



**Charo v Sharif & 3 others (Environment & Land Case E21 of 2022)
[2023] KEELC 21774 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E21 OF 2022
EK MAKORI, J
NOVEMBER 22, 2023**

BETWEEN

JAPHET NOTI CHARO PLAINTIFF

AND

ABDULAZAK MUHSIN SHARIF 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

DIRECTOR OF SURVEY KENYA 3RD DEFENDANT

THE COUNTY GOVERNMENT OF KILIFI 4TH DEFENDANT

RULING

1. The Plaintiff seeks the following reliefs:
 - i. Injunctive orders against the Defendants from entering, remaining, constructing, selling, leasing, charging, and or dealing with the suit portion purportedly known as Portion Nos. 9313 Malindi pending the hearing and determination of this suit.
 - ii. Costs be provided.
2. There is a Supporting Affidavit by one Japhet Noti Charo (Applicant) deposed on 22nd March 2022.
3. The application is opposed. There is a replying affidavit deposed by one Adulrazak Muhsin Shariff and dated 6th May 2022.
4. The Applicant averred that he is in occupation of land parcel described as Nos. 9313 Malindi. The Applicant has set a long history on how he acquired the said plot. That Plot No. M5 measuring 598.42 acres was private land registered in the name of Angel East Africa Rubber Plantations Ltd and was later



grabbed by one Sheikh Salim Bin Khalifan. The Government of Kenya compulsorily acquired that land at some point in time. The family of the applicant was taking care of the land albeit not registered. The Government of Kenya finally recognized their rights and the land in question and promised to do another compulsory acquisition in a bid to settle the family on the suit property.

5. The applicant stated that while the family was waiting for documentation, the defendant had been issued with an allotment letter and deed plan prepared for a portion measuring 0.1263 within parcel No. M5 hence this action.
6. The 1st Respondent in this matter has deposed a long affidavit on the history of the land in question. The land was initially private. The Government compulsorily acquired it. He is the registered lessee from the Government of Kenya for a term of 99 years commencement 1/9/1994. The land was acquired for the expansion of Malindi Town. Plot No. M5 does not exist. It became portion No. 1731/R.
7. Besides there existed a suit Malindi ELC No. 104/2013 Kadzo Masha Kazungu and Morris Mlewa. The parties were husband and wife. The applicant knows the parties and the existence of the suit, which touched on the same subject matter. Counsel Otara was representing her. Judgment was obtained against her over the same suit property. Contempt proceedings were instituted against her. She was jailed ELC No. 104/2013 pronounced the issues that are being resuscitated here.
8. The issues for the determination of this Court are whether the current application meets the threshold laid in *Giella v Cassman Brown Co. Ltd* [1973] EA 358 for issuance of injunctive relief(s) and who bears the costs of the application.
9. The threshold to achieve before the grant of an injunction is as held in the *Giella* Case:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”
10. The first issue to determine then is whether the applicant has proved a prima facie case with the probability of success as held in *Mrao v First American Bank Of Kenya & 2 others* [2003] KLR 125 as follows:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”
11. The Plaintiff/Applicant has not shown the manner he acquired the land in question. The land has a history of mutating from plot M5 when it was private to public land after compulsory acquisition acquiring description as Portion No. 1731/R. Several people were allotted portions arising from that compulsory acquisition for purposes of expansion of the Malindi Town.
12. The Applicant claims to be waiting for another round of compulsory acquisition to get ownership documents for the said land. In essence, the purpose of the injunction will be a stop-gap as the applicant pursues ownership documents. The procedure adopted by the applicant is strange, the Court cannot issue injunctive orders as envisaged by the applicant.



13. Section 7 of The *Land Act*, 2012 is the law that frameworks several ways to acquire legitimate ownership of land in Kenya:
- a. Transfer of property
The common way of acquiring a valid title deed to land in this country is through the process of transfers. This is where a buyer through an elaborate legal process buys land before the seller transfers the same to his ownership.
 - b. Government allocation
Allocation is where the Government transfers public land to an individual for a specific time and use with conditions.
 - c. Adjudication
This is undertaken by the Government – it mainly concerns ascertaining and recording rights and interests in areas of community land for purposes of registration.
 - d. Compulsory acquisition
Ownership of land can also be acquired through compulsory acquisition whereby the Government acquires private land for a public purpose or good say in infrastructural development, after following the legal processes and compensating the private owner. There is an elaborate legal regime and procedure on how this is done. The government must first issue sufficient notice to land owners and even publish the same in the Kenya Gazette.
 - e) Adverse possession
Land can be acquired have acquired legitimately through a doctrine called adverse possession or prescription. Adverse possession comes about when a person stays and uses land that is not his or hers for a continuous period of 12 years without opposition from the registered owner - nec vi, nec clam, nec precario (no force, no secrecy, no persuasion The ‘intruder’ can move to court and claim valid ownership and title of the land since the original owner had acquiesced on his rights.
 - f) Settlement programs
Ownership of land can also be passed through settlement programs. The most noticeable is the Settlement Fund Trustee (SFT), a scheme to settle the landless and even squatters.
 - g) Land transmission
Top of Form
Bottom of Form
Transmission happens when land passes to others following say death. The property passes to the deceased personal representative(s) who is/are registered as the proprietor(s).
14. I have tried to check how the applicant acquired the land in question and his proprietary interest to no avail. He does not fall within the 7 modes of acquiring land rights in Kenya. He says he is waiting for a second round of compulsory acquisition. A prima facie case with a probability of success has not been set out.



15. The principles stated in Giella's Case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd V Afraba Education Society* [2001] 1 EA 86 as cited in [*Karen Bypass Estate Ltd v Print Avenue and Company Ltd* \[2014\] eKLR:](#)

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”.

16. I need not address the other two conditions. The Applicant seeks to reverse the pendulum in this matter. There exist other matters which already address what is being sought here. The application dated 22nd March 2023 is at best abuse of the court process and is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 22ND DAY OF NOVEMBER, 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Otara for the Applicant

Mr. Kandia for the Respondent

Court Clerk: Happy

