



Fatma Sayed Abbas (Suing under Power of Attorney through Mohamedali Naushadhusein Jiwa) v Khalid Gulmoh'D & 7 others (Environment & Land Case E8 of 2020) [2022] KEELC 3912 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E8 OF 2020**

JO OLOLA, J

JUNE 9, 2022

BETWEEN

FATMA SAYED ABBAS (SUING UNDER POWER OF ATTORNEY THROUGH MOHAMEDALI NAUSHADHUSSEIN JIWA) PLAINTIFF

AND

KHALID GULMOH'D KHAMIS SHAPI 1ST DEFENDANT
MANGI CHARO YAA 2ND DEFENDANT
REGISTRAR OF LANDS, KILIFI 3RD DEFENDANT
CHIEF LANDS REGISTRAR 4TH DEFENDANT
DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 5TH DEFENDANT
SETTLEMENT FUND TRUSTEES 6TH DEFENDANT
NATIONAL LAND COMMISSION 7TH DEFENDANT
THE ATTORNEY GENERAL 8TH DEFENDANT

RULING

1. By the Notice of Motion dated October 26, 2020, Fatma Sayed Abbas (suing under power of attorney through Mohamedali Naushadhusein Jiwa) (hereinafter the plaintiff/applicant) prays for a temporary order of injunction to issue against the defendants/respondents restraining them from trespassing upon, selling, transferring, carrying on construction and/or in any other manner interfering with the property known as Kilifi/Madeteni/608 pending the hearing and determination of this suit.
2. The application which is supported by an affidavit sworn by the plaintiff is based on the grounds:



- (i) That the plaintiff is the registered and beneficial owner of the suit property measuring 0.7 Ha;
 - (ii) That the suit property was transferred to the plaintiff by the Government of Kenya sometime in 1986 and he has at all times material remained in possession of the same;
 - (iii) That the plaintiff was the first registered owner of the property and upon being issued with a title deed in 1986, she surrendered her original title deed to the commissioner of lands;
 - (iv) That the said surrender was in compliance with the Ministry of Lands directive issued on May 30, 1986 requiring all the land owners of Madeteni to do so in order to be issued with letters of allocation;
 - (v) That upon surrendering the said title deed, the plaintiff was asked to pay kshs 170/- for the registration and processing of her certificate of lease;
 - (vi) That on or about November 30, 1993, the land registrar Kilifi wrote to the commissioner of lands confirming that the plaintiff was the registered owner of the suit property;
 - (vii) That to-date, the plaintiff has never been issued with a letter of allotment or certificate of lease as promised and despite having a legitimate expectation;
 - (viii) That unbeknown to the plaintiff, on or about March 13, 2016, the 6th defendant purported to fraudulently, illegally and/or irregularly transfer the suit property to the 2nd defendant;
 - (ix) That the purported transfer was premised on a false, irregular and misleading ground report dated December 20, 2011 prepared by the land adjudication Office which report purported that the property was 1.2 Ha;
 - (x) That subsequently and unbeknown to the plaintiff, the 2nd defendant illegally and/or irregularly purported to transfer the suit property to the 1st defendant on August 28, 2017;
 - (xi) That unless the prayers sought are granted to preserve and protect the plaintiff's proprietary interest in the property, the plaintiff will suffer irreparable loss and damage.
3. Khalid Gulmohamed Khamis Shapi (the 1st defendant) is opposed to the grant of the orders sought. In his Replying Affidavit sworn on March 22, 2021, the 1st defendant denies that the plaintiff is the owner of the suit property and/or in occupation thereof. The 1st defendant further denies that the 6th defendant fraudulently transferred the suit property to the 2nd defendant and further that the 2nd defendant fraudulently, illegally and irregularly transferred the property to himself.
 4. On the contrary, the 1st defendant avers that the 6th defendant procedurally and lawfully offered the property to the 2nd defendant vide a letter dated February 28, 2012 which the 2nd defendant accepted in writing on March 13, 2012. The 1st defendant further avers that in compliance with the letter of offer, the 2nd defendant paid the full requisite charges of kshs 7,685/- for which he was issued with an official receipt on March 9, 2012.
 5. The 1st defendant further avers that the suit property was transferred to the 2nd defendant by the Settlement Fund Trustees (S F T) on March 13, 2016 when a discharge of charge was issued. The 1st defendant avers that the 6th defendant is a competent authority mandated to issue the transfer and/or discharge of the suit property and there is no evidence of fraud adduced to support the contention that it fraudulently transferred the suit property.



