



Rutere & 34 others v Muthithi Investment Limited & 3 others; Inspector General of Police & 3 others (Interested Parties) (Environment & Land Petition 21 of 2019) [2023] KEELC 817 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 21 OF 2019
J OMANGE, J
JANUARY 26, 2023**

BETWEEN

LUCY OGOKI RUTERE & 34 OTHERS PETITIONER

AND

MUTHITHI INVESTMENT LIMITED 1ST RESPONDENT

FUELEX LIMITED 2ND RESPONDENT

RIVERBANK LIMITED 3RD RESPONDENT

KANDIMUGWA LIMITED 4TH RESPONDENT

AND

INSPECTOR GENERAL OF POLICE INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

ETHICS & ANTICORRUPTION COMMISSION INTERESTED PARTY

NAIROBI CITY COUNTY INTERESTED PARTY

RULING

1. The two applications coming up for ruling today is the application dated 3rd November, 2022 and the application dated 22nd November, 2022. The application dated 3rd November by the petitioners seek an order for injunction brought on the grounds that the 1st Respondents advocates have written to the petitioners seeking an amount of Kshs 3,000,000 per plot. The applicant avers that the court should preserve the status quo so as not to infringe the rights of the petitioners to property.



2. The application dated 22nd November, 2022 by the 1st Respondent urges the other hand urges the court to order the petitioners to deposit Kshs 18 million as security for costs. The 1st Respondent contends that the Petitioner has filed the petition to delay the 1st Respondent from enjoying the fruits of his Judgement.
3. The court directed that both applications be canvassed by way of written submissions. As the date of writing this Ruling on 24th January, 2023 only the 1st Respondent has filed submissions. The court has considered the submissions and the pleadings filed herein as well as the previous proceedings in this matter.
4. I will deal with the application dated 3rd November, 2022 first. The application seeks orders for injunction primarily on the grounds that if the application is not allowed the petitioners right to property will be violated. The application is opposed by the 1st Respondent on two main grounds one that the application is res judicata and secondly that the threshold for grant of an injunction has not been met.
5. Regarding this application, the court must first determine whether the application is Res judicata. Section 6 of the *Civil Procedure Act* provides “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.
6. On the 6th February, 2022 Hon Lady Justice Komingoi delivered a Ruling in respect of an application in which the prayer was” That pending the hearing and determination of this suit this Honourable court be pleased to grant a temporary injunction restraining the 1st, 2nd and 3rd Respondents from evicting, demolition, and or in any manner whatsoever interrupting the petitioners quiet possession and enjoyment of all that schooling, commercial and or residential structures erected on all that parcel of land originally known as LR No 11344R and subsequently subdivided into LR 22142, 22144, 11344R.
7. These are the exact same prayers that are sought in this application. The parties are the same litigating under the same title; the application was conclusively decided by a competent court having the requisite jurisdiction. The application is now subject of appeal. In view of the foregoing I find that the present application is *Res judicata*. Having found that the application is *Res judicata* I will not delve into the merits of the application for injunction. On the issue of costs, the Petitioner filed this application while fully aware that the court had made a determination on the same. The 1st Respondent is awarded costs for the application.
8. I will now turn to the application dated 22nd November, 2022 which prays that the petitioners be ordered to deposit Kshs 18,000,000 in court. In support of this prayer the 1st Respondent/ Applicant has traced the long litigation history that the parties herein have had. The parties herein have litigated in ELC Case No 457 of 2013 Muthithi Investments v Andrew Kyendo, ELC A No 1084 (OS) Mary Auma Odhiambo v Muthithi Investments Limited, and an appeal in the Court of Appeal Civil Appeal No 437 of 2019 which is an appeal against the Ruling delivered on 6th February, 2022.
9. It is beyond argument that as matters stand the 1st Respondent has a court Judgement in his favour. It is also not in dispute that the parties herein have been embroiled in court cases which date back to 2013. The 1st Respondent who has been unable to enjoy the fruits of his Judgement must be feel particularly aggrieved. It is on this basis that he argues that the court should find that actions by the Petitioners



herein have been taken with the aim of frustrating the enjoyment of the decree. The 1st Respondent asks that the petitioners be ordered to deposit security for costs for Kshs 18,000,000.

10. Order 26 Rule 1 provides that “In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party’.
11. I have considered the submissions by counsel for the 1st Respondent on this issue. I note that this matter is filed as a Constitutional Petition. An order for security costs in the amount sought by the 1st Respondent would be an impediment to access to justice as envisaged by Article 48 of the [Constitution](#).
12. In view of the foregoing having considered both applications the court makes the following orders;
 - a. The petitioner’s application dated 3rd November is dismissed with costs to the 1st Respondents.
 - b. The 1st Respondents application dated 22nd November, 2022 is dismissed. Costs to be in the cause.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF JANUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Maya for the Petitioners

Mr. Kinyanjui for the 4th Interested Party

Steve - Court Assistant

