



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 31 OF 2021

ABDUL HAMID EBRAHIM.....PETITIONER

VERSUS

- 1. COUNTY GOVERNMENT OF MOMBASA**
- 2. THE OFFICER IN CHARGE OF PHYSICAL PLANNING AND ENFORCMENT OF BUILDING CODE, MOMBASA**
- 3. THE ASSISTANT PUBLIC TRUSTEE MOMBASA**
- 4. THE HONOURABLE ATTORNEY GENERAL**
- 5. NYONDO NGAO NYAE**
- 6. HAMISI MOTO**
- 7. SAJADI KAZI KIRUMBI**
- 8. MUSTAFA ZWAI MZUNGU**
- 9. JOHN BOSCO RIMMBA KAI**
- 10. SAID GOMO BADI (5th – 10th respondents sued**
on their own behalf and on behalf of Pendeza Community Village
consisting of alleged 136 villagers).....RESPONDENTS

RULING

The application is dated 15th July 2021 and is brought under Article 22 and 23 of the Constitution and Rule 23 and 24 of the Constitution of Kenya (Protection of rights and fundamental freedoms Practice and Procedure Rules 2013) seeking the following orders;

- a) That the matter be certified urgent and service be dispensed with at the first instance.
- b) That prior to the hearing and determination prayer (d) of inter parties, the 5th -10th Respondents be restrained from erecting, constructing, building and/or developing structures of whatever description on Plot Sub-division No. 6747/I/MN.
- c) That prior to the hearing and determination of prayer (d) below, there be a site visit by the Deputy Registrar accompanied by a valuer to prepare and file in court a ground report of Plot Sub-division No. 6747/I/MN.
- d) That pending the hearing and determination of this petition, the 5th -10th Respondents be restrained from erecting, constructing, building and/or developing structures of whatever description on Plot Sub-division No. 6747/I/MN.

e) That the officer commanding police station Nyali be directed to enforce the orders issued herein.

f) That the costs of the application be provided for.

It is based on the grounds that the Applicant is a beneficial owner of Plot Subdivision No. 6747/1/MN in Bombolulu, Mombasa. The Applicant has filed a petition seeking the declaratory orders. The Applicant is apprehensive that the hearing of the petition will take some time. As a result of the congested ELC court diary the earliest this petition may be heard is towards the end of the year 2021. The 5th to the 10th Respondents have filed their two cases in the ELC court and before the Chief Magistrate Court but which cases are yet to be heard and determined. For developments to be allowed to proceed in a civilized country managed through the rule of law, there must be approval of the proposed developments from the National Environmental Management Authority under the EMCA Cap 387 Laws of Kenya. This however is a devolved function to be executed by the 1st and 2nd Respondents. The developments being carried by the 5th - 10th Respondents offends the provisions of EMCA for they have been done without an Environmental Impact Assessment (EIA). The danger being caused by the activities of the 5th - 10th Respondents is that unless the said respondents are stopped by the court by the time the main petition is heard and determined the suit property is likely to have become a big slum with many occupants. To evict such big number of people has political, economic and social implications which in most instances favour a non-eviction approach. Apart from the construction of the structures the 5th - 10th respondents are also busy sub-dividing, selling and adversely dealing with Plot Sub-division No. 6747/1/MN to the detriment of the Applicant. This subdivision and selling process brings onto the suit property new people unknown to the applicant and who are not parties to this case. Evicting parties who never participated in a trial occasionally leads to a verdict for a new trial. This will cause the applicant a lot of inconveniences and costs.

That the best approach in the interim pending the hearing and determination of the petition is to have sub-division, leasing, selling and construction stopped by this court. With this by the time the case is heard and determined the suit property will be in its current position. The court should get an impartial report by the Deputy Registrar assisted by a surveyor or a joint valuation by a surveyor appointed by both sides. This report will assist the court to appreciate the physical appearance of the suit property as at the time the petition was filed. The Applicant has demonstrated that damages are not adequate compensation and in any case the 5th to 10th respondents are squatters of unknown means and abode. Even if damages were an adequate remedy the 5th to 10th respondents have no way of paying those damages. The fact that adverse possession cannot issue against a Government agency is a statutory provision. The suit urging the court to grant Title to the 5th - 10th respondents fails at that. Prima Facie, this argument stands as the suit property is still registered in the name of the Assistant Public Trustee. In this case, the balance of convenience tilts in favour of the Applicant. Furthermore before the 5th - 10th respondents came to the suit property last year, 2020 they had a home where they were residing in.

The 5th to 10th respondents raised a preliminary objection that in the foremost the Respondent do pray that this Honorable court stay this petition and application pending the Hearing and Determination of CMCC ELC No 147 Of 2019 Mombasa- Mustafa Zwai Mzungu, John Bosco Rimba Kai, Said Gomo Badi Vs Abdul Hamid Ebrahim & 2 Others and ELC MISC No. 17 of 2021 (OS) Mombasa- Nyondo Ngae Nyae, Hamisi Moto and Sajadi Kazungu Vs Abdul Hamid Ebrahim. That by the Petitioner's own admission there exists CMCC ELC No 147 of 2019 Mombasa- Mustafa Zwai Mzungu, John Bosco Rimba Kai, Said Gomo Badi Vs Abdul Hamid Ebrahim & 2 Others and ELC Misc No. 17 of 2021 (OS) Mombasa-Nyondo Ngae Nyae, Hamisi Moto and Sajadi Kazungu Vs Abdul Hamid Ebrahim. That the subject matter in this Petition and that in the other suits identified above is the ownership of Plot Sub-Division No. 6747/1/MN. That further, by the Petitioners own admission the matters are still pending in court and there are interim orders in place against the Petitioner. That the Respondent maintains that the Petition herein is therefore Sub- judice and the Petitioner has only clothed it as a Petition to circumvent the existing interim orders which have been issued in the other matters. That the issues raised in the petition and application herein are similar to the issues in the existing suits and further do not disclose any reasonable cause of action as against the 5th - 10th Petitioners. That the issues presented before this court by the Petitioner herein are therefore issues that are yet to be ventilated and canvassed and are subject of consideration by the other courts of competent Jurisdiction. That therefore this court entertaining this Petition and the Application herein risks having this court sit as an appellate court and or may lead to there being contradictory orders at the same time with respect to the suit property. That this petition violates the doctrine of Constitutional avoidance. That the Application is an abuse of the process of this Honorable Court and serves only to prejudice the 5th - 10th Respondents herein. That the Petitioners' Petition and Application both dated 15th July 2021 lacks merit and should be dismissed with costs and /or stayed indefinitely

This court has considered the application, preliminary objection and the submissions therein. The issue for determination is, whether this matter is sub judice. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or

seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

The issue as to whether or not this suit is subjudice is therefore properly raised as a Preliminary Objection and the court will consider the same. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"

Section 7.

"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."

I have perused the pleadings referred to in the preliminary objection CMCC ELC No 147 Of 2019 Mombasa- Mustafa Zwai Mzungu, John Bosco Rimba Kai, Said Gomo Badi Vs Abdul Hamid Ebrahim & 2 Others and ELC MISC No. 17 of 2021 (OS) Mombasa- Nyondo Ngae Nyae, Hamisi Moto and Sajadi Kazungu Vs Abdul Hamid Ebrahim. That by the Petitioner's own admission there exists CMCC ELC No 147 of 2019 Mombasa- Mustafa Zwai Mzungu, John Bosco Rimba Kai, Said Gomo Badi Vs Abdul Hamid Ebrahim & 2 Others and ELC Misc No. 17 of 2021 (OS) Mombasa-Nyondo Ngae Nyae, Hamisi Moto and Sajadi Kazungu Vs Abdul Hamid Ebrahim. That the subject matter in this Petition and that in the other suits identified above is the ownership of Plot Sub-Division No. 6747/I/MN. I find that the parties are similar and so is the subject matter. I find that this matter is sub judice provided for under section 7 of the Civil Procedure Act and the objection is sustained. Any orders sought in this matter should be sought in those files. I strike out this suit with costs. Having done so there is no application to be determined as the suit stands struck off.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JANUARY 2022.

N.A. MATHEKA

JUDGE