



REPUBLIC OF KENYA



Balu & 10 others v Railway Housing Co-operative Society Limited & 7 others (Environment & Land Petition 23 of 2021) [2023] KEELC 18194 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 23 OF 2021**

**MAO ODENY, J
JUNE 20, 2023**

BETWEEN

**MUPA BALU 1ST PETITIONER
MULONGO KAKUNDE 2ND PETITIONER
MICHAEL K. FONDO 3RD PETITIONER
TOBIAS KADENGE KATANA 4TH PETITIONER
KADZO KAINGU 5TH PETITIONER
GEORGE MUNYIKA 6TH PETITIONER
JACKLINE NGALA 7TH PETITIONER
JOSEPHINE CHISHENGA 8TH PETITIONER
GEORGE RUNYA 9TH PETITIONER
BETTY MGHARO 10TH PETITIONER
REHEMA NDORO GONA 11TH PETITIONER**

AND

**RAILWAY HOUSING CO-OPERATIVE SOCIETY LIMITED . 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
THE CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 3RD RESPONDENT
THE CHIEF LAND REGISTRAR 4TH RESPONDENT
DIRECTOR OF SURVEYS 5TH RESPONDENT
COUNTY GOVERNMENT OF KILIFI 6TH RESPONDENT**



RULING

1. Before the court for determination is a Notice of Motion application dated October 8, 2021 filed by the Petitioners on October 12, 2021. The orders sought were framed as follows;
 - 1) Spent.
 - 2) Spent.
 - 3) That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue prohibitory orders restraining the 1st Respondent, his agents, servants and/or assigns from evicting the Petitioners, interfering with the Petitioners' quiet possession, leasing, selling and in any other way disposing its interest in Kilifi/Kikambala Block 285/3 and the resulting titles being land parcels Numbers; Kilifi/Kikambala/285/3/28, Kilifi/Kikambala/285/3/29, Kilifi/Kikambala/285/3/32, Kilifi/Kikambala/285/3/33, Kilifi/Kikambala/285/3/34, Kilifi/Kikambala/285/3/35, Kilifi/Kikambala/285/3/43.
 - 4) That pending the hearing and determination of this application and Petition inter-partes, an inhibition order do issue against the 4th and 5th Respondents restraining them jointly and severally from authorizing any dealings/registrations and or transactions on Kilifi/Kikambala Block 285/3 and the resulting titles being land parcels Numbers; Kilifi/Kikambala/285/3/28, Kilifi/Kikambala/285/3/29, Kilifi/Kikambala/285/3/32, Kilifi/Kikambala/285/3/33, Kilifi/Kikambala/285/3/34, Kilifi/Kikambala/285/3/35, Kilifi/Kikambala/285/3/43.
 - 5) That pending the hearing and determination of the Petition, this Honourable Court be pleased to direct the 3rd, 5th and 7th Respondents to investigate and file a report with this court on the process by which the property herein was transferred to the 1st Respondent, authenticate the titles in possession of the 1st Respondent in respect of land titles arising from land parcel described as Kilifi/Kikambala Block 285/3 and the resulting titles being land parcels Numbers; Kilifi/Kikambala/285/3/28, Kilifi/Kikambala/285/3/29, Kilifi/Kikambala/285/3/32, Kilifi/Kikambala/285/3/33, Kilifi/Kikambala/285/3/34, Kilifi/Kikambala/285/3/35, Kilifi/Kikambala/285/3/43.
 - 6) That this court be pleased to issue such furthers [sic] in the interim as it deems just and equitable.
 - 7) That costs of this application be provided for.



