



REPUBLIC OF KENYA



KENYA LAW
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**Miliki Limited v Ali & 3 others (Environment & Land Case
E022 of 2020) [2022] KEELC 124 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E022 OF 2020**

JO OLOLA, J

JUNE 9, 2022

BETWEEN

MILIKI LIMITED PLAINTIFF

AND

MOHAMED YUSUF ALI 1ST DEFENDANT

ABDUL SHAKURE 2ND DEFENDANT

HAYA BILALI 3RD DEFENDANT

KHALIFA MOHAJI 4TH DEFENDANT

RULING

1. By the Notice of Motion dated November 25, 2020 as filed herein on 2nd December 2020, Miliki Limited (the Plaintiff) prays for orders:
3. That pending the hearing of this suit, this Honourable Court be pleased to grant an injunction restraining the Defendants/Respondents, either by themselves, their servants or agents from doing any of the following that is to say:
 - (a) Accessing, visiting, trespassing, further trespassing or remaining thereon;
 - (b) Putting up fences, placing beacons, constructing, further constructing and/or erecting any illegal structures thereon whether permanent or temporary;
 - (c) Drilling, further drilling or excavating any boreholes or water wells;
 - (d) Clearing bushes, subdividing, selling, advertising for sale, letting or sub-letting or in any other manner dealing with the Plaintiff's property title numbers Lamu/Blocks 2/347, 2/348 and 2/350 situate at Langoni Area in Lamu Island.



4. That this Honourable court be pleased to issue a mandatory order of eviction and/or vacant possession against the Defendants/Respondents from the Plaintiff's property title numbers Lamu/Blocks 2/347, 2/348 and 2/350 situate at Langoni Area in Lamu Island.
 5. That the Officer Commanding Lamu Police (OCS) to enforce the orders of this Court.
 6. That the Costs of this application be awarded to the Plaintiff/Applicant.
2. The application is supported by an affidavit sworn by the Plaintiff's director Joseph Brunlehner and is premised on the grounds that:
 - (a) The Plaintiff is the legally registered lessee of the suit properties having leased them in the year 2017 for the purpose of constructing a World Class Tourist Hotel.
 - (b) The Plaintiff has had peaceful use and occupation of the suit properties until sometime in the year 2019 when the Defendants illegally and without any colour of right gained access to the properties and started putting up illegal temporary structures, tilling the land, digging boreholes and water wells and thereby completely defacing the suit properties;
 - (c) The Plaintiff's officers visited the suit properties recently and found the Defendants in the process of erecting a permanent perimeter wall and putting up permanent structures thereon; and
 - (d) The Defendants who have never owned the land are using their influence as the natives and their political connections with the area officials to grab the properties with the aim of extinguishing the Plaintiff's proprietary rights over the same.
 3. Mohamed Yusuf Ali (the 1st Defendant) is opposed to the application. In his Replying Affidavit sworn and filed herein on March 8, 2021, the 1st Defendant avers that he has been living on the parcel of land for 18 years and the claim that they moved therein in the year 2019 is untrue and misleading.
 4. The 1st Defendant further avers that they live on the land with 31 other people and the Plaintiff has only picked on a few people in order to mislead the Court. The 1st Defendant asserts that he knows the Plaintiff's director who has sworn the Supporting Affidavit as they have had several disputes before in regard to the suit property which is public land.
 5. The 1st Defendant avers that the Plaintiff has always desired to remove them from the suit land and it has now acquired the same fraudulently and without following the due process.
 6. Haya Bilali (the 3rd Defendant) is equally opposed to the application. In her Replying Affidavit sworn and filed herein on March 8, 2021, the 3rd Defendant avers that the contention that they entered the suit land in the year 2019 is untrue and meant to mislead the Court. The 3rd Defendant avers that she has been utilizing and living on the land for the last nine (9) years with the authority and permission of the County Government of Lamu.
 7. Insisting that she occupies the land with many other listed people, the 3rd Defendant asserts that the suit properties have been known to be public land and have always been utilized by members of the public. It is her case that the Applicant has failed to demonstrate that he has a prima facie case capable of succeeding as the certificate of lease was fraudulently acquired and the due legal process was never followed.
 8. Abdul Shakure and Khalifa Mohaji (the 2nd and 4th Defendants respectively) are equally opposed to the application. By their joint Grounds of Opposition dated February 26, 2021 as filed herein on March 8, 2021, the 2nd and 4th Defendants state that:



