



REPUBLIC OF KENYA



KENYA LAW
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**Mitsanze & 19 others v Pancholi & another (Environment & Land Case
197 of 2019) [2023] KEELC 18285 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18285 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 197 OF 2019

SM KIBUNJA, J

JUNE 21, 2023

IN THE MATTER OF LAND PARCEL CR. NO. 14337/11MN, CR 66422

AND

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT
THE PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP OF
ONE DECIMALTWO ZERO EIGHT (1.208) HECTARES OR THEREABOUT
OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION**

BETWEEN

SAID MUSA MITSANZE & 19 OTHERS PLAINTIFF

AND

MAHENDRA BHANUPRASAD PANCHOLI & ANOTHER DEFENDANT

RULING

1. In the application dated the 30th January 2020, the plaintiffs seek for inter alia, temporary injunction restraining the defendants from invading and/or trespassing and/or demolishing and/or selling and/or transferring and/or dealing with the suit premises, being plot No. 14337/11/MN, CR No. 66422 situate at Bamburi – Utange, Mombasa in any manner, whatsoever detrimental to the rights and interests of the plaintiffs/applicants herein, pending the hearing and determination of the suit, and for leave to serve the originating summons through advertisement in one of the daily newspapers. The application is based on the six (6) grounds on its face and supported by the affidavit Said Musa Mitsanze, the 1st plaintiff, sworn on the 30th January 2020. The plaintiffs case is that the process server has been unable to trace the defendants to be served with the originating summons since its filing on the 5th November 2019. That on the 3rd January 2020 police officers claiming to be from Kiembeni Police Station and acting for the defendants came to the suit premises and started demolishing some of their houses, but stopped on being shown the suit papers. That on the 27th January 2020, police officers allegedly from Bamburi Police Station came to the suit premises claiming to have been sent



- by the defendants and directed them to demolish their houses within seven (7) days. That unless the orders sought are granted, they will suffer irreparable loss and damage.
2. The court has noted from the record that despite the directions of the 3rd February 2020, 26th February 2020, 12th May 2020, 24th September 2020, 5th November 2020, 1st March 2021, 20th May 2021, 24th January 2022, 14th February 2022 and 5th July 2022, there is no evidence that the defendants herein have ever been served with the suit papers. The court has also noted that on the 5th November 2020 and 1st March 2021 one Mrs Kyalo advocate appeared in court allegedly representing the defendant. The record show that the said counsel had indicated that they had filed appearance/notice of appointment of advocates on 2nd November 2020, but the court disclosed there were no copies of the same in the court file. The court directed counsel to ensure copies of their documents were placed on the court record but none has been traced as I perused the file in the process of preparing this ruling. The record further confirms that one Ms Onyango appeared for the defendants on the 20th May 2021 but again no documents to verify that the defendants had been served and or had appointed counsel to represent them in this suit has been filed with, or availed to the court.
 3. In the application dated the 29th March 2021, the plaintiffs seek for the transfer of MCELC No. 22 of 2019 (Mombasa) from the Chief Magistrate court to this court for hearing and determination. The application is premised on the five (5) grounds on its face and supported by the affidavit of William C. Kenga, advocate, sworn on the 29th March 2021. The plaintiffs case is that the matter before the lower court and this one are related and it is prudent to have the two tried together. That the lower court matter should therefore be transferred to this suit.
 4. The application is opposed through the grounds of opposition dated the 12th October 2022 filed through Ms. Martin Tindi & Co. Advocates, inter alia that as the plaintiffs filed two cases in two courts, this suit should instead be transferred to the lower court for consolidation with MCELC No. 22 of 2019 that is ready for trial.
 5. The learned counsel for the plaintiffs filed their submissions dated the 14th February 2023 on the application dated the 29th March 2021 and filed on 1st April 2021, which the court has considered.
 6. The following are the issues for the determinations by the court;
 - a. Whether the plaintiffs have met the threshold for injunction order to be issued at this interlocutory stage.
 - b. Whether the plaintiffs have made out a reasonable case for substituted service to be allowed.
 - c. Whether the plaintiffs have made a reasonable case for the transfer of the lower court file to this court.
 - d. Who pays the costs.
 7. The court has carefully considered the grounds on the two applications, affidavit evidence, grounds of opposition, submissions filed by the learned counsel, the record and come to the following findings;
 - a. That in view of fact that the plaintiffs are yet to serve the defendants with the suit papers, including the application for injunction dated the 30th January 2020, despite the various court directions on service including involving the OCS Bamburi, the court finds it is only fair and just for the defendants to be served first and accord them an opportunity to be heard before the court can consider whether the plaintiffs have met the threshold for an order of injunction to issue at this stage.



- b. That on the plaintiffs' contention that the filing of grounds of opposition dated the 12th October 2022 by defendants through Ms. Martin Tindi & Co. Advocates is evidence that the defendants in this suit had been served with the suit papers, the court has perused the court record and has not seen any affidavit of service of the suit papers upon the defendants or any memorandum of appearance or notice of appointment of counsel for the defendants in this file. That in any case, the plaintiffs would not be seeking for substituted service as they have done under prayer 4 of their notice of motion dated the 30th January 2020 if they had served the defendants. The court therefore takes Ms. Martin Tindi & Co. Advocates to be counsel on record for some of the parties in the lower court file, MELC No. 22 of 2019, that the plaintiffs are seeking through their application dated the 29th March 2021 to transfer to this court. Indeed, the record confirms that it is the court that directed on the 5th July 2022 that Mr. Tindi be served with that application.
- c. That the plaintiffs are the ones who filed MELC No. 22 of 2019 that they now seek to be transferred to this court. They are also the ones who filed this suit before this court while well aware the lower court file was pending there for hearing and determinations. There is no justification given why this suit, whose subject matter is said to be a subdivision of the land subject matter in the lower court suit, was not filed in the lower court. The parties represented by Ms. Martin Tindi & Co. Advocates have in their grounds of opposition indicated that the lower court suit is ready for hearing and this suit should instead be transferred to that court to avoid further delay. The learned counsel for the plaintiffs has in their submissions objected to that proposal pointing out that there is no application before this court seeking to transfer this suit to the lower court. Under the provisions of section 18 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, this court has the power to inter alia withdraw and transfer a suit pending in any court subordinate to it, and to transfer any suit pending before it to any court subordinate to it with jurisdiction, on its own motion or upon being moved by any of the parties. That considering that the lower court matter was filed before this suit and by the same plaintiffs, it is only fair and just this suit be transferred to the lower court for hearing and determination.
- d. That no evidence of reasonable attempts made in serving the defendants with the suit papers have been placed before the court, and as such the court finds no basis upon which to consider the prayer for substituted service. However, now that this suit has been transferred to the lower court, the plaintiffs will be at liberty to move that court for the said orders upon satisfying the court that they have made reasonable attempts at serving the defendants and failed.
- e. On the issue of costs in the two applications, the court is of the view that they be in the cause the provisions of section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya notwithstanding.
8. That flowing from the foregoing, the court finds and orders as follows;
- a. That the notice of motion dated the January 30, 2020 has no merit and is hereby dismissed.
- b. That though the application dated the March 29, 2021 seeking to transfer the lower court file to this court is found to be without merit, the court on its own motion orders that this suit be and is hereby transferred to Mombasa Chief Magistrates Court for hearing and determination.
- c. The costs in the two applications be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 21st DAY OF JUNE 2023.



S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs : Absent

Defendants : Absent

Counsel : Mr. Tindi for the Defendant.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