2. The application was supported by the supporting affidavit of Musa Balu who deponed that the suit parcels of land were previously owned by one Sheila Norton who divested her interests in the year 1968 with instructions that the block of land be subdivided and transferred to her ex-employees, the Petitioners herein.
3. He further deponed that as a result, the block of land was marked as being part of Kikambala Settlement Scheme where they have been in occupation of. He added that the suit properties were then unknowingly to them allocated to one Francis Kamau Kinuthia who was not an employee of the said Sheila Norton and that Kinuthia then transferred the suit properties to the 1st Respondent vide an alleged sale agreement dated April 19, 2006. It was his averment that he was apprehensive that the 1st Respondent was gearing up to brutally evict the Petitioners from the suit properties.
4. The 1st Respondent opposed the application vide a Replying Affidavit sworn by Aggrey Ogotu on November 10, 2021 who deponed that the prayers sought in the present petition against the suit properties were directly and substantially identical to those in already concluded ELC Suit No 44 of 2010.
5. He explained that on May 29, 2009, some eleven people, the 2nd and 6th Petitioners included, filed an Originating Summons in Mombasa HCC No 158 of 2019 claiming adverse possession of the subdivision numbers 28, 29,32,33,35 and 43. Later on May 10, 2010, the 1st Respondent filed another suit against the eleven individuals in Malindi HCC No 44 of 2010 seeking inter alia, ownership rights over the suit properties.
6. He further deponed that the Defendants therein raised similar arguments as those raised in the present petition and sought orders inter alia of injunction against the 1st Respondent. That the two suits were consolidated, heard and determined simultaneously; and judgment delivered on September 20, 2019 in favour of the 1st Respondent.
7. Subsequently, the individuals filed a notice of appeal together with an application for stay of execution dated November 19, 2019 which was dismissed vide a ruling dated November 5, 2020 for lack of merit. He deponed that the Appeal is yet to be prosecuted and that the Petitioners ought not to have filed a fresh suit.
8. Notably, the 6th and 7th Respondents were in support of the Notice of Motion and relied on the Replying Affidavits sworn on January 31, 2022, Dr. James Nguzo and February 8, 2021 by Michael Bidii Ngala respectively.
9. Parties agreed to file written submissions.

Petitioners' submissions

10. Counsel relied on the case of *Giella v Cassman Brown and Co. Ltd* [1973] EA 358, and submitted that the principles to be considered in an application for injunction are three, namely; an applicant must establish a prima facie case, that an applicant will suffer irreparable injury if an injunction is not granted, and when in doubt, the court consider the application on a balance of probabilities.
11. Counsel added that in addition to those principles, the court should further bear in mind that public interest is weighty and far outweighs private interests as it was explained in the cases of *Flemish Investments Limited v Town Council of Mariakani*, MSA HCCC No 459 of 2010 [2012] eKLR; and *John Mosingi Marube v County Commissioner Kisii County and 2 others* [2016] eKLR.



12. Mr. Mutua further submitted that the present petition was not in any way related to the Mombasa suit and that the parties were not the same and that the issue in the former suit was adverse possession, as opposed to redress sought in this suit for violation of the Constitution.
13. It was counsel's further submission that the applicants are members who can be described as marginalized in terms of land ownership who have resided on the suit property for decades and in terms of the constitutional provisions touching on the marginalized, the applicants ought to be given a fair hearing and this can only be possible if interlocutory orders are granted.

1st Respondent's Submissions

14. Counsel for the 1st Respondent submitted that this court became functus officio when judgment was delivered and orders issued on November 5, 2020 and relied on the cases of Raila Odinga and 2 others v IEBC and 3 others [2013] eKLR; and Telkom Kenya Limited v John Ochanda [suing on his own behalf and on behalf of 996 employees of Telkom Kenya Limited] [2014] eKLR.
15. Counsel further submitted that the application did not meet the threshold for grant of injunction orders stipulated in the Giella v Cassman Brown case [supra] as the Petitioners failed to demonstrate the existence of a prima facie case on the ground that this court had already declared the 1st Respondent the owner of the suit properties in the judgment dated 5th November 2020.
16. Counsel added that the suit was *res judicata* HCC No 158 of 2019 as provided under Section 7 of the Civil Procedure Act and relied on the cases of Mrao v First American Bank Ltd and 2 others [2003] KLR 125; and Elwak Water Supply Association and 17 others v County Government of Mandera and another [2019] eKLR.
17. On the issue of irreparable harm counsel submitted that the Petitioners had failed to demonstrate the irreparable harm they would suffer if the injunction was not granted and that the balance of convenience tilts in favour of not granting the same.
18. Counsel submitted that since the orders sought were equitable in nature, the maxims that he who comes to equity must do equity and must come with clean hands came into play. To counsel, the Petitioners were guilty of material non-disclosure as they deliberately failed to disclose that they were parties in the former suit and relied on the case of Josephat Supare Ole Sakunda and 10 others v Harrison and another [2006] eKLR.

6th Respondent's Submissions

19. Similarly guided by the case of Giella v Cassman Brown [supra], counsel argued that the Petitioners had met the threshold and deserving of an order of injunction. Counsel argued that it was not enough for the Respondent to oppose the application for reasons that they were in possession of the suit titles, yet it was the same titles which were being challenged. Counsel relied on the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR.
20. On whether the Petitioners will suffer irreparable harm, counsel submitted that having demonstrated that the Petitioners were in possession of the suit properties for over 50 years, eviction would cause unquantified loss and cited the cases of Ooko v Barclays Bank of Kenya Ltd [2002] KLR 394; and Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR.
21. Counsel added that the balance of convenience tilts in favour of the Petitioners and cited the case of Truphena J Chemite v Pius Kiptum Yano and 3 others [2020] eKLR. Counsel urged the court to allow



the prayer for investigation of title for reason that the claim by the Petitioners was well within the definition of a historical land injustice.