1. The application is bad in law, vexatious and an abuse of the Court process orchestrated in depriving the people of Lamu and the public of their land.
2. The Notice of Motion application dated November 25, 2020 does not meet the threshold for granting an injunction.
3. The Deponent in the Supporting Affidavit sworn on November 25, 2020 does not have the locus standi to appear for the Applicant as he does not have any authority to act.
4. The Plaintiff/Applicant has not produced any evidence that he wants to construct a world class hotel as alleged and the plans approved by the County Government of Lamu are plans for building a fence.
5. The parcels of land Lamu/Block II/348; Lamu/Block II/345 and Lamu/Block II/350 were and still are public land in which the Defendants and members of the public have been living in and utilizing for decades.
6. That if at all the said parcels of land were converted to private land then due legal process was never followed.
7. The Plaintiff has illegally, fraudulently and without following the due legal process acquired public land.
8. The Plaintiff in bringing this suit and the application is abusing the Court process and using this Honourable Court to assist and aid an illegality.
9. I have carefully perused and considered both the Plaintiff's application and the response thereto by the Defendants. I have similarly considered the rival submissions and authorities placed before me by the Learned Counsels representing the parties herein.
10. The Plaintiff Company has sought temporary injunctive orders restraining the four (4) Defendants from, among other things, trespassing, putting up fences, constructing or further constructing structures, clearing bushes, selling or in any manner dealing with the properties known as Lamu/Block II/347, 348 and 350 situated at Langoni area in Lamu County.
11. In addition the Plaintiff craves a mandatory order of eviction and/or vacant possession to issue removing the Defendants from the said parcels of land.
12. It is the Plaintiff's case that it is the legally registered lessee of the suit properties having acquired the same in the year 2017 for the purpose of construction of a tourist hotel. Through its director Joseph Brunlehner, the Plaintiff avers that it has enjoyed peaceful use and occupation of the suit properties until sometime in the year 2019 when the Defendants illegally and without any colour of right gained access thereto and commenced construction of all manner of structures thereon.
13. It is further the Plaintiff's case that unless the Defendants are restrained in the manner sought herein, the suit properties are in danger of being completely wasted and damaged to its prejudice and detriment.
14. On their part, the Defendants jointly and severally deny that they are recent entrants to the suit properties. On the contrary, the Defendants assert that the properties in question are public land and that they have occupied and utilized the same for many years with the tacit approval of the County Government of Lamu.



15. The Defendants aver that the Plaintiff has always been desirous of removing them from the suit properties and accused the Plaintiff of proceeding to acquire the suit properties fraudulently and without adhering to due process.
16. Order 40 Rules 1 and 2 of the [Civil Procedure Rules](#) sets out the law on granting temporary injunction in the following manner:

“Where in any suit it is proved by affidavit or otherwise –

- (a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the Defendant threatens or intended to remove or dispose off his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit.

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

17. The principles for consideration for the grant of such injunctions were long settled in the oft cited case of *Giella v Cassman Brown and Company Limited* [1973] EA 358 where Spry V. P observed as follows:

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. 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 a balance of convenience.”

18. As to what would amount to a prima facie case in such a civil case, the Court of Appeal recently fashioned a definition in [Mrao Limited v First American Bank of Kenya Limited & 2 others](#) [2003] eKLR in the following words:

“In civil cases, a prima facie case is a case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.”

19. That definition was once again adopted by the Court of Appeal in [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR where the Court by way of further explanation stated thus:

“The party on whom the burden of proving a prima facie case lies 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. We reiterate that in considering whether or not a prima facie case has been established, the



Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation.”

