of 1994.

The Petitioner's submissions

10. The Petitioner reiterated the contents of his application and the supporting affidavit and submitted that he has annexed photos in his supporting affidavit indicating that the 1st Respondent is maliciously wasting the suit properties which activities will deteriorate the value of the properties. He submits that the Petition has a high chance of success. According to the Petitioner, there is no damage that the 1st Respondent will suffer if orders of injunction are not granted and if there is any damage at all, the same can be compensated by the Petitioner.
11. The Petitioner therefore submits that his application has met the three requirements for injunction as required in the case of *Giella-v Cassman Brown* (1973) EA and Order 40 of the [Civil Procedure Rules](#) (2010).

The 1st Respondent's submissions

12. The 1st Respondent filed written submissions On whether the Petitioner/Applicant had a prima facie case, the 1st Respondent highlighted that he holds valid title deeds for all the mentioned parcels of land in the Petition and the only parcel of land which had an objection is Plot Kyuso/Kyuso "A"/597 and that the introduction of the new parcels of land Kyuso/Kyuso "A"/152, 153, 154, 155, 157, 568, 569, 570, 571, 572, 573, 573, 574, 575 and 576 which were never part of the objection is borne out of malice since they were never challenged during the adjudication process.
13. The 1st Respondent also submitted that the Applicant does not stand to suffer irreparable loss since the photographs displayed by the Applicant show digging activities done a very long time ago and the



area is overgrown with bushes and the activities cannot be termed as destruction of the Respondent's land. The 1st Respondent stated that he was only clearing bushes to the land which he holds title to.

14. The 1st Respondent concluded that the balance of convenience tilts towards not granting an injunction. He pointed out that the Petitioner Applicant filed ELC Case No.18 of 2021(formerly ELC No.69 of 2019 Machakos) Kilonzo Kitheka v Alexander Mwendwa Mwova and was granted an injunction which he enjoyed for 2 years only to withdraw the case and has come seeking for similar orders. It is the 1st respondent's contention that once he is granted the injunction, he will never prosecute his case. He urged the court to dismiss the application with costs.

Analysis and Determination

15. I have considered the application herein, the supporting affidavit, replying affidavit and submissions by counsel for both parties. The Petitioner states that the 1st Respondent has been wasting and damaging the suit properties and seeks that this court issues an order of temporary injunction against the Respondent, his agents, servants or anyone claiming under or through him from cutting down trees, partitioning, fencing, digging a dam or in a manner amounting to destruction and damaging of the parcels of lands which are subject matter before this court pending the hearing and determination of the application and the suit.
16. The conditions for consideration in granting an injunction is now well settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

“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.”
17. In my opinion, the Petitioner has put forward a claim of violation of fundamental rights and freedoms in the previous determination of the parties' land dispute. The truth of whether or not the said rights and freedoms were violated is a matter that can only be ascertained during the hearing. Has the Applicant established a prima facie case with a probability of success? At this stage the courts role is to gauge the strength of the Petitioners case and not to adjudge the main suit. In my view this is a matter that in the interests of justice ought to be given an opportunity to be heard on merit in order to facilitate closure to this long standing dispute. In the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In *Habib Bank AG Zurich v. Eugene Marion Yakub*, CA No 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

The same caution was repeated in *National Bank of Kenya V. Duncan OwouR Shakali & Another*, CA No 9 of 1997 when Omolo JA stated:

“The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on



affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

18. I do find that a prima facie case with a probability of success has been made out but restate as found in the *National Bank of Kenya v Duncan Owour Shakali & Another*, CA No 9 of 1997 (supra) that “a prima facie case does not, in my view, mean a case, which must eventually succeed.”
19. In deciding the appropriate orders suitable in the circumstances of this case I have noted that the title deeds to the suit properties are in the name of the 1st Respondent and that he is in physical possession of the same. In my view the orders sought by the Applicant as drawn will not serve the purpose of preservation of the suit property pending hearing and determination of the petition and will not serve the interests of justice. It would be unfair to bar the Respondent from making use of his own property when he has title, possession and has been the beneficiary of a decision made following the legal process provided under the *land adjudication Act*. In addition the photographs that the Petitioner has attached are not properly authenticated by a certificate showing who took them. The said photographs show the clearing of small bushes and not major trees and there is no evidence of building of a dam. I am therefore of the opinion that an order of maintenance of the status quo would suit this case better. In Nairobi Civil Appeal 33 of 2012 *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the court described status quo as hereunder:

“Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events.”

20. It was observed by the court in *Thugi River Estate Limited & another v Naitonal Bank of Kenya Limited & 3 others* [2015] eKLR that a status quo order must be specific and clear to the parties. The court observed as follows:

“Status quo” in this respect, as maintained by an injunctive or conservatory or stay order, is the then existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in *American Cyanid Co.-v- Ethicon* [1975] 1 All ER 504 at 511 “where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.....” The second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved. Ordinarily where it is the court that has prompted a status quo order or has prompted the parties to it, it is more appropriate and exceedingly relevant to describe clearly the state of affairs at the time the order for status quo is issued. It is undesirable to simply make an order of status quo to be maintained without clearly describing the state of affairs then existing and being preserved.



Assistance of the counsel should always be sought in such instances otherwise each party may walk away with its own state of affairs in mind”

21. It is therefore my opinion that in issuing an order of *status quo*, the court will specify the current status of the land and what the parties can or cannot do on the land in order to protect the substratum of the suit pending hearing and determination of this petition. Based on the foregoing reasons I do make the following orders;
- A. Pending hearing and final determination of the petition herein the current status quo pertaining to the suit parcels of land be maintained.
 - B. The current *status quo* is that title to and possession of the suit parcels of land shall remain with the 1st Respondent.
 - C. The 1st Respondent will not cut down or destroy trees or carry out any major construction on the suit parcels of land.
 - D. Each party to bear his own costs of this application.

DELIVERED, DATED AND SIGNED AT KITUI THIS 26TH DAY OF JANUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and virtually in the presence of:

Musyoki Court Assistant

