



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. E17 OF 2020

SAUDA SAID RAJAB JUMA

(Suing on her own behalf and as the Attorney of Muhsin Said

Rajab Juma and Omar Said Rajab)PLAINTIFF

-VERSUS-

SADIKI FERI 1ST DEFENDANT

NGUMA KATANA NGOLE 2ND DEFENDANT

ABDALLA CHEMBE 3RD DEFENDANT

KESI SARO MAE 4TH DEFENDANT

SHUKURANI KALUME 5TH DEFENDANT

KASENA KALAMA 6TH DEFENDANT

KAHINDI MAE 7TH DEFENDANT

KATANA MWATSUMA..... 8TH DEFENDANT

JANDO MWAPONDA9TH DEFENDANT

PATRICK CHIBARAWA10TH DEFENDANT

KARSA NGOMA 11TH DEFENDANT

SAIDI ELIJA BONGO12TH DEFENDANT

DOUGLAS KALONZI 13TH DEFENDANT

ANTHONY TANGAI KAGIA14TH DEFENDANT

NGALA MWADENDE..... 15TH DEFENDANT

PETER TANGAI 16TH DEFENDANT

DAVID NYUNGA17TH DEFENDANT

TANGAI BRAHA18TH DEFENDANT

BENSON NGALA MWATUNJE..... 19TH DEFENDANT
JONATHAN KAHINDI NGALA 20TH DEFENDANT
MWANYAMBA NDIRE 21ST DEFENDANT
DAVID MUNGA MWADENDE..... 22ND DEFENDANT
COUNTY COMMISSIONER, KILIFI23RD DEFENDANT
REGISTRAR OF LANDS, KILIFI..... 24TH DEFENDANT

AND

AISHA BINDI RAJAB JUMA 1ST INTERESTED PARTY
KHADIJA BINTI RAJAB JUMA 2ND INTERESTED PARTY
ZAINABU BINTI RAJAB JUMA3RD INTERESTED PARTY
ABU ABDALLA MOHAMED4TH INTERESTED PARTY
SAID AMIN ATHMAN 5TH INTERESTED PARTY
MOHAMED ATHMAN OMAR 6TH INTERESTED PARTY
ALI SHARIFF OTHMAN 7TH INTERESTED PARTY
TARIM ATHMAN OMAR 8TH INTERESTED PARTY
HAFSWA ATHMAN OMAR9TH INTERESTED PARTY
HAWA SHARIFF ATHMAN 10TH INTERESTED PARTY
SHAMSIYA SHARIFF ATHMAN 11TH INTERESTED PARTY
T WALIB SWALEH MUSA 12TH INTERESTED PARTY
SAID SWALEH MUSA 13TH INTERESTED PARTY
SHIFEYA SWALEH MUSA14TH INTERESTED PARTY

RULING

1. By the Notice of Motion dated 13th November, 2020 Sauda Said Rajab Juma (*Suing on her own behalf and as the attorney of Muhsin Said Rajab Juma and Omar Said Rajab*) (*hereinafter the Plaintiff*) prays for an order of injunction restraining the 24 Defendants from erecting any structures or interfering with the Plaintiff's use and enjoyment of all that parcel of land known as Plot No. 140/IV/MN (CR9771) measuring approximately 480 acres. The Plaintiff also prays for an order that the County Commissioner Kilifi (*the 23rd Defendant*) and the Registrar of Lands Kilifi (*the 24th Defendant*) do enforce the said orders.

2. The application which is supported by an affidavit sworn by the Plaintiff herself is premised on the grounds that:

(i) *The Plaintiff and the 14 Interested Parties are the registered owners of the suit property;*

(ii) *The Plaintiff's grandfather Rajab Bin Juma (now deceased) allowed the Defendants' parents who were working on the farm to build temporary houses on a portion of the suit property.*

(iii) *The Defendants parents requested and were allowed to bring their families in the farm but after the employment relationship ended, the Defendants and their families have declined to vacate the suit property and are continuing to erect structures thereon;*

(iv) *The Plaintiffs and the Interested Parties have after several meetings with the 1st to 21st Defendants agreed to hive off some 30 acres and to transfer the same to the Defendants but they have refused to execute the settlement agreement upon being incited by the*

22nd Defendant who does not reside on the land;

(v) *Some of the Defendants have started selling portions of the suit property to third parties;*

(vi) *As a result of the Defendants wrongful acts, the Plaintiff and the Interested Parties, have been denied the use, benefit and enjoyment of the portion of the suit property occupied by the 1st to 21st Defendants and the Plaintiff and the Interested parties have suffered loss and damage and are in danger of losing portions of the land to third parties; and*

(vii) *It is therefore necessary that the Defendants be restrained by an order of the Court as sought herein.*

3. By a consent dated 15th March, 2021 and recorded in Court on the same day, some 32 more Defendants were enjoined in the suit. By the same consent the suit is so far as it relates to the 1st, 6th, 10th, 14th, 25th to 56th Defendants was compromised and the suit marked as settled between them. The application therefore proceeds as between the 2nd, 4th, 7th, 8th, 9th, 11th, 13th, 15th as well as the 19th, 20th and 21st Defendants.

