



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. E011 OF 2021

IN THE MATTER OF:

CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF

SECTION 4, LAND ACT NO. 12 OF 2012

AND

IN THE MATTER OF:

ARTICLE 1, 2, 3, 10, 19, 20, 22, 23, 24, 27, 28, 35, 47, 48, 50, 53, 60, 61, 62, 73

AND

IN THE MATTER OF:

ARTICLE 12(2) OF THE LANDS ACT NO. 6 OF 2012

AND

IN THE MATTER OF:

ARTICLE 26 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

AND

IN THE MATTER OF:

ARTICLE 10 & 12 OF THE INTERNATIONAL COVENANT OF ECONOMIC,

SOCIAL AND CULTURAL RIGHTS 1996

AND

IN THE MATTER OF:

ARTICLE 6 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES'

RIGHTS (1981) CHARTER & PROTOCOL

AND

IN THE MATTER OF:

ALLEGE VIOLATION OF LEADERSHIP & INTEGRITY AND NATIONAL VALUES

AND

IN THE MATTER OF:

FREEDOM OF ACCESS TO JUSTICE

AND

IN THE MATTER OF:

DOCTRINE OF REASONABLENESS, PROPORTIONALITY AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF:

PRIVATE LAND AND ABUSE OF POWER

AND

IN THE MATTER OF:

UNIVERSALITY OF HUMAN RIGHTS AND DIGNITY

AND

IN THE MATTER OF:

THE HIGH COURT OF KENYA (SUPERVISORY JURISDICTION, PROTECTION OF

FUNDAMENTAL RIGHTS OF FREEDOM OF INDIVIDUAL, HIGH COURT

PRACTICE RULES AS READ WITH CLAUSE 19 OF

THE CONSTITUTION OF THE REPUBLIC OF KENYA,

TRANSITIONAL CLAUSES AND CONSEQUENTIAL PROVISION OF

THE SCHEDULE TO THE CONSTITUTION

BETWEEN

NICODEMUS KASUVU MUTUA MBAI.....1ST PETITIONER

DANIEL MUTUA MULINGA.....2ND PETITIONER

JEREMIAH MUTISYA PAUL.....3RD PETITIONER

VERSUS

NATIONAL POLICE SERVICE.....1ST RESPONDENT

COUNTY COMMANDER MACHAKOS COUNTY...2ND RESPONDENT

OCPD ATHI RIVER.....3RD RESPONDENT

OCS ATHI RIVER POLICE STATION.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL OF KENYA.....5TH RESPONDENT

NATIONAL LAND COMMISSION.....6TH RESPONDENT

AND

DANIEL KYULI AND 6999 OWNERS OF A SUBDIVISION

OF MAVOKO TOWN BLOCK 12.....INTERESTED PARTIES

RULING

What is before court for determination are the Petitioners' Notice of Motion application dated the 29th July, 2021, Interested Parties' Notice of Preliminary Objection dated the 7th September, 2021 and Application dated 9th August, 2021. In the Application dated 29th July, 2021, the Petitioners' seek an interlocutory injunction restraining the Respondents or their agents from threatening, evicting, barricading, removing, arresting or interfering with their right of ownership including enjoyment of land parcel No. LR 8529/7 (Formerly 8529/1 pending the outcome of this Petition. The application is premised on the grounds that the Applicants are registered owners of the suit property. Further, that the Respondents have duly confirmed that the Petitioners are the true owners of the suit property and there is no court order authorizing the Respondents from evicting them. They contend that they have not in any way done anything wrongful to warrant the intervention of the Respondents who are abusing powers granted to them by law. Further, the Respondents are in breach of the Petitioners' right to land. The application is further supported by the affidavit of JEREMIAH MUTISYA PAUL.

In the Notice of Preliminary Objection, the Interested Parties seek for orders to strike out the Petition including Notice of Motion application on the basis that it is res judicata and offends the provisions of section 7 of the Civil Procedure Act. Further, that the interim orders granted on 29th July, 2021 be vacated forthwith.