7th Respondent's Submissions

22. Counsel submitted only in relation to prayer 5 of the application and stated that the establishment of the County Assembly and its duties under Articles 176 and 185 of the Constitution respectively. To counsel, the powers of the 7th Respondent under Article 185 did extend such as to give powers to conduct investigations through its existing committees or ad hoc committee. This, he submitted, was also provided under standing orders 160 and 179 of the County Assembly of Kilifi Standing Orders.

Analysis and Determination

23. Having considered the notice of motion, affidavits and submissions filed, I find that the following issues arise for determination;
- a) Whether the Petition is *res judicata*.
 - b) Whether the prayers for injunction are merited.
 - c) Whether the 3rd, 5th and 7th Respondents be directed to investigate and file a report with this court on the process by which the property herein was transferred to the 1st Respondent.

24. It must be noted that it will only be necessary to determine the last two issues if the answer to the first issue is in the negative.

25. The principle of *res judicata* is found at section 7 of the Civil Procedure Act which 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.

26. As regards the rationale of the doctrine of *res judicata*, the Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR explained as follows; -

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

27. The Court of Appeal further quoted with approval the Indian Supreme Court in the case of Lal Chand vs. Radha Kishan, AIR 1977 SC 789 where it was stated;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity,



justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

28. Further, in [Nancy Mwangi T/A Worthlin Marketers v Airtel Networks \(K\) Ltd \(Formerly Celtel Kenya Ltd\) & 2 others](#) [2014] eKLR the Court quoted the case of [E.T v Attorney General & another](#) (2012) eKLR wherein the court stated; -

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

29. Explanation 6 under Section 7 of the [Civil Procedure Act](#) further provides that; -

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

30. In the present case, it was deposed that there existed another suit being Mombasa HCCC 158 of 2009, which was eventually consolidated with Malindi ELC No 44 of 2010. In the former suit, some 11 Plaintiffs filed an amended Originating Summons seeking orders inter alia a declaration that they have acquired the suit properties by adverse possession and a permanent injunction against the 1st Respondent herein. It is also clear that save for the 1st Respondent herein, none of the other parties in the present suit were parties in the former suit. It is also evident that the Petitioners herein filed the suit on their own behalf, so did the Plaintiffs in the former suit.

31. It is also evident that the issue in the former suit was a claim for adverse possession and in the current suit the Petitioners are challenging the 1st Respondent’s titles to the suit properties. In my view these issues are not substantially the same hence I disallow the plea of *res judicata*.

32. On whether the prayers for interlocutory injunction are merited, the Petitioners needed to satisfy the court that they had met the principles of granting an injunction which were restated in the case of [Fina Bank Ltd v Spares and Industries Limited](#) 2000] 1 EA 52 as follows:-

“The conditions for the grant of an interlocutory injunction were:-

- i. That the applicant had to show a prima facie case with a probability of success.



- ii. The injunction would not normally be granted unless the applicant stood to suffer irreparable injury or loss which could not be adequately compensated by an award of damages, and
- iii. If the court was in doubt, the application would be decided on the balance of convenience.”

33. In addition, Order 40 of the Civil Procedure Rules, provides; -

Cases in which temporary injunction may be granted [Order 40, rule 1.]

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
- (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 orders.

34. In this case, it is not disputed that the suit properties are registered in the name of the 1st Respondent. The Petitioners’ claim was that the suit properties were irregularly allocated to one Francis Kinuthia who in turn transferred the same to the 1st Respondent irregularly and the Petitioners averred that they have been in possession of the suit properties for many years and that the same had been alienated as a settlement scheme to settle squatters.

35. The Petitioners annexed a certified copy of Kikambala Settlement Scheme area map from the Land Survey Office Mombasa and photographs to demonstrate that the Petitioners were in occupation of the suit properties. The 1st Respondent did not also deny that the Petitioners were on the suit property. In the circumstances, I am satisfied that the Petitioners have established a prima facie case as defined above.

36. I am equally satisfied that the Petitioners stand to lose their homes if an interlocutory injunction is not granted and therefore grant the orders of injunction as prayed. Parties to fast track the hearing of the case.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

