



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 16 OF 2020

IN THE MATTER OF

ARTICLES 10, 21, 22, 23, 35, 62 AND 67 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

**THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47, 60, 64, 65, 73
AND 232 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF

ARTICLE 165(4) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

**THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

AND

IN THE MATTER OF

THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011, SECTION 13

AND

IN THE MATTER OF

THE LAND ACT, SECTION 4, 7, 150 PART VIII, LAND REGISTRATION ACT SECTIONS 24, 25, 26,30, 34, 35, 36, 37, 40, 101

BETWEEN

MAMBRUI SEA DENUS LIMITED1ST PETITIONER

ALESSANDRO TRENTAVIZI 2ND PETITIONER

ACRE ONE LIMITED 3RD PETITIONER

VERSUS

HON. JOSEPH KASENA YERI	1 ST RESPONDENT
ALFRED KAHINDI	2 ND RESPONDENT
PORTOFINO INVESTMENTS LIMITED.....	3 RD RESPONDENT
KAZUNGU NGUMBAO MUNYAUKI	4 TH RESPONDENT
MAIFAMIS HOUSING CO-OPERATIVE SOCIETY LIMITED ..	5 TH RESPONDENT
MOZA MOHAMED ABUD	6 TH RESPONDENT
GODANA HARIBAE DULO.....	7 TH RESPONDENT
THE SETTLEMENT FUND TRUSTEES	8 TH RESPONDENT
THE DIRECTOR OF SURVEY	9 TH RESPONDENT
THE REGISTRAR OF LAND KILIFI	10 TH RESPONDENT
THE MINISTRY OF LANDS & PHYSICAL PLANNING.....	11 TH RESPONDENT
THE NATIONAL LAND COMMISSION	12 TH RESPONDENT
THE HON. ATTORNEY GENERAL	13 TH RESPONDENT

RULING

1. By the Notice of Motion dated 16th December, 2020 as filed herein on 22nd December 2020, Mambui Sea Denus Limited, Alessandro Trentavizi and Acre One Limited (*hereinafter "the Petitioners"*) pray for orders that:

3. *Pending the hearing and determination of this Petition, this Court be pleased to issue a conservatory order against the Respondents prohibiting the 7th to 10th Respondents from dealing with the register known as Ngomeni Squatter Settlement Scheme or Malindi/Ngomeni Scheme;*

4. *Pending the hearing and determination of the Petition herein, the 5th Respondent, its servants and or agents be directed by order of mandatory injunction to remove the barbed wire fence and any other developments made by them on the Petitioners' portions of land aforesaid within 7 days of service of the Honourable Court's order and failure of which the Petitioners be at liberty to engage the services of a contractor who will remove the offending developments made by the 4th Respondent on the said land and the costs incurred thereby be paid by the 4th Respondent in any event within a time to be specified by the Honourable Court should it become necessary;*

5. *... spent.*

6. *That pending the hearing and determination of this Petition an order of injunction (be issued) restraining the Respondents, their servants and or agents or any one of them from trespassing upon, selling mortgaging, transferring, developing or in any other way dealing with the Petitioners' pieces of land known as Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambui Town; and*

7. *The costs of the application to be in the cause.*

2. The application which is supported by an affidavit sworn by the 2nd Petitioner – Alessandro Trentavizi is premised *inter alia* on the grounds that:

(i) *The 1st Petitioner was the proprietor of Portions of land known as Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambui Town having acquired the original portion vide a transfer registered in the land office as Cr. No. 24478/2;*

(ii) *By a transfer dated 9th September 2013, the 1st Petitioner sold Portion No. 667, 668, 669, 679, 680, 681, 692, 693, 703, 704, 705, 706 and 707 to the 2nd Petitioner who subsequently sold Portion Nos 703 and 705 to one Mary Jacinta Musundi;*

(iii) *By a further transfer dated 14th November, 2011 made between the 1st Petitioner and the 3rd Petitioner, the 3rd Petitioner*

became the registered proprietor of the interest in Portion No. 691 (Original No. 652/35);

(iv) Sometime in the year 1999, the 1st Petitioner became aware of an erroneous survey that had been undertaken by the 8th and 9th Respondents resulting in the encroachment by the said survey on private lands. In addition, following administrative intervention, it was discovered that some 600 portions of land had been illegally surveyed and titles issued. The titles were recalled and the 8th to 11th Respondent, were required to cancel the survey and the subsequent overlapping titles.

