



**Khalid & 4 others v Hilali & 14 others (Environment & Land Petition  
7 of 2020) [2022] KEELC 3812 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3812 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 7 OF 2020**

**JO OLOLA, J**

**MAY 12, 2022**

**IN THE MATTER OF THE BILL OF RIGHTS UNDER CHAPTER FOUR OF  
THE CONSTITUTION OF KENYA, 2010, THE UNIVERSAL DECLARATION OF  
HUMAN RIGHTS (1948) AND THE AFRICAN CHARTER ON HUMAN RIGHTS**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS  
AND FREEDOM OF THE INDIVIDUAL (SUPERVISORY JURISDICTION)  
PRACTICE AND PROCEDURE RULES, 2006 AND PART 5 RULES 19  
OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED  
CONTRAVENTIONS OF PART VIII OF THE LAND ACT**

**AND**

**IN THE MATTER OF DISREGARD FOR NATIONAL VALUES AND PRINCIPLES,  
EQUALITY AND FREEDOM FROM DISCRIMINATION, FAIR ADMINISTRATIVE  
ACTION, SECURITY AND PRIVACY OF PERSONS, ARBITRARY DEPRIVATION  
AND DISPOSSESSION OF PROPERTY, AND FAILURE TO ADHERE  
TO CONSTITUTIONAL PRINCIPLES OF LAND POLICY IN KENYA**

**BETWEEN**

**BWANLOO MOHAMED KHALID ..... 1<sup>ST</sup> PETITIONER  
MOHEMED BWANLOO MOHAMED ..... 2<sup>ND</sup> PETITIONER  
SAKINA AHMET SWALEH ..... 3<sup>RD</sup> PETITIONER  
MBWANA MWINYI KOMBO JUMA ..... 4<sup>TH</sup> PETITIONER  
MWARA MWATU ..... 5<sup>TH</sup> PETITIONER**

**AND**



ABDULRAHMAN MOHAMED HILALI .....	1 <sup>ST</sup> RESPONDENT
TAUHIDA MOHAMMED .....	2 <sup>ND</sup> RESPONDENT
MOHAMED ABDULRAHMAN MOHAMED .....	3 <sup>RD</sup> RESPONDENT
YAHYA AHMED SHEE (ALIAS) BASODE) .....	4 <sup>TH</sup> RESPONDENT
ABDULQADIR BARKALE FAMAU (ALIAS DULA) .....	5 <sup>TH</sup> RESPONDENT
BAILE MOHAMMED SOMOBWANA .....	6 <sup>TH</sup> RESPONDENT
AHMED MOHAMED .....	7 <sup>TH</sup> RESPONDENT
MAHMOUD MOHAMMED .....	8 <sup>TH</sup> RESPONDENT
ABDALLA FARID FADHIL .....	9 <sup>TH</sup> RESPONDENT
MOHAMED ALI MAHADHI .....	10 <sup>TH</sup> RESPONDENT
SALMA MOHAMED OMAR .....	11 <sup>TH</sup> RESPONDENT
JAMES KAMOTHO GACHARA .....	12 <sup>TH</sup> RESPONDENT
THE COUNTY GOVERNMENT OF LAMU .....	13 <sup>TH</sup> RESPONDENT
THE NATIONAL LAND COMMISSION .....	14 <sup>TH</sup> RESPONDENT
THE HONOURABLE ATTORNEY GENERAL .....	15 <sup>TH</sup> RESPONDENT

## RULING

1. By the notice of motion dated August 20, 2020, the five (5) petitioners herein pray for an order of injunction, prohibition and/or restriction to restrain the 1<sup>st</sup> to 14<sup>th</sup> respondents herein from trespassing, selling and/or carrying on any further activities or dealing in any manner with the property known as Mohamed Khalid Nyekombo family land being Lamu/Mokowe Old Town/824 to 866 located in Mokowe area of Lamu County.
2. The application which is supported by an affidavit sworn by the 1<sup>st</sup> petitioner – Bwanloo Mohamed Khalid is premised on the grounds:
  - (i) That the petitioners are the lawful owners of the suit property having acquired the same legally some by way of sale agreements and others through inheritance;
  - (ii) That the respondents have without the petitioners' knowledge and or consent gone forward to allocate and/or process fraudulent titles to the suit parcels;
  - (iii) That as a result of the respondents actions the petitioners have suffered loss and damage;
  - (iv) That unless the process of distribution, allocation, transfer of land and issuance of titles is stopped, the Petitioners will suffer irreparable loss; and
  - (v) That in the interest of justice the honourable court ought to preserve the suit premises pending the hearing and determination of the main suit.



3. The 1<sup>st</sup> to 11<sup>th</sup> respondents are however opposed to the grant of the orders sought. In an application sworn on their behalf by the 1<sup>st</sup> respondent – Ahmed Mohamed and filed herein on January 27, 2021, the respondents aver that the petitioners have not demonstrated any tangible evidence of having purchased the subject properties.
4. The respondents assert that they are the legal owners of the disputed properties a fact which is well documented in the Land Registry as demonstrated by the title deeds issued to themselves. The respondents state that prior to the issuance of the said title deeds, they had occupied the suit property for many years and they were therefore justifiably issued with the titles.
5. The 1<sup>st</sup> to 11<sup>th</sup> respondents further deny that the 1<sup>st</sup> petitioner's father lived on the suit property as stated by the petitioners. It is their case that the 1<sup>st</sup> petitioner had no capacity to sell any portion of the land and that if he did so the sale was illegal ab initio. The respondents further aver that the petitioners have not laid any foundation or demonstrated that there existed land belonging to the Mohamed Nyakembo family – and hence their claim herein is unfounded.
6. The 12<sup>th</sup> respondent – James Kamotho Gachara is equally opposed to the application. In his replying affidavit filed herein on January 26, 2021, the 12<sup>th</sup> respondent avers that the petitioners have come to court with unclean hands and have concealed vital information including the fact that the 3<sup>rd</sup> petitioner started claiming the land after the 12<sup>th</sup> respondent had purchased the same. The 12<sup>th</sup> respondent reported the matter to the County Commissioner's Office whereupon the 3<sup>rd</sup> petitioner was ordered to stop dealing with the land.
7. The 12<sup>th</sup> respondent avers that after the resolution of the dispute, he tried to develop the property but he was stopped by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners who apparently harboured intentions to resell the land to other unsuspecting buyers.
8. The 12<sup>th</sup> respondent further avers that there is no evidence that the suit land is family land and the Petitioners have not shown what prejudice they suffered after the National Land Commission exercised its mandate to administer what was Government land.
9. I have carefully perused and considered the application and the responses thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates acting for the parties.
10. The petitioners herein pray for an order of injunction restraining the respondents from dealing with a parcel of land they describe as Mohamed Khalid Nyekombo family land. It is their case that the land measuring 4.5 acres has since been sub-divided into different portions ranging from Lamu/Mokowe Old Town/824 to Lamu/Mokowe Old town/866. It is further the petitioner's case that the Respondents have without their knowledge or consent allocated themselves the land and fraudulently proceeded to obtain titles thereto.
11. The conditions for consideration in granting such an injunction were long settled in the celebrated case of *Giella -vs- Cassman Brown & Company Limited* (1973) 358 where the Court observed as follows:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”



12. Accordingly the question which arises for determination is whether the application before me meets the threshold set for the grant of the orders sought herein. As to what amounts to a prima facie case, the Court of Appeal in *Mrao Limited -vs- First American Bank of Kenya & 2 others* (2003) KLR 125 expressed itself 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 property directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

13. In the matter before me, the 1<sup>st</sup> petitioner avers that the suit property was bequeathed to himself in 1973 by his father the late Mohamed Khalid Nyekombo. The 1<sup>st</sup> petitioner asserts that his father who passed away in 1991 had purchased the suit property in the 1960s from one Mwalimu Hussein and that they had resided on the land until his father’s demise after which he took over the same.

14. The 1<sup>st</sup> petitioner avers that he was working with the Kenya Police Department in Kisii County until his retirement and that it was on his return that he discovered that the Respondents were laying claim to the suit property. It is his case that he thereafter sold various portions of the land to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners.

15. From the material placed before me however, there was nothing, much to support the Petitioners claims that his father bought the suit property from one Mwalimu Hussein as no sale agreement has been annexed in support of that proposition.

16. In their entire pleadings herein, the petitioners have not provided any evidence and or demonstrated the existence of any parcel of land in the name of the late Mohamed Nyekombo or their own names.

17. On the other hand the respondents have in their replying affidavits demonstrated that they are the registered proprietors of the said parcels of land. While the Petitioners contend that the said 42 titles were procured by fraudulent means, no evidence of the alleged fraud has been placed before the court.

18. The evidential burden of proof is captured in sections 109 and 112 of the *Evidence Act*, cap 80 of the Laws of Kenya as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

19. From the material placed before me, I was not persuaded that the petitioners had discharged the legal and evidential burden of proof. The respondents on the other had have annexed copies of title deeds issued to them for the various pieces of land in their possession. In that respect, section 26(1) of the *Land Registration Act*, No 3 of 2012 provides as follows:

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- (1) The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- (a) On the grounds of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

20. As Tunoi J (as he then was) stated in *Virjay Morjariaa v Nansingh Madhusingh Darbar & another* [2000] eKLR:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

21. Arising from the foregoing, I am not persuaded that the motion dated August 20, 2020 had any merit. I dismiss the same with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 12TH DAY OF MAY, 2022.**

**In the presence of:**

**No appearance for the Petitioners**

**No appearance for the Respondents**

**Court assistant - Kendi**

**J. O. Olola**

**JUDGE**

