



Kinyua & another (Suing as the Legal Representatives of the Estate of George Mbogori) v Kananu (Environment and Land Appeal E058 of 2024) [2025] KEELC 3280 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E058 OF 2024
JO MBOYA, J
MARCH 26, 2025**

BETWEEN

PATRICK RIUNGU KINYUA & ROSE KARIMI MBOGORI [SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GEORGE MBOGORI] APPELLANT

AND

MARTHA KANANU RESPONDENT

RULING

1. The Application dated 10th March 2025, seeks the following reliefs:
 - i. That this Honourable court be pleased to certify this application as of utmost urgency and be heard on priority basis and service thereof be dispensed within the first instance.
 - ii. That this Honourable court be pleased to issue an order restraining the respondent, her assigns, agents or anybody else whatsoever claiming through them from entering, trespassing or in any other way interfering with the appellants/applicants' occupation and use of land parcel No. Nyaki/Kithoka/692 pending the hearing and determination of this Application.
 - iii. That this Honourable court be pleased to issue an order restraining the respondent, her assigns, agents or anybody else whatsoever claiming through them from entering, trespassing or in any other way interfering with the applicant's occupation and use of land parcel No. Nyaki/Kithoka/692 pending the hearing and determination of this Appeal.
 - iv. That this Honourable court be pleased to issue an order of inhibition against any dealings on the parcel of land No. Nyaki/Kithoka/6246 pending the hearing and determination of this Application.



- v. That this Honourable court be pleased to issue an order of inhibition against any dealings on the parcel of land No. Nyaki/Kithoka/6246 pending the hearing and determination of this Appeal.
 - vi. That the costs of this application be borne by the Respondent.
2. The instant application is premised on the various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of the appellant/applicant [Patrick Riungu Kinyua] sworn on even date. In addition, the deponent has annexed various annexures including the certificate of official search relating to L.R No. Nyaki/Kithoka/6246, being the property against which the orders of injunction and inhibition are being sought against.
 3. The respondent filed a replying affidavit sworn on the 24th of March 2025 and wherein the respondent has contended that the instant application is not only misconceived but devoid of merits. In addition, the respondent has also averred that the orders sought at the foot of the application are likely to affect and or impact upon 3rd parties who have not been joined into the proceedings.
 4. The application came up for hearing on 26th of March 2025 whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of oral submissions. To this end, the parties proceeded to and canvassed the application. Moreover, the submissions by and on behalf of the parties are on record.
 5. The applicants herein adopted the grounds contained in the body of the application and the averments in the supporting affidavit. In addition, the applicants highlighted two [2] salient issues for consideration and determination by the court. The issues raised by the applicant are namely, that the respondent is likely to sell and or dispose of the suit property during the pendency of the appeal, and that the appellant shall suffer irreparable loss unless the orders sought are granted.
 6. Regarding the first limb herein, learned counsel for the applicants has submitted that the respondent herein is likely to sell and dispose of the suit property during the pendency of the appeal. In any event, it was averred that the respondent has since been bringing various people to the suit property in an endeavor to sell and or dispose or sell the same.
 7. On the other hand, it was also submitted that the respondent has illegally encroached upon a portion of L.R No. Nyaki/Kithoka/692 and curved out a portion thereof measuring 0.86 acres, without the consent and permission of the appellant/applicant.
 8. Secondly, it was submitted that unless the orders sought are granted the applicant herein shall suffer irreparable loss and or prejudice, incapable of being compensated vide an award of damages. In this regard, it was posited that the applicant is therefore entitled to the orders sought in the application.
 9. The respondent adopted the replying affidavit sworn on the 24th March 2025 and thereafter highlighted three [3] salient issues for consideration and determination. The issues raised by the respondent are namely; that the respondent is the one in occupation of the disputed portion of the suit property; the respondent is the registered owner of the suit property alongside two other persons who have not been sued; that the grant of the orders sought shall be tantamount to evicting the respondent from the suit property, albeit at an interlocutory state.
 10. Regarding the first issue, the respondent submitted that the suit property, namely Nyaki/Kithoka/6246 belongs to and is registered in the name of the respondent and two other people who have not been sued in respect of the instant matter. To this end, the respondent referred the court to annexure No. 3, namely; certificate of official search in respect of the said property and which shows



that the property is registered in the names of Martha Kanani Kaaria; Doris Gacheri Kaaria and Tonny Mutethia Kaaria, respectively, as joint tenants.