(v) On 30th September, 2004, the 1st Petitioner commenced proceedings being Malindi HCCC No. 38 of 2004 seeking orders of vacant possession of the areas occupied by the 3rd Respondent and 5 others in Portions No. 658 to 707 situated North of Mamburui Town. Judgment was subsequently granted in favour of the 1st Petitioner with an order of vacant possession of the suit premises. The Respondents were then evicted and the 1st Petitioner fenced the entire portion of land. The 2nd Petitioner also installed a chain link fence on the portions he had purchased from the 1st Petitioner;

(vi) Unbeknown to the Petitioners, the 1st, 2nd, 3rd, 5th, 6th and 7th Respondents and like situated persons, never surrendered their respective titles that had been created over the Petitioners private lands though the Petitioners remained in possession;

(vii) Unbeknown to the Petitioners, the 2nd Respondent with the help of the 8th to 11th Respondents corruptly, fraudulently and without any colour of right and in total disregard of official communication in their custody and several judgments of the Honourable Court permitted the 1st and 3rd Respondents to not only effect subdivisions of defunct titles to parcels No. Ngomeni Squatter Settlement Scheme/1400 into two portions, they also permitted 1st Respondent to transfer what was now referred to as Malindi/Ngomeni/2239 to the 2nd Respondent and also cleared and effected a transfer from the 3rd Respondent to the 4th Respondent of what is now known as Ngomeni Squatter Settlement Scheme/1401;

(viii) The 1st, 2nd, 3rd, 5th, 6th and 7th Respondents are now holders of titles that were issued as part of the same unlawful scheme resulting in what is known as Ngomeni Squatter Settlement Scheme/1398 and Malindi/Ngomeni Settlement Scheme/1403;

(ix) The parcels of land registered in the names of the Petitioners were all clearly demarcated on the ground with beacons and fenced and the titles created and issued to the 1st, 2nd, 3rd, 5th, 6th and 7th Respondents would suggest that the Government of Kenya through the 7th Respondent owned land which would, if surveyed appear to float on the Petitioners' portions of land;

(x) The Petitioners have not been consulted, there have been no formal exercise of the powers under Part VIII of the Land Act No. 6 of 2012 or any preceding legislation and the Petitioners have not been compensated.

(xi) As a result of the production of illegal letters of offer issued by the 7th to 10th Respondents and the subsequent unlawfully registered titles, and in pursuance of an attempted exercise of a right to the use and occupation of the land purchased by them, the 2nd and 4th Respondents have led a group of about 30 armed men who demolished the Petitioners' fences and they are now in the process of erecting their own fences and effecting further developments on the lands;

(xii) In addition, on 19th October, 2020 the 4th Respondent marshalled a large group of armed individuals and they forcefully demolished a chain link fence erected by the 2nd Petitioner securing his lands aforesaid. The invasion and subsequent fencing of the land was done in spite of the Petitioners' protest and pleas to the Police for help. As a result thereof, the Petitioners' rights under Article 40 of the Constitution have been violated;

(xiii) Further and in the alternative, the Petitioners aver that the 8th Respondent in pretended exercise of powers conferred by the Land Adjudication Act wrongfully and unlawfully assumed lordship over the Petitioners' lands aforesaid, directed the 9th Respondent to create a Settlement Scheme and issued letters

of offer thereof and subsequently the 10th Respondent unlawfully issued titles thereof to members of the public including the 1st, 2nd, 3rd, 6th and 7th Respondents; and

(xiv) The Petitioners are apprehensive that unless interlocutory orders are made as set out in the Notice of Motion, the Respondent may take steps to complete the alienation process causing the Petitioners loss and damage.

3. The application is opposed by the Respondents. In his Replying Affidavit sworn on 24th February, 2021 as filed herein on 25th February 2021, Joseph Kasena Yeri (the 1st Respondent) avers that he has a home within the Ngomeni Settlement Scheme where he has always lived and was identified as a squatter. In 1992, he applied together with others who had homes in the area to be allocated land in the scheme but instead it is Mansour Naji Said who had no land or structure therein who was issued with a fake certificate of ownership of the land in 1993.

4. The 1st Respondent avers that the certificate of ownership was issued to Mansour Naji after the expiry of the six months' time given by the Minister and the Recorder of Title had no power or authority to issue the same.

5. The 1st Respondent asserts that Ngomeni Squatters Settlement Scheme was legally established by the Government of Kenya to settle the squatters who had settled and developed the Ngomeni village and its peninsula. All the Respondents are residents of the area and have homes that they have been living in for ages but the Petitioners were never present during the process of land adjudication.

6. The 1st Respondent further avers that by a notice issued on 15th December, 1995 by the Land Adjudication Officer, all persons claiming land within the Scheme were required to make their claim within 21 days from the date of the notice. More than 10,000 families were identified as squatters during the process and were hence issued with titles for the land.
7. The 1st Respondent avers that he was not a party to Malindi HCCC No. 38 of 2004 and that he was not involved in the suit in any way.
8. Potofino Investments Limited (*the 3rd Respondent*) is equally opposed to the application. In a Replying Affidavit sworn by its director Francesco Sabatino and filed herein on 18th February, 2021, the 3rd Respondent avers that the Petitioners' application is without merit and is an abuse of the Court process as the same does not meet the legal threshold for the grant of conservatory orders.
9. The 3rd Respondent asserts that both the Petition and the application under it are a classic case of an indolent litigant who obtains a decree of the Court and does nothing about it for 15 years.
10. The 3rd Respondent avers that it did purchase all that parcel of land known as Malindi/Ngomoni/2239 from the 2nd Respondent under an agreement of sale on 25th July, 2017. During and after the sale, the 3rd Respondent did conduct due diligence under the law and it established that the said property was allotted to the 2nd Respondent by the 8th and 10th Respondents.
11. The 3rd Respondent further avers that it did purchase the portion of land known as Malindi/Ngomoni Settlement Scheme/1403 from the 7th Respondent on 31st July, 2017. Again during the transaction, the 3rd Respondent conducted due diligence and established that the property was registered in the name of the 7th Respondent. On 13th March, 2018, the 3rd Respondent similarly purchased land portion number Malindi/Ngomoni/2240 from the 2nd Respondent after conducting due diligence.
12. The 3rd Respondent avers that the Petitioners have never had actual physical possession of the land and they have never visited the said parcels of land. Having purchased the said properties from allottees out of the legitimate process of adjudication, the 3rd Respondent who is not in possession of the properties is by law entitled to enjoy quiet possession of the same without any interference from any quarter.
13. Kazungu Ngumbao Munyauki (*the 4th Respondent*) is equally opposed to the application. In his "Affidavit in Response" sworn and filed herein on 12th May 2021, the 4th Respondent avers that he was born in Ngomeni Area in 1939 and that the land they occupied was their ancestral land. The 4th Respondent avers that the Government undertook a land adjudication exercise in the area in 1996 and he was subsequently issued with a letter of offer for their family land.
14. The 4th Respondent further avers that on 27th July 2008, he was issued with a Title Deed for the property now known as LR No. Magarini/Ngomoni/1401 which he subsequently sold to the 5th Respondent.
15. Maifamis Housing Co-operative Society Limited (*the 5th Respondent*) is similarly opposed to the Petitioners' application. In a Replying Affidavit sworn on its behalf by its Chairman Patrick P. Maimba and filed herein on 12th May, 2021, the 5th Respondent avers that on 28th March 2019, it did enter into an agreement of sale with the 4th Respondent who was then the registered owner of the portion of land known as Ngomeni/Squatter Settlement Scheme/1401.
16. The 5th Respondent further avers that prior to the said purchase of the property, they had undertaken an official search which revealed that the 4th Respondent was the registered owner of the land. They have since taken possession of the property and erected a fence thereon.
17. The 5th Respondent avers that the group of 30 people that the Petitioners claim to have invaded the land were actually people they had hired to work on the fence and the damages claimed by the Petitioners are nothing but a figment of their own imagination.
18. I have carefully perused and considered the application and the response thereto by the 1st, 3rd and 5th Respondents. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates for the Parties. The 2nd, 6th to 13th Respondents did not file any response to the application.
19. The three Petitioners jointly pray for conservatory orders to issue restraining the 7th to 10th Respondents from dealing with the register known as Ngomeni Squatter Settlement Scheme or Malindi/Ngomoni Scheme. The Petitioners also crave an order of mandatory injunction directed at the 5th Respondent to remove the barbed wire fence and any other development made by the 5th Respondent on the Petitioners' portion of the land pending the hearing and determination of the suit. Ultimately, the Petitioners have urged the Court to issue a temporary order of injunction restraining the Respondents, their servants and/or agents, from trespassing upon, selling, mortgaging, transferring, developing or in any manner dealing with the Portions of land known as Nos. 658 to 707 (original No. 652/2-51) situated North of Mamburi Town.
20. As the Supreme Court of Kenya stated in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others, Supreme Court Application No. 5 of 2014 (2014) eKLR:**

“... The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of

stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and on balances of probabilities. The concept of “stay order”

is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of the case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

21. Arising from the above case and a number of other decided authorities, it is now generally accepted that in order to satisfy itself that there is reason to grant a conservatory order, the application before the Court ought to meet the following threshold:

(a) First, an applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

(b) The second issue for consideration is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

(c) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.

(d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

22. In the matter before me, the Petitioners seek an order to restrain the Settlement Fund Trustee (*the 8th Respondent*) the Director of Survey (*the 9th Respondent*), the Registrar of Lands Kilifi (*the 10th Respondent*), the Ministry of Lands and Physical Planning (*the 11th Respondent*), the National Land Commission (*the 12th Respondent*) and the Honourable the Attorney General (*the 13th Respondent*) from dealing with the register known as Ngomeni Squatter Settlement Scheme or Malindi/Ngomeni Scheme.

23. It is the Petitioners’ case that the said register came about after the 8th Respondent in pretended exercise of powers conferred by the Land Adjudication Act wrongfully and unlawfully assumed lordship over the Petitioners’ parcel of land and directed the 9th Respondent to create the Scheme and issue letters of offer to the 1st to 7th Respondents and other likely situated persons. Arising from the exercise, the Petitioners contend that the 10th Respondent unlawfully issued title deeds to the said Respondents and other people over land that was already privately owned by the Petitioners.

24. From the Replying Affidavits of the 1st, 3rd, 4th and 5th Respondents, it is apparent that the Ngomeni Squatter Settlement Scheme was established by the Government of the Republic of Kenya way back in the year 1993. The Petitioners have not denied that by a letter dated 15th December, 1995, the area Land Adjudication Officer issued notices to all persons claiming to have letters of allotment or titles over the affected area to make their claim within 21 days of the notice.

25. It is apparent that the Petitioners and/or their predecessors in title did not make any such claims and hence the subsequent issuance of letters of offer and title deeds to the 1st to 7th Respondents and other people within the Scheme. While it is possible that the Petitioners and/or their predecessors in title may have not received the said notice, the Petitioners by their own admission became aware of the Scheme sometime in 1999.

26. By their own pleadings herein, the Petitioners assert that in the year 1999, the 1st Petitioner became aware of an erroneous survey that had been undertaken by the 8th and 9th Respondents resulting in the encroachment by the said survey on private lands. The Petitioners further aver that it was discovered by administrative action then that some 600 portions of land had been illegally surveyed and titles issued to various individuals.

27. Arising from that discovery, the Petitioners instituted Malindi High Court Civil Case No. 38 of 2004 against some six (6) individuals and obtained Judgment for their eviction from the suit land on 19th January, 2005.

28. It was not clear from the material placed before me whether the said Judgment had been executed against the said individuals. What was clear to me was that the present Respondents were not party to the said suit and that they remained in possession of the suit properties and continued to hold the titles issued to them as a result of the establishment of the Scheme.

29. In the circumstances herein, it was evident that the 1st to 7th Respondents did not invade the suit properties. On the contrary the Respondents were issued with letters of offer and title deeds in their possession following a process duly established by the Government of the Republic of Kenya. While it may as well be that the process of creation of the scheme failed to take into cognizance the rights and interests of the Petitioners, that is a question that can only be answered after the trial herein has been concluded.

30. As at this juncture however, I did not find any basis to issue orders restraining the 8th to 13th Respondents from dealing with the register of the entire scheme. Indeed while the Petitioners urge the Court to stop the use of the register, it was clear from their own pleadings that other than the 1st to 7th Respondents sued herein, there were at least some 600 individuals and titles that the Petitioners refer to as “likely

situated persons “ who are likely to be affected by any orders issued herein. Those individuals are not Parties to this suit and it would be extremely prejudicial to them if the Court were to issue orders affecting their interest before they are heard on the same.

31. At any rate, and as the Petitioners admit, the register for the scheme has been in place since 1999 and various individuals have since been issued with the title deeds as a result thereof. I did not in the circumstances think that issuing a conservatory order at this stage would facilitate the ordered functioning within public agencies, a principle which this Court ought to take into consideration prior to the issuance of such orders.

32. As regards the prayer for a mandatory injunction, it is trite that for the same to issue, there must be special circumstances shown over and above the establishment of a *prima facie* case for such an injunction to issue. As the Court of Appeal stated in **Kenya Breweries Limited and Another -vs- Washington Okeyo (2002) 1 EA 109**.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Plaintiff.”

33. In the matter before me, the contention by the Petitioners is that the 8th to 13th Respondents adjudicated that which is private land and issued titles to the 1st, 2nd, 4th 6th and 7th Respondents. On the other hand, the Respondents contend that the establishment of the Scheme and the adjudication of land therein followed the proper procedure as set by law.

34. I did not think that the circumstances herein were special and or clear as to warrant a mandatory order of injunction.

35. Finally, the Petitioners also sought an order of temporary injunction to restrain the Respondents from trespassing upon, selling, mortgaging, transferring, developing or dealing with the suit properties in any manner whatsoever. For the Court to issue such an injunction, it must satisfy itself that the Petitioner’s case is an arguable *prima facie* case with a likelihood of success. The Petitioners would also be required to demonstrate the prejudice that they stand to suffer if the orders of injunction were not granted.

36. As the Court of Appeal stated in **Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR**:

“The party on whom the burden of proving a *prima facie* case lies has must show 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.”

37. From the material before me, the Petitioners learnt of the alleged infringements herein way back in 1999. In the year 2004, they filed a suit against other individuals but left out the Respondents herein. I did not therefore think that there was any urgent necessity to take any precipitate action against the Respondents at this late stage of the day.

38. In any event and as I have alluded to hereinabove, land adjudication is a lawful inter-agency process with an elaborate dispute resolution procedure. Unless and until the Petitioners provide evidence to demonstrate that the process under which the Respondents acquired their titles and obtained possession of the land was outside the law, I did not see any basis to restrain the Respondents in the manner sought herein.

39. The upshot is that I did not find any merit in the Petitioners Notice of Motion dated 16th December, 2020. The same is dismissed with costs.

Ruling dated, signed and delivered virtually at Nyeri via Microsoft Teams this 28th day of April, 2022.

In the presence of:

Mr. Tukero Ole Kina for the Petitioner

Mr. Atyang for the 3rd Respondent

No appearance for other Parties

Court assistant - Kendi

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J. O. Olola

JUDGE