4. In a Replying Affidavit sworn on their behalf by Jando Mwaoponda (*the 9th Defendant*) and filed herein on 20th January 2021, the 2nd, 4th, 7th, 8th, 9th, 11th, 13th and 15th Defendants aver that granting the orders sought at this stage would be tantamount to declaring the Plaintiff as having proved her case before the main suit is heard and determined.

5. The Defendants further assert that the suit property is occupied by about 500 families who have been in occupation for a long time and have put up both permanent and temporary structures thereon. They further aver that they have buried their relatives on the land from time immemorial and urge the Court to dismiss the application.

6. In his response to the application, Benson Ngala Mwatunje (*the 19th Defendant*) has sworn a Replying Affidavit filed herein on 24th February, 2021. He avers that he was born on the suit land in 1954 and found his father and his brothers occupying and working on about 150 acres of land. The 19th Defendant avers that his nucleus family occupies and used about 15 acres of land with another 10 acres for rotational practices.

7. The 19th Defendant further avers that the late Rajab Juma had a close relationship with his own father Mwatunje Ngala Ndire and that he was aware they had an agreement with his uncles and grandfather on how to use the Suit land with common and agreed boundaries amongst themselves.

8. The 19th Defendant denies that their family was on the land as labourers for the said Rajab Juma. He further denies that the Plaintiff herein has authority or standing to sue them or seek an order for their eviction as her grandparents came to settle on the land in the 1930s and 1940s, which was long after the Defendants' family had occupied the land.

9. David Munga Mwadende (*the 22nd Defendant*) is equally opposed to the application. In his Affidavit in Reply filed herein on 8th February, 2021, the 22nd Defendant avers that the Plaintiff's plaint feebly discloses a representative suit but the Plaintiff has not sought leave of Court to institute the same as required.

10. The 22nd Defendant avers that contrary to the averments made by the Plaintiff, his family and himself are residents of what is now known as Plot 140 of Section IV Mainland North, occupying and working between 70 and 75 acres. It is his case that his great grandfather settled on the land long before the Europeans expressed an interest to settle and establish sisal plantations in the area in early 1910.

11. The 22nd Defendant further avers that in or about 1923, the land now known as Plot 140/IV/MN was surveyed and registered as Plot 79/IV/MN measuring approximately 2,850 acres in the name of Nassoro Bin Mbaruk. The indigenous people were not consulted and grave historical injustices were visited upon them.

12. The Defendant avers that whatever the Plaintiff claims to have acquired by inheritance or otherwise, is or was already extinguished and/or the land is otherwise held in trust for the indigenous persons who admittedly have been in physical possession of the suit land for more than five generations.

13. I have carefully perused the application and the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for some of the parties as well as the parties acting in person.

14. The Plaintiff craves an order of injunction restraining the Defendants from erecting any structures or interfering with her use and enjoyment of the suit property said to be measuring some 480 acres. She also prays for an order directing the 23rd and 24th Defendants to enforce compliance of the injunctive orders.

15. As the Court of Appeal reiterated in **Nguruman Ltd -vs- Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR:**

“... 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 injunctions 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 rest the foundation of any order of injunctions interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

16. The same court expounding on what would amount to a *prima facie* case in **Mrao Limited -vs- First American Bank of Kenya Ltd & Another (2003) eKLR**, observed as follows:

“So what is a *prima facie* case? I would say that in civil cases, 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 or rebuttal from the latter.

... But as I earlier endeavoured to show, and I cite ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

17. In the matter before me, it is not in doubt that the defendants are in possession of certain portions of the suit property. According to the Plaintiff, the Defendants parents were initially employees of her grandfather Rajab Bin Juma. The said Rajab allowed the Defendants parents to build temporary houses on a portion of the suit property and to invite their families to stay with them thereon.

18. It is the Plaintiff’s case that when the employment relationship ended, the Defendants and their families declined to vacate the land and that they have continued to erect structures thereon.

19. The Plaintiff does not however state when the Defendants were employed by her said grandfather and/or when the employment relationship was terminated. It was also not clear to me when the Plaintiff’s grandfather passed away and when the Plaintiff and the Interested parties came to be the registered proprietors of the suit property.

20. That information would have been important as the Defendants deny ever being employed by the Plaintiff’s grandfather. It is the Defendants case that the suit land was long occupied by their great grandparents long before the Plaintiff’s grandfather arrived on the scene. In their response to the application, the Defendants have annexed photographs of both permanent and temporary structures which they claim to have built over the years on the suit land.

21. I have looked at the photographs and it is apparent to me that while they may not have any title in their names, the Defendants have been on the suit property for a considerable period of time. That being the case I am quite reluctant to grant orders of injunction as sought herein. As the Court of Appeal stated in **Nguruman Ltd (Supra)**:

“The party on whom the burden of proving a *prima facie* case lies must how a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion ...”

22. In the matter before me, it is apparent that the Defendants have not only been on the suit land but that over a period of time, they have put up both permanent and temporary houses thereon. It is acknowledged by the Plaintiff that they have been living on the land and I do not find any urgent necessity to prevent them from continuing to use the land.

23. In the result, I did not find any basis for the Motion dated 13th November, 2020. It is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF JANUARY, 2022 VIA MICROSOFT TEAMS.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court Assistant - Mugambi

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J. O. Olola

JUDGE