11. Arising from the foregoing, it has been submitted that by virtue of being the owners of the suit property, no order of injunction can issue and or be granted, unless, there exists compelling reasons to warrant the grant of such an order.
12. Secondly, it has been submitted that it is the respondent who is in occupation of the disputed portions of land which fall[s] within L.R Nyaki/Kithoka/6246. In this regard, it has been posited that the grant of an order of temporary injunction [if any] shall be tantamount to evicting the respondent from the suit property.
13. It has been submitted that the orders being sought, namely; temporary injunction and inhibition, shall impact on and or affect third parties, who have neither been sued and or notified. In this respect, it has been contended that such an order would amount to violating the rule of natural justice.
14. Having reviewed the application and the response thereto and upon consideration of the oral submissions made on behalf of the parties, I come to the conclusion that the determination of the instant application turns on three [3] key issues, namely; whether an order of temporary injunction can issue to restrain and or prohibit an act which has already occurred or otherwise; whether the grant of the orders of temporary injunction would be tantamount to eviction albeit at an interlocutory stage; thirdly, whether the orders sought will impact upon the rights of third parties who have not been impleaded or otherwise.
15. Regarding, the first issue, namely; whether an order of temporary injunction can issue to restrain and or prohibit an act which has already occurred, it is imperative to recall that the applicant herein has posited that the respondent is actually residing on and or occupying the disputed portion of land. To this end, it suffices to take cognizance of grounds 10 and 11 of the application beforehand.
16. For ease of appreciation, grounds 10 & 11 of the application states thus;
 - “ 10. The respondent who leaves on land parcel No. Nyaki/kihtoka/6246 has wrongfully encroached into L.R No. Nyaki/Kithoka/692 and fenced off a portion measuring 0.86 acres.
 11. It is this illegal encroachment that the applicants sought to be halted in the trial court”.
17. Form the contents of paragraphs 10 and 11 [details in terms of the preceding paragraphs] it is apparent that the acts complained of by the applicant herein have already happened, occurred and or accrued. To the extent that the acts complained of have already occurred, the question that does arise is whether such acts can be taken care of by an order of temporary injunction, either in the manner sought or at all.
18. To start with, there is no gainsaying that an order of temporary injunction is forward-looking in the sense that same is intended to avert the occurrence of an imminent or threatened action, whose occurrence is likely to injure and or harm the applicants. Simply put, an order of temporary injunction suffices where the act complained of has not occurred and not otherwise.
19. In the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR, the court stated thus;
 8. It is apparent from the pleadings that the Respondent was seeking a permanent injunction against the disconnection of his electricity by the Appellant. A permanent injunction which is



also known as perpetual injunction, is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered.

A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.
10. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.
11. In *Nguruman Limited v Jan Bonde Nielsen & 2 others*, [CA No. 77 of 2012](#); [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

20. Bearing in mind the dicta espoused in the decision [supra], it is my finding and holding that in so far as the respondent is already in occupation of the disputed portion of land, which is contended to have been fenced within L.R No. Nyaki/Kithoka/6246, the orders of temporary injunction sought cannot issue.
21. Next is the issue of whether the grant of the orders sought, namely; orders of temporary injunction, would be tantamount to evicting the respondent from the disputed portion of land albeit at an interlocutory stage. Notably, the applicant concedes that it is the respondent who is in occupation of the disputed portion of land, which is being claimed by the applicant.
22. Furthermore, the applicant has contended that even though the disputed portion of land forms part of L.R No. Nyaki/Kithoka/692, the same [disputed portion] has been [sic] annexed by the respondent and now forms part of L.R Nyaki/Kithoka/6246. In this regard, the import of the orders of temporary injunction are such that the respondent should cease occupation and possession of the disputed portion of land.
23. My understanding and interpretation of the orders sought is to the effect that the applicant herein seeks to have the respondent evacuated and or removed from the disputed portion of land during the hearing and determination of the appeal. Essentially, the order being sought is one of eviction, albeit disguised as a temporary injunction.



24. Suffice it to underscore that an order of injunction, whose import and tenor is to evict a person who is already in occupation, cannot issue at an interlocutory stage. For good measure, courts of law are called upon to remain vigilant and to ensure that cunning litigants do not procure eviction orders under the guise of [sic] temporary injunction. If such a scenario were to be allowed to happen, then the rule of law and in particular, the right to be heard would be brought to disrepute.
25. In addition, the granting of such an order shall also culminate into serious and grave consequences. Nevertheless, if the applicant herein was desirous to procure an order of mandatory injunction, then the applicant ought to have pleaded such an order and thereafter satisfied the requisite threshold. [see Nation Media Group & 2 others v John Harun Mwau [2014] eKLR.
26. In the case of the Headmaster Kiembeni Baptist Primary School & Another V Pastor of Kiembeni Baptist Church [2005] eKLR the court stated as hereunder;

In my view these are issues that can only be resolved after a full hearing of the case. The Respondent's application sought a permanent injunction and that is what the learned Senior Resident Magistrate granted. That in effect conclusively decided the suit. That is wrong. When dealing with applications for injunction courts should not decide issues of fact – Mbutia – Vs – Jimba Credit Finance Corporation & Another (1988) KLR 1. Issues of fact should be decided after hearing evidence.

I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for the grant of permanent injunctions at interlocutory stage. See also Shah _v – Shah (1981) KLR 374.

27. Suffice it to state that the factual and legal matrix that underpinned the said decision replicate the facts and circumstances obtaining in respect of the instant matter. Quite clearly, what the applicant is seeking to achieve is to procure an order of eviction albeit through the back door.
28. Other than the foregoing, it is also imperative to observe that the disputed portion of land is contended to form part of L.R Nyaki/Kithoka/6246, unless a decision shall have been issued to the effect that the said portion falls within L.R Nyaki/Kithoka/692, which is claimed by the applicant.
29. Arising from the foregoing, what comes to the fore is to the effect that the applicant is actually seeking for an order of temporary injunction to bar and or prohibit the respondent from what is deemed to form part of the land registered in the name of the respondent and two others. In this regard, the applicant is essentially keen to procure an order to restrain the respondent from using what is arguably hers [pending any decision to the contrary].
30. In the case of Nguruman Ltd vs Jan Bonde Nielsen and another (2014) eKLR, the court of appeal considered a similar situation and thereafter stated thus;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.
31. To my mind, the factual position obtaining in this matter comes/falls within the purview of the holding adverted to and highlighted in the decision of Nguruman Ltd [supra].



32. Finally, it is worthy to recall that the applicant herein annexed various certificates of official search to the supporting affidavit. One of the certificates of official searches annexed relates to L.R No. Nyaki/Kithoka/6246.
33. From the said certificate of official search, it is evident that the parcel of land in question, which is the subject of the orders of temporary injunction and inhibition, is registered in the following names:
- i. Martha Kananu Kaaria
 - ii. Doris Gacheri Kaaria
 - iii. Tonny mutethia Kaaria
34. Even though the said property is registered in the names of three [3] persons, the applicant herein has only impleaded and sued Martha Kananu Kaaria, namely, the respondent. Nevertheless, it is not lost on this court that any orders which may issue will impact upon and or affect the rest of the proprietors of the said parcel of land.
35. The question that the court must grapple with is whether an order can issue and or be granted against a party and or person who has not been impleaded and notified. Pertinently, article 50 (1) of *the Constitution* 2010 guarantees every person a right to fair hearing and fair trial, which are critical tenets of the due process of the law.
36. In the absence of notice and involvement of the other registered proprietors in this particular suit, the issuance of any adverse order shall violate, breach and or infringe the constitutional imperatives underpinned by article 50 of *the constitution*.
37. Such an endeavor is not fathomable under *the Constitution* or at all.
38. The scope of the right to fair hearing; fair trial and the due process of the law has been highlighted in various decisions.
39. Nevertheless, it suffices to cite and reference the decision in the case of Gladys Boss Shollei vs Judicial Service Commission (2016) eKLR; where the Supreme Court [the apex Court] stated thus:
68. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR (Njoki Ndungu, SCJ, Concurring), this court made the following finding concerning the right to a fair trial under article 50(1) and 50(2):
- “(255) Article 50(1) refers to the right to a fair hearing for all persons, while article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms ‘fair hearing’ and ‘fair trial’ are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect...



(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further, he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.

... (261) It is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).

40. In my humble, albeit considered view, the grant of the orders sought at the foot of the current application shall impact upon and affect the rights of third parties who have neither been joined nor included. In this regard, the orders [if any] shall violate the rules of natural justice.

Final Disposition:

41. For the reasons which have been highlighted in the body of the ruling, I come to the conclusion that the application beforehand is not meritorious. In any event, there is no gainsaying that the applicant has neither established nor proven the existence of a prima facie case, which is a threshold issue in applications concerning orders of temporary injunction.

42. In the premises, the final orders of the court are as hereunder:

- i. The Application be and is hereby dismissed.
- ii. Costs of the Application be and are hereby awarded to the Respondent

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF MARCH 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma- Court Assistant

Mr. Nyaga for the Appellant/Applicants.

Mr. Kaba holding brief for Mr. Maranya for the Respondent.