6. The 1st defendant further avers that the 2nd defendant was subsequently on March 13, 2017 issued with a title which title he legally sold and transferred to himself vide a sale agreement dated August 25, 2017 at a consideration of kshs 7,425,000/-.
7. I have carefully perused and considered the plaintiffs application as well as the response thereto by the 1st defendant. I have taken similar consideration of the submissions and authorities placed before me by the learned advocates representing the parties. The 2nd to 8th defendants did not file anything in response to the application.
8. The plaintiff herein prays for a temporary order of injunction to restrain the defendants from trespassing upon, selling, transferring, carrying on any construction on and/or dealing in any manner whatsoever with all that parcel of land known as Kilifi/Madeteni/608 measuring 0.7 Ha (the suit property) pending the hearing and determination of this suit.
9. It is the plaintiff's case that she was the first registered proprietor of the suit property after the government transferred the same to her in the year 1986. The plaintiff asserts that subsequently and by a notice issued by the commissioner of land in the daily newspapers on May 30, 1986, all landowners within Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni, Kakuyuni/ Madunguni and Kilifi/Matsangani within the then Kilifi district were required to surrender their title deeds to the district land officer in order to be issued with Certificates of Leases.
10. The plaintiff avers that in compliance with the said notice she surrendered her title on or about August 9, 1986 upon which she was directed to pay kshs 170/- being the fees for transfer, registration of the certificate, preparation, opening of the register and stamp duty. To-date however, the plaintiff has neither been issued with a letter of allotment nor a certificate of lease for the land as she had expected.
11. It is further the plaintiff's case that she has since realized that on March 13, 2016, the 6th defendant herein – the Settlement Fund Trustees (S.F.T) fraudulently and illegally transferred the land to the 2nd defendant who also proceeded to transfer the same to the 1st defendant on August 28, 2017.
12. On his part, the 1st defendant' denies that the suit property was transferred and registered in his name in a manner that was fraudulent, irregular or illegal. The 1st defendant avers that the plaintiff neither owns nor occupies the suit property. On the contrary, the 1st defendant asserts that the suit property was lawfully transferred to the 2nd defendant's name following due process.
13. In that respect, the 1st defendant told the court that by a letter of offer dated February 28, 2012, the S F T duly offered the suit property to the 2nd defendant who proceeded to accept the offer in writing by his own letter dated March 13, 2012. As was required under the letter of offer, the 2nd defendant paid the charges requisite for the transfer being kshs 7,685/- and was issued with an official receipt therefor on March 9, 2012.
14. Following that process the 1st defendant told the court that the 6th defendant duly discharged the charge on the land and transferred the same to the 2nd defendant on March 13, 2016. That property was subsequently on August 25, 2017 sold to the 1st defendant by the 2nd defendant.
15. As Spry V P stated in *Giella vs Cassman Brown & Company Limited* (1973) EA 358:

“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.”

16. That being the case, the first matter for consideration is whether the plaintiff herein has made out a *prima facie* case with a probability of success at the trial. As the Court of Appeal stated in *Mrao Limited vs First American Bank of Kenya Limited & 2 Others* (2003) eKLR;

“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.”

17. That definition was once again re-emphasized by the Court of Appeal in *Nguruman Limited vs 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.”

18. In the matter before me the plaintiff asserts that she was the first registered proprietor of the suit property having been so registered in the year 1986 and that she has been in possession and occupation thereof to-date. She accused the 6th defendant of fraudulently and illegally transferring the suit property to the 2nd defendant in the year 2016 and that the 2nd defendant in similar fashion transferred the same to the 1st defendant in the year 2017.

19. There was however nothing much submitted by way of evidence in support of that position. While the plaintiff told the court she was the first to be registered as the owner of the land in the year 1986, she did not exhibit a copy of the title to demonstrate her ownership of the land.

20. It was also clear to me that while the plaintiff asserts that she has been in occupation and possession of the land since 1986 and that she stands to suffer prejudice if the same is taken away from her, the plaintiff is neither in occupation nor possession of the land. That much is clear from her own annexure “MNJ-10” titled Ground and Record Status Report on plot no 461 and 608 Madeteni Settlement Scheme.

21. At paragraph 12 of her Supporting Affidavit, the plaintiff attributes the transfer of the suit land from the 6th defendant to the 2nd defendant, to a false, irregular and misleading ground report dated December 20, 2011 prepared by the then Kilifi land adjudication officer one Felix Kiteto. Subsequently, the plaintiff asserts as follows at paragraph 20 of the Affidavit:

“That subsequently, the 6th defendant/respondent prepared a fresh ground report dated September 21, 2020 by Ms Mary Muteti (which) contradicts the false, irregular and misleading ground report dated December 20, 2011 and sets the record straight on the suit property. (Marked and Annexed as “MNJ-10” is a copy of the ground report dated September 21, 2020).”

22. At page 1 on the Record Status of Plot no 608 the Report states in the relevant sections as follows:



Record Status Plot 608

In 1986 this parcel was allocated to Fatma Said Abbas who was issued with title deed and surrendered it for re-allocation. During allocation of 2002 this parcel was allocated to Thomas Kadzomba Shindo and Fatma Said Abbas was never considered. Further, Thomas never complied with SFT terms and reallocation was done in 2012 to Mangi Charo Yaa vide letter of offer AS/C/115A/17 who was further discharged in 2017 and title deed issued in his favour.

23. From my reading of the report which was meant to help the plaintiff be allocated the land, it was apparent that the suit property was under the control of SFT. At the time of allocation, the land was allocated to someone who never complied with the SFT's terms and conditions and the same was then reallocated to the 2nd defendant on that ground.
24. From the annexures attached to the 1st defendant's Replying Affidavit, it was evident that the 2nd defendant duly complied with the offer given to him in 2012 and that on completion of the process he was issued with a title deed for suit property on March 13, 2017. As the holder of such a title, the 2nd defendant had the legal authority to sell and transfer the property to the 1st defendant as he is said to have done vide the sale agreement dated August 25, 2017.
25. Arising from the forgoing, I was not persuaded that the plaintiff has made out a *prima facie* case with any probability of success at the trial and/or that she stood to suffer any irreparable damage or loss unless the orders sought were granted.
26. The upshot is that I did not find any merit in the Motion dated October 26, 2021. It is dismissed with costs to the 1st defendant.

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

In the presence of:

No appearance for the plaintiff

No appearance for the defendant

Court assistant - Kendi

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J O OLOLA

JUDGE

