



**Chikala v Abdi (Environment & Land Case E038 of 2022)  
[2023] KEELC 18337 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E038 OF 2022**

**AE DENA, J  
JUNE 22, 2023**

**BETWEEN**

**MWANAHAMISI RAMA CHIKALA ..... PLAINTIFF**

**AND**

**HARUN BASHIR ABDI ..... DEFENDANT**

**RULING**

**Background**

1. Sometime in the year 1994 the owner of parcel No. Kwale/Diani SS/255 (suit property) measuring about 2.0 Ha appointed her as caretaker of the same as he did not live in the suit property. He also allocated her and her husband a portion of the suit property as their own as they looked after the entire suit property. That in the presence and permission of the said owner the allocated portion was demarcated by planting trees. That she has been in occupation of the suit property since then. According to the Plaintiff the owner introduced her to one Ali Abdi Ibrahim who was to be in charge of the dealings and affairs of the suit property while the owner was away.
2. Neighboring plot and when she went to report the issue to Ali Abdi Ibrahim at his place of work in Diani she was informed he had passed on earlier that year and she provided her contacts for the relatives or next of kin to reach her. The defendant did contact her and visited the suit property and informed the plaintiff that the family of the deceased had appointed the defendant to be in charge of the suit property. That the plaintiff explained to her the circumstances under which she stayed on the suit property and the demarcated portion. The defendant recognized the Plaintiff's arrangements with the owner. It is averred that sometime in the year 2022 she started receiving calls threatening her to accept money in lieu of vacating the premises when she was later coerced by the defendant to sign an agreement in this regard at an ex gratia sum of Kshs. 1 million for which she received Kshs. 300,000. Following the consistent threats, she decided to leave for her safety, but her sons remained in the property. She filed the present suit against her eviction from the said land.



3. Together with the suit was filed an application dated 4<sup>th</sup> August 2022 under Certificate of Urgency seeking for orders to restrain the defendant and his agents from inter alia destroying, encroaching, evicting or laying claim on the portion she was allocated. The application was opposed by the defendant. However, on 12/10/2021 parties agreed to maintain the status quo in respect of the portion alleged allocated to the Plaintiff and this court accordingly issued orders for status quo to be maintained but restricted to the portion the plaintiff was laying claim.

### **Present Application**

4. This ruling is in respect of the application dated 7/2/2023 where the Defendant/Applicant seeks the following prayers;
  1. Spent
  2. That the subject suit property be Designated earmarked and/or limited to a portion measuring approximately 0.125 Acres in the parcel of land title number Kwale/Diani SS/255 measuring approximately 5 acres.
  3. That pending the hearing and determination of this application, an order of temporary injunction do issue restraining the respondent by herself, servants, workmen and/or agents or otherwise howsoever from entering, remaining on, developing or in any way interfering with the status quo of the subject portion measuring approximately 0.125 acres in the parcel of land title number Kwale/Diani SS/255 measuring approximately 5 acres.
  4. That temporary orders of injunction do issue restraining the respondent by herself, servants, workmen and/or agents or otherwise howsoever from encroaching, trespassing and/or interfering in any form whatsoever with the remaining portion not subject to the main suit herein measuring approximately 4.875 acres in parcel of land title number Kwale/Diani SS/255.
  5. That a permanent injunction do issue restraining the herself, servants, workmen and/or agents or otherwise howsoever from encroaching, trespassing and/or interfering in any form whatsoever with the remaining portion not subject to the main suit herein measuring approximately 4.875 acres in parcel of land title number Kwale/Diani SS/255 measuring 5 acres.
  6. That the costs of this application be borne by the respondent.
5. The application is supported by the affidavit of the applicant and is premised on the grounds that; -
  - a. The applicant is the legal and authorized agent of the registered owner of the property known as Kwale/Diani SS/255 measuring approximately 5 acres having been duly appointed vide a specific power of attorney and the same being registered.
  - b. The respondents claim in the main suit is on an undivided portion of the property measuring approximately 1/8 an acre where the semi temporary building the respondent alleging to occupy is situated.
  - c. The respondent was not in occupation of the suit property when instituting the proceedings herein as clearly stated in her pleadings hence the portion was not occupied at the time the maintenance of status quo order dated 18<sup>th</sup> October 2022 was granted by this honourable court upon consent by both parties.



- d. That the respondent then instructed her five sons to occupy the suit property after a maintenance of the status quo order was granted.
- e. The said sons with the instructions of the plaintiff have since chased away the caretaker of the property and have in many occasions threatened to harm him
- f. The said sons with the instructions of the plaintiff have also removed and/or destroyed all beacons placed on the remaining portion not subject to the main suit herein measuring approximately 4.875 acres
- g. The respondent and her disclosed agents have also chased away all potential purchasers and developers of the remaining portion not subject to the main suit claiming that the whole property is subject to a court case.
- h. The Applicant stand to suffer irreparable loss and damage through the Respondents actions unless restrained.
  - i. In the circumstances of this case it is only fair and just and in the interest of law and order that the orders sought herein be granted.