In the application dated the 9th August, 2021, the Interested Parties had sought to be enjoined in this Petition, which order was granted. They further sought for the current Petition No. E 011 of 2021 be struck out or dismissed for being incompetent as well as an abuse of the due process of law and vexatious. The application is premised on the grounds that there is an ongoing ELC Case No. 42 of 2017 involving the same subject matter LR No. 8529/1 and 8529/7 which are non-existent, which suit is scheduled for hearing on 7th October, 2021. The Petitioners have made similar applications in ELC 42 of 2017 ultimately abusing the due process of court. The Petitioners have never produced any ownership documents on suit property but the Interested Parties have produced valid documents proving ownership of Mavoko Town Block 12. The Petitioners are imposters who do not reside nor occupy the suit property while the Interested parties have been in occupation thereon. The suit property known as LR No. 8529/1 is non-existent as in 1994 the owners messrs Drumvale Farmers' Cooperative Society applied for amalgamation of the same together with LR No. 7083/1 and 3673. Further, the said amalgamation was approved in 1995 with LR No. 8529/1, 7283/1 and 3673 forming the current Mavoko Town Block 12. The Interested Parties are the absolute owners of Mavoko Town Block 12. The exhibited Certificate of Title number 8529/7 allegedly from the original number 8529/1 is a forgery and subject of police investigation vide Athi River Police Inquiry No. 5/2020 and Police file 44E/188/2020 CF 544/2020 HG12/4/2021 complainant Edward Matu – Accused Joel Muli. Further, Hon. Justice Odunga in Nairobi Misc. App No. 255 of 2006, ruled that the legal interest in the suit properties resides in the Interested Parties. The application is supported by the affidavit of DANIEL KYULI who reiterates their averments above.

The Respondents filed Grounds of Opposition where they contended that the Petitioners have failed to specifically demonstrate with reasonable precision the manner in which their actions violate the Petitioners' rights. They claim the Petitioners have failed to demonstrate the requirements set for the grant of orders of injunction as sought in the application. Further, the Petitioners have not adduced any evidence in support of their assertion that indeed the Respondents are evicting them from the suit properties. They insist the 1st, 2nd, 3rd and 4th Respondents are Police Officers who have a constitutional mandate to investigate a matter once they receive a complaint. Further, the mere allegation that a right or a fundamental freedom of the Petitioners has been or is likely to be contravened is not of itself sufficient to entitle them to the remedies sought. They aver that the Petitioners have failed to demonstrate how the Respondents have acted or are acting illegally, arbitrarily, unjustly, irregularly or oppressively and how any of their rights have been violated. They reiterate that the application is full of speculation as the Petitioners are not clear on who exactly is invading the suit property and no evidence of their arrest has been presented before court. Further, the application and Petition lack merit and amount to an abuse of the court process.

The Petitioners filed two replying affidavits sworn by JEREMIAH MUTISYA PAUL. The deponent insists they are the registered owners of the suit property LR No. 8529/7 and have been paying rates to the County Government of Machakos. He disputes the criminal investigations and insist a relevant government ministry confirmed their ownership document. He denies ownership of suit property is subject to police investigation and insists they do not know Daniel Kyuli including Joel Muli. He confirms existence of ELC No. 42 of 2017 involving the Interested Parties and the Petitioners herein. Further, that the case principally is challenging the Petitioners' entitlement to LR 8529/7 but the same is yet to be heard and the Respondents are not parties therein. He explains that on 21st November, 2020, the Respondents arrested some of their employees and charged them vide Criminal Case no. 121 of 2020 and 122 of 2020 respectively. Further, on 27th July, 2021 the Petitioners were picked up by some Police Officers, taken to Athi River Police Station but after interrogation, they were released and warned not to step on the suit property.

The applications and Notice of Preliminary Objection were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 29th July, 2021, Application dated 9th August, 2021 and Notice of Preliminary Objection dated the 7th September, 2021 as well as the respective affidavits, annexures and rivalling submissions, the following are the issues for determination:

- Whether the Petitioners are entitled to orders of temporary injunction pending the outcome of the Petition.