20. In support of their application for both the restraining and mandatory injunction, the Plaintiff has produced the Certificate of Leases for the suit properties showing the same are registered in its name. While the Defendants accused the Plaintiff of fraudulently registering itself as the proprietor of public land without following due process, it was apparent from a perusal of both the Plaintiff’s Supporting Affidavit and the Supplementary Affidavit filed on April 26, 2021 that the Plaintiff was not the original owner of the land.
21. From the material placed before me, it was apparent that the suit properties were a sub-division of a parcel of land previously known as Lamu Island Block II/119. That original parcel of land was on April 28, 1978 registered in the name of one Ahmed Said Ahmed Bujra from whom the Plaintiff derived its lease.
22. Again while some of the Defendants stated that they had occupied and utilized the suit premises for decades, there was nothing much placed before me in support of that contention. I have looked at the photographs of the structures on the suit premises as exhibited by both the Plaintiff and the Defendants. It was apparent that the same were newly built as many remained half-built and incomplete.
23. That the Defendants were recent entrants to the suit property can be confirmed from a letter dated November 11, 2020 from the Lamu County Surveyor and addressed to the Directorate of Criminal Investigations on the subject of the Defendants’ encroachment on the suit properties. The letter exhibited in the Plaintiff’s Supplementary Affidavit reads in the relevant portion as follows:

“RE: Boundary Re-establishment/ Encroachment Investigation Parcels Lamu/block Ii/345, 348 and 350: Owner: Miliki Limited

Reference is made to the request you presented to the Land Registrar and the undersigned on the above subject matter. From a site visit done on the 3rd of November 2020, and measurements thereof, the following information was explicit(ly) gathered:

 - (i) That the boundary points of the disputed boundary line were seemingly uprooted as they could not be found. They were however, re-established from other points from another section of the same scheme.
 - (ii) That within parcels 345, 348 and 350 are mostly affected by intrusion of squatters as manifested by the presence of several make-shift structures and fences.
 - (iii) It was also observed that some two permanent structures are also upcoming, one almost complete.
 - (iv) A well is also in existence in parcel No. 345.”

...”
24. Thus from the totality of the circumstances herein, it was clear that the Plaintiff had demonstrated ownership of the properties and how it acquired the same. There was nothing on the contrary to demonstrate that the Defendants were entitled to the parcels of land.



25. As it were, Section 26(1) of the [Land Registration Act 2012](#) provides that a Certificate of Titles shall be taken by all Courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner thereof and that such a title is not subject to challenge except:-
- “(a) On the grounds of fraud or misrepresentation to which the proprietor is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
26. As I have found hereinabove, while the Defendants accuse the Plaintiff of acquiring public land and fraudulently causing itself to be registered as the proprietor thereof, there was no evidence of any such fraud placed before me. It was also evident that contrary to the Defendants averments, the suit properties had been registered in the name of a third party from whom the Plaintiff acquired the leasehold interest. The Defendants did not state why if indeed the land was public land, they themselves were busy constructing structures thereon.
27. Given the Report by the Lamu County Surveyor dated 11th November 2020 and the photos exhibited by both sides in the dispute, it was apparent that the Defendants had encroached the land and were continuing to put up both temporary and permanent structures. On that account, this Court was satisfied that unless the Defendants are restrained in the manner sought herein, the Plaintiff stands to suffer actual, substantial and demonstrable injury which may not be adequately compensated by an award of damages.
28. Arising from the foregoing, I was also persuaded that the Plaintiff has demonstrated to the satisfaction of the Court, that there are special and exceptional circumstances herein that warrant the grant of the orders of a mandatory injunction sought.
29. It follows that I am persuaded that there is merit in the Motion dated 25th November, 2020. I allow the same as sought under Prayer No. 3 and 4 thereof.
30. The Defendants have 30 days from today to remove their structures from the suit land failure to which the same may be forcefully removed in the matter contemplated under Prayer No. 5 of the Motion.
31. The Plaintiff shall have the costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 9TH DAY OF JUNE, 2022.

J. O. OLOLA

JUDGE

In the presence of

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