### **Response**

6. The respondent opposed the application through a replying affidavit filed on 15/2/2023. The respondent reiterates the averments raised in a supporting affidavit earlier on filed on her behalf and which stated that the portion of the suit property occupied by her was demarcated by planting trees to mark the boundary and that the said portion has never been surveyed. That the defendant's approximation of the area cannot be relied on as the same has no proof of survey.
7. The respondent avers that she has annexed photographs of the trees demarcating her portion despite the same having been destroyed by the Defendant/Applicant, the trunks are still visible. That the Applicant's assertions that he has had the intention of disposing off the remaining portion of the suit property and not the portion subject of the main suit are baseless and malicious as this suit did not exist by the time the applicant was subdividing the land.
8. It is averred that the court issued status quo orders on 12/10/2022 and which the applicant is well aware of. That the defendant however still went ahead and continued with development of the suit property including on the portion restrained by the court. That the defendant's agents on 11/2/2023 continued to make constructions on the suit property and refused to stop when the plaintiff's son intervened and asked them to stop. The respondent states that she only moved out of the property when someone started destroying her house and trees but her sons have never moved out of the property. The plaintiff/respondent prays that the application is dismissed.

### **Submissions**

9. The application was canvassed by way of written submissions which parties filed and exchanged.

### **Applicants Submissions**

10. The Applicant's submissions are filed before court on 14/3/2023. The applicant has identified two issues for determination; -
  1. Whether it is important that the size of the suit property is ascertained and defined
  2. How the size of the portion should be determined.



11. Citing article 40 of the [Constitution](#) of Kenya 2010 on the right to own property and Section 26 of the [Land Registration Act](#) as to indefeasibility of title it is submitted since the restraint was limited to the claimed portion the defendant maintained his absolute rights on the portion not subject of this suit.
12. It is submitted the burden of proof is upon the plaintiff to define the particulars of the boundaries and approximate size of the suit portion claimed and which she has failed in spite of the opportunity to do in response to this application. Counsel's view was that this issue should not be left to the court as the court should be guided by the pleadings. The case of [Jennipher Nyambura Kamau versus Humphrey Mbaka Nandi](#) [2013] eKLR is relied upon. As such the application should be allowed as prayed.

### **Respondent's submissions**

13. The Respondent's submissions were filed on 3/4/2023. Two issues for determination have been identified namely Whether there was contempt on part of the plaintiff/respondent and Whether this court should grant the injunction orders sought by the Defendant.
14. On whether there was contempt on the part of the Plaintiff/Respondent, the court was asked to consider the contempt threshold as was stated in [Mary Wania Karobia Versus Nairobi City Council](#) [2017] eKLR and in [Richard Lanet Koonyo Versus Seleone Koonyo & 3 Others](#) [2017] eKLR. Counsel for the plaintiff urged that the defendant has not tendered any evidence to support the allegation that the plaintiff was interfering with the portion she was not laying upon.
15. On whether the court should grant the injunction orders sought, it is submitted that the defendant has not demonstrated that their case is unusually strong and clear as was put in [Lucy Wangui Gachara Versus Minudi Okemba Lore](#) [2015] eKLR, that for that reason the application should be dismissed with costs to the respondent.

### **Determination**

16. The application is brought under the provisions of Order 40 Rules 1,2,3 & 4, Order 51 rule 1 of the [Civil Procedure Rules](#) 2010, Sections 1A,1D and 63(a) of the [Civil Procedure Act](#), Section 26 of the [Land Registration Act](#) and article 40 of [the Constitution](#). From my review of the application it has two substantive limbs namely the demarcation and ascertainment of the size of the portion of land allegedly occupied and or invaded by the plaintiff which is the subject of the plaintiff's claim and orders of injunction restraining the plaintiff from interfering with the rest of the parcel of land unclaimed by the plaintiff.
17. I will at this juncture lay to rest the issue of contempt of court which I noted counsel for the plaintiff spent a lot of time on. The application clearly is not one for contempt of the court orders. But be that as it may this is not to say that this court would not frown against any such behavior. The violations in my understanding were raised in support of the present application. I will therefore not dwell on this issue.
18. My understanding of the defendant's pleadings and the prayers as crafted are that the plaintiff's alleged invasion of the suit property is limited to a portion measuring 0.125 Acres. It is this portion which the defendant seeks at prayer 1 of the application be earmarked and designated as the suit property and seemingly it is the portion in dispute. The defendant further seeks that the plaintiff be stopped from interfering with 4.875 Acres which is the acreage for the remaining portion of land based on the total acreage of 5 acres. It was submitted by counsel for the defendant that the status quo orders and the restraint herein was limited to the portion claimed by the plaintiff and the rest of the land not being affected by the orders, the defendant maintained his absolute rights on the portion not subject of this suit.



19. According to the Plaintiff, the land was simply demarcated by planting of trees to mark the boundaries and has never been surveyed. The Plaintiff/Respondent further states that the defendants approximation of the acreage cannot be relied upon without a survey exercise. The plaintiff states that she has been in occupation of the land for a very long period of time and the same was allocated to her and the husband by the initial owner as they had been working for the owner as caretakers for a long period of time.
20. The defendant on the other hand asserts his rights to the land vide the title deed annexed to the pleadings and states that the plaintiff has no ownership rights over the same. Let me point out the plaintiffs ownership and occupation of the alleged allocated portion in my view cannot be ascertained at interlocutory stage. It is a matter for determination on merits after a full hearing.
21. I have noted the defendant's averments that the size of the alleged allocated portion being claimed is not stated in the pleadings and I agree with Counsel in this regard. The plaintiff has clearly pleaded in the Plaint herein that she was allocated a portion off the land by the owner of the property and this is what she is agitating for. The portion is the subject matter and this clearly leaves out the rest of the property. The plaintiff has also submitted that the same was never surveyed. Indeed, it is clear that despite the allocation there was no subsequent subdivision process undertaken by the owner to hive off the said portion from the entire land in favor of the plaintiff. This court therefore sees the relevance for the portion to be ascertained and mapped out for certainty and focus on the subject matter as opposed to the entire land. This can only be undertaken through some survey vis a vis the existing RIM/deed plan at the lands registry.
22. The defendants also seek orders of interlocutory injunction as outlined earlier. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules, 2010 which provides that: -

“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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (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.”

23. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, 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."

24. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely There must be a serious/fair issue to be tried, Damages are not an adequate remedy, the balance of convenience lies in favour of granting or refusing the application.
25. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. On whether the Applicant has established a prima facie case, the defendant alleges that the plaintiff has invaded his part of the suit property and continues to use the same. The plaintiff on the other hand states that it is the defendant /Applicant who has invaded her portion and even destroyed part of her trees despite orders of status quo earlier issued by this court being in place. The defendant/applicant has refuted this claim. It is clear that the statements by the parties herein are contradictory, however the plaintiff/respondent has annexed photographs showing tree stumps a clear indication of trees that have been felled.
26. At this juncture the court cannot however tell who cut these trees as no report has been placed before court in proof of the matter having been reported and taken up by the police on related charges. The court will therefore have to determine the issue after hearing the matter.
27. The important consideration before granting a temporary injunction under Order 40 of the Civil Procedure Rules is preservation of the suit property, the court has already done so through the status quo orders issued with respect to the portion claimed by the plaintiff.
28. In my view I think this matter is best approached by determining the matter on a balance of convenience. As it is the portion of the land claimed by the plaintiff is not yet ascertained and must be ascertained because clearly from the pleadings the entire land is not in dispute. However, the court will not blindly be led into admitting the acreage provided by the defendant without proper expert intervention. Additionally, as long as the portion claimed by the plaintiff is unknown in terms of acreage then the same fate befalls the remainder of the portion which is not in dispute. Infact the application for injunction would in my view be premature at this stage.
29. Considering the above scenario then the balance of convenience tilts in favor of maintaining the status quo and which this court has done with consent of the parties and which orders the court has not been moved to set aside. I draw support from the holding in *Virginia Edith Wambui...vs....Joash Ochieng Ougo*, Civil Appeal No.3 of 1987 (1987) eKLR, where the Court of Appeal held that: - "The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial."
30. The upshot is that the Notice of Motion dated 7/2/2023 is partly merited to the extent that there is need to ascertain the size of the portion alleged to have been allocated to the plaintiff and which is the portion the subject of this suit. The orders for temporary injunction are declined. The following orders shall and hereby issue to dispose of the application.
  - a. The District Land Surveyor Kwale shall visit the property Kwale/Diani SS/255 and; -
    - i. Establish the area and portion claimed to have been allocated to the plaintiff both in terms of the size and any existing boundaries.
    - ii. Give a ground status report of the said portion above vis a vis the property Kwale/ Diani SS/255 and; -



- b. The survey exercise shall be carried out within 45 days of this order in the presence of both parties herein together with their counsels. Parties are at liberty to be accompanied by their own private surveyors during the exercise.
- c. The costs of the survey shall be borne by the Defendant.
- d. The orders of status quo issued on 12/10/2022 are reiterated until further orders of the court.
- e. Costs of the application shall be in cause.

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 22<sup>ND</sup> DAY OF JUNE, 2023**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mwanyika for the Plaintiff

Mr. Oluoch for the Defendant/Applicant

Mr. Disii- Court Assistant.