- Whether the Petition should be struck off.

As to whether the Petitioners are entitled to orders of temporary injunction pending the outcome of the Petition. In line with the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125**, I will proceed to decipher whether the Petitioners have established a prima facie case with probability of success at the trial. The Petitioners claim to be registered owners of land parcel No. LR 8529/7 (Formerly 8529/1) while the Respondents have threatened them with eviction and are harassing them. They insist the Respondents have duly confirmed that they are the true owners of the suit property and there is no court order authorizing the Respondents from evicting them. The Petitioners further contend that the Respondents have arrested and had their representatives charged in court with a criminal offence. The Respondents insist the Petitioners have not demonstrated how their rights have been violated while the Interested Parties claim that LR No. 8529/1 is nonexistent as in 1994 the owners messrs Drumvale Farmers' Cooperative Society Limited applied for amalgamation of the same together with LR No. 7083/1 and 3673 which culminated in the formation of the current Mavoko Town Block 12 that they absolutely own.

Looking at the Petition including the documents presented by the respective parties, I note there is already an existing suit being ELC No. 42 of 2017 involving the Interested Parties and the Petitioners herein which is principally challenging the Petitioners entitlement to LR 8529/7. I further note that the suit property LR 8529/7 was indeed a portion of LR No. 8529/1 which the Interested Parties claim was amalgamated with two other parcels in 1995 to form Mavoko Town Block 12. Further, I note the Petitioners obtained their Lease in 1999 after the alleged amalgamation. A cursory look at Nairobi Misc. App No. 255 of 2006, I note Justice Odunga while dealing with a judicial review application ruled that the legal interest in the suit lands which are LR No. 8529/1, 7283/1 and 3673 which was amalgamated and later subdivided to members of Drumvale Farmers' Cooperative Society Limited resided in the Interested Parties. It has also emerged vide a letter dated 28th June, 2018 from the Chief Land Registrar, that LR No. 8529/1 does not exist having been surrendered to the Government (together with LR No. 7283/1 and 3673) in exchange for individual title deeds for the shareholders of Drumvale Farmers' Cooperative Society Limited. Further, in a letter dated the 26th September, 2019, from BOMA Surveyors Co. Ltd addressed to the Chief Land Registrar, it confirmed that the Deed Plan No. 430882 for LR No. 8529/7 that they had prepared on the approval letters given to them, sleeps on an already registered land with its own title. It is interesting to note that the Petitioners instituted this Petition without including the Interested Parties nor informing court of the existence of the aforementioned pending ELC case which is dealing with determination of ownership of the suit properties. It is my considered view that the issues raised by the Petitioners can only be determined once the owner of the suit property is established. In the circumstances while associating myself with the decisions cited above, I find that the Petitioners have not established a prima facie case to warrant the orders of injunction sought. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that in instances when a party fails to establish the first limb on injunctions, the court need not proceed to make a determination of the other two and I will hence decline to do so.

As to whether the Petition should be struck off.

The Interested Parties sought for striking out of this Petition which the Petitioners disputed. I note the Petitioners have raised issues touching on violation of their rights by the Respondents which need to be determined. Be that as it may, I note the Petition was filed after ELC Case No. 42 of 2017 involving the same subject matter being determination of ownership of LR No. 8529/1 and 8529/7 had been instituted, which case is still pending. Further, I find that the said suit indeed is related to this Petition. Section 6 Of the Civil Procedure Act provides that: ' **No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed'**

In relying on these legal provisions as well as the facts as presented, I will decline to strike out the Petition but proceed to stay it pending the determination of the ELC Case No. 42 of 2017. I further find that this Petition is not res judicata as claimed by the Interested Parties as ownership of suit property is yet to be determined.

It is against the foregoing that I find the Petitioners' Notice of Motion application dated the 29th July, 2021 unmerited and will disallow it. I find the Interested Parties' Notice of Preliminary Objection dated the 7th September, 2021 unmerited and also disallow it. I find the Application dated 9th August, 2021 partially successful.

The interim orders which have been in place be and are hereby vacated.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE