



REPUBLIC OF KENYA



Tugboat Enterprises Limited & 11 others v Ngolo & 13 others (Environment & Land Case E26 of 2020) [2022] KEELC 3821 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E26 OF 2020**

JO OLOLA, J

JUNE 9, 2022

BETWEEN

TUGBOAT ENTERPRISES LIMITED 1ST PLAINTIFF
NOW INVESTMENTS LIMITED 2ND PLAINTIFF
AHMED TWAHIR 3RD PLAINTIFF
RISHAD SHOSHI 4TH PLAINTIFF
GAMAN ALI MOHAMED GAMAN 5TH PLAINTIFF
FARRUKH KHALIL 6TH PLAINTIFF
NAJI ABDALLA NAJI SAID 7TH PLAINTIFF
PATRICK MILIMO 8TH PLAINTIFF
BRITTA MILIMO 9TH PLAINTIFF
SHEM EDWIN MIGOT ADHOLA 10TH PLAINTIFF
SAID TWAHIR 11TH PLAINTIFF
SALAH JEIZAN 12TH PLAINTIFF

AND

RASHID KAJELA NGOLO 1ST DEFENDANT
HAMISI NGOLO 2ND DEFENDANT
HAMZA RASHID NGOLO 3RD DEFENDANT
SALIM MWANGALE A.K.A SPESHELI 4TH DEFENDANT
ALFRED AGUNGA 5TH DEFENDANT
MOHAMMAD 6TH DEFENDANT



FRANCIS KATANA KONDE A.K.A SPESHELI	7TH DEFENDANT
ABDALLA HUSSEIN	8TH DEFENDANT
MOHAMMED RASHID	9TH DEFENDANT
MVUO JUMA PAUL A.K.A WANJE KARIMUKO	10TH DEFENDANT
DAVID IVULI AMADI	11TH DEFENDANT
MALE MPEMBA	12TH DEFENDANT
REHEMA MOHAMED	13TH DEFENDANT
HASSAN ALI	14TH DEFENDANT

RULING

1. By a Notice of Motion dated December 4, 2020, the 12 Plaintiffs herein pray for a temporary order of injunction to issue restraining the 14 Defendants from entering upon, trespassing and/or continuing to trespass, erecting any structures and/or interfering with the suit land pending the hearing and determination of the suit.
2. It is the Plaintiffs further prayer that due to the hostility on the part of the Defendants as well as their tendency to violence, the Officer Commanding Station (OCS) Malindi do assist in the service of the orders granted herein.
3. The application is supported by an Affidavit sworn by one Professor Abdullah Naji Said, a Director or the 1st Plaintiff Company and is based on the grounds that:
 - (a) The Plaintiffs are the registered owners of the suit land;
 - (b) The Defendants together with their employees, servants and/or agents have without any colour of right entered and trespassed on the suit land and have started to erect illegal structures in clear contravention of the Plaintiffs' right to quiet possession and peaceful enjoyment of their land;
 - (c) The Defendants are very hostile and have refused the Plaintiffs or the Plaintiffs representatives access to the suit land and the Defendants are wasting the said land;
 - (d) The Plaintiffs will suffer irreparable loss unless the Defendants are restrained by an order of this Court as the illegal structures that the Defendants are erecting may extend to the entire land to the detriment of the Plaintiff who may have no way of accessing the land and on developing the same as they may wish to do;
 - (e) The Plaintiffs have reported the matter to the Police at Malindi but the Police have not been able to apprehend the Defendants nor stop their illegal activities on the land as the Defendants ordinarily run away from the land as soon as the Police are sighted approaching the suit land and it is not possible for the Police nor can they be expected to remain permanently on the suit land;
 - (f) The interest of Justice would be served by this Honourable Court granting the orders sought herein;



- (g) The Defendants will not suffer any prejudice by the grant of the orders sought (but) the Plaintiffs will suffer irreparable loss if the Defendants are not stopped by this Court; and
- (h) The Plaintiffs property rights as enshrined in the Constitution will be preserved and protected by the grant of the orders sought herein.
4. Rashid Kajela Ngolo (the 1st Defendant) is opposed to the application. In his Replying Affidavit sworn on 19th February 2021, the 1st Defendant avers that the Plaintiffs have misled the Court and are being economical with the truth. The 1st Defendant avers that the suit property situated in Kivulini was once declared an adjudication section and all the squatters on the land were identified.
 5. The 1st Defendant avers that while all the squatters were subsequently issued with titles, he was himself and 14 others not issued with any title documents. The 1st Defendant avers that they then came to discover that their portions had been offered to third parties under different legislation which overlapped the adjudication section.
 6. The 1st Defendant further asserts that since 1993, the Government has made various attempts to settle the 15 squatters and that they have a genuine claim over the suit property. The 1st Defendant states that he has no connection with the rest of the Defendants herein who are trespassers and did illegally invade the land recently. He asserts that he reported the recent invasion to the Police and some of the invaders were arrested and charged in Court.
 7. The 1st Defendant avers that the genesis of the titles held by the Plaintiffs were long revoked and/or are null and void the same having been issued by the Recorder of Titles who did not have power to do so.
 8. In his response to the application the 5th Defendant – Alfred Agunga has filed a Notice of Motion dated 15th February, 2021 seeking to have an order that he has wrongly been sued herein and that his name ought to be struck out from the suit.
 9. The 5th Defendant’s application is based on the grounds that he is a stranger to the Plaintiffs and that he has no knowledge of the existence of the suit property. The 5th Defendant denies that he has at any point in time trespassed upon the said properties as alleged or at all and asserts that the suit as against him is unfounded, baseless and misconceived.
 10. I have carefully perused and considered the two applications and the responses thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties. The 2nd, 3rd, 4th, 6th to 14th Defendants did not file any response to the application.
 11. The 12 Plaintiffs herein filed this suit against the 14 Defendants through their Complaint dated 4th December 2020 in which they seek inter alia orders of permanent injunction to issue against the 14 Defendants. The Plaintiffs also want the Defendants to demolish their structures from the land and grant vacant possession of the same.
 12. Filed contemporaneously with the suit was the first application before me in which the Plaintiffs pray for a temporary order of injunction to issue restraining the Defendants from entering upon, trespassing and/or continuing to trespass on the land, erecting any structures and/or interfering in any manner whatsoever with the suit land pending the hearing and determination of their suit.
 13. It is the Plaintiffs’ case that the 1st Plaintiff was the registered owner of those parcels of land known as LR Nos. 5465 & 5466 Malindi which parcels of land were amalgamated into one parcel of land known as LR No. 6461 Malindi. It is further their case that the 1st Plaintiff sub-divided the said LR No. 6461



Malindi into 42 parcels of land and sold 25 parcels to the 2nd to 12th Plaintiffs. The 1st Plaintiff thereby retained in its name 16 parcels of land.

14. The Plaintiffs assert that they are the registered proprietors of their respective portions of the suit land. They accuse the Defendants of invading the said parcel of land sometime in August and September, 2020 after which the Defendants commenced construction of all manner of structures thereon. The Plaintiffs aver that unless the Defendants are restrained by an order of injunction as sought, they may proceed and construct the illegal and unauthorized structures on the entire piece of land thereby putting paid to any plans that the Plaintiffs had for the development of the suit land.
15. The conditions for consideration in granting an interlocutory injunction were long settled in the celebrated case of *Giella -vs- Cassman Brown & Company Limited* (1973) EA 358 where the Court stated thus:

“First, an applicant must show a prima facie case with 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.”
16. The issue that arises therefore is whether the application before me meets the threshold set out for the grant of such orders. As to what would amount to a prima facie case, the Court of Appeal offered guidance in *Mrao Limited -vs- First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 thus:

“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 properly 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.”
17. In the matter before me, it is not contested that the Plaintiffs are the registered proprietors of the suit properties. While the 1st Plaintiff obtained its title way back in 1993, the 2nd to 12th Plaintiffs are beneficiaries of a sub-division said to have been carried out by the 1st Plaintiff and they obtained their titles in the year 2015.
18. On his part, the 1st Defendant does not deny being on a portion of the suit properties. However while the Plaintiffs aver that he recently invaded and occupied the land in August/September 2020, the 1st Defendant asserts that the Plaintiffs are being economical with the truth. It is the 1st Defendant’s case that the titles held by the Plaintiffs are of doubtful origin the same having been issued by the Recorder of Titles who had no power to do so.
19. The 1st Defendant told the Court that as at the time that title was issued to the 1st Plaintiff in 1993, he and 14 other people were already occupying the land as squatters. The 1st Defendant further told the Court that the area was declared an adjudication section and all squatters were identified but when the adjudication ended, 15 of them had not been issued with title documents and they have since Petitioned various Government offices for help in vain.
20. From the material placed before me, it was not in doubt that the 1st Defendant had laid a claim to the suit land from as early as the year 1994. That much is indeed acknowledged by the Plaintiffs in the



Supplementary Affidavit of Professor Abdallah Naji Said sworn on 22nd March, 2021 wherein he states as follows at Paragraphs 3 to 5 thereof:

- “ 3. That in reply to Paragraphs 3, 4, 5, 6, 7, 8 and 9 I do repeat and reiterate that the 1st Defendant together with the said 14 squatters have previously filed suits in respect of the said allegations which suits were all turned against them including the complaint to the National Land Commission which complaint was determined by this Court in Judicial Review Application No. 6 of 2017 wherein the Court stopped the National Land Commission from dealing with the complaint in view of the fact that the 1st Defendant and the others had been to Court in various matters which had been determined against the 1st Defendant and the said applicants and therefore the said issues cannot be raised again before this Court;
4. That in answer to Paragraphs 10 and 11 the Applicants are not aware of any approval given to the 1st Defendant together with alleged 14 squatters to proceed with the processing of the titles and the allegation that the District Commissioner had issued a letter in the year 2005 did not change the fact that there were already existing titles issued to ourselves and other third parties and I further do state that the said letter was written after the ruling of Justice Ouko on the 20th September, 2004 striking out the Plaintiff's/1st Defendant in this suit and others) suit with costs as is clearly shown in the annexure “ASN 3” to my affidavit in support of the application herein; and
5. That in answer to Paragraph 13, 14, 15 and 16 it is clear that the 1st Defendant does not want to tell the whole truth as the 1st Defendant would want to conceal the letter written to him by the Commissioner of Lands on 18th June, 1993 advising the 1st Defendant and the alleged 14 squatters that they had no claim to the suit land as the titles were issued procedurally and the 1st Defendant and the alleged 14 other squatters were advised to look for alternative land through the office of the Provincial Commissioner and I attach the said letter and mark the same “ANS 1”.

21. A perusal of the said annexure “ANS 1” reveals that as at the said 18th day of June 1993, the 1st Defendant and the 14 squatters were on the land as it advises them in the penultimate paragraph at Page 4 thereof as follows:

“The Provincial Commissioner Coast Province has been requested to identify for you alternative land. You should in view of the above make arrangements to leave the land for the legally registered proprietors before they take legal action against you in Court.”

22. As it were there is nowhere either in the Plaintiffs Supporting Affidavit and/or the Supplementary Affidavit where they state that the 1st Defendant and the other said 14 squatters left the land. That being the case, one can only but agree with the 1st Defendant that the Plaintiffs are being economical with the truth when they accuse the 1st Defendant and others of invading the suit land in August/September, 2020.

23. 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 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.”



24. In the circumstances herein, I was not persuaded that the 1st Defendant and/or the original 14 squatters could be said to have recently invaded the suit land and/or that there was an urgent need to restrain them from continuing to be on the land. While it was apparent that there had been at least three suits filed as between the 1st Plaintiff and the 1st Defendant and others, it was unclear to me at this stage why the Plaintiffs had not sought and/or obtained an order for eviction of the 1st Defendant from the suit land.
25. What was clear to me was that the 1st Defendant resides on the land and if the orders of injunction were to be issued in the manner sought herein the 1st Defendant would suffer greater inconvenience as he is likely to be uprooted from the suit property prior to the hearing of the suit filed herein.
26. In the circumstances and given the apparent rights of the Plaintiffs as noted from the titles they hold I decline to grant the injunction in the manner sought but instead direct that parties do maintain the status quo pending as of today pending the hearing and determination of the main suit.
27. In response to the 5th Defendant's Motion dated 15th February, 2021 seeking to have his name struck off the suit on account of being wrongly sued, the Plaintiffs have filed a Supporting Affidavit by one Sylvester Maruga Gikande who states in the relevant Paragraphs 2 to 4 of the short Affidavit as follows:

“2. That in the month of August, 2020 I was engaged by the 1st Plaintiff to go into the suit land and find out the identity of the people who were invading the same.

3. That I do remember that I visited the subject land on various days and between 20th to 25th August, 2020 I did visit the land on a daily basis and I can confirm that on the said dates whenever I visited the suit land, Mr. Alfred Agunga was among the people who were on the said land and he seemed to be in charge of the people who were subdividing the land into various portions for the people who were present to take over.

4. That it is therefore not true to state that the said Alfred Agunga has never trespassed or intruded into the suit land as he was among the leaders of the invaders who are the Defendants herein.”

28. From a perusal of the said affidavit, it was unclear to me what connection the deponent has with the 1st Plaintiff or any of the other Plaintiffs. While he avers at Paragraph 1 that he was authorized by the Plaintiffs to file the Further Supporting Affidavit, no such authority was annexed to the affidavit. And while the deponent claims that the 5th Defendant was on the land between 20th to 25th August, 2020 apparently leading the invading Defendants, he does not state whether he knew the 5th Defendant before or how he came to identify him as the person who was on the land.
29. Indeed the Statement in the Further Supporting Affidavit is clearly contradictory to the Supporting Affidavit sworn by the 1st Plaintiff's Director on 4th December, 2020 wherein he avers as follows at the relevant Paragraphs 6 and 9 thereof:

“6. That despite my attending the District Security Committee (meeting) on the issue of the Defendants invasion of the suit land, the Police were unable to apprehend the Defendants, their employees, servants and/or agents or even stop them as the Police informed me that the said trespassers would disperse and run away whenever the Police vehicle was sighted approaching the suit land; and

9. That the Defendants are very hostile towards anyone connected to or suspected to be connected to the Plaintiff and have threatened the use of violence (on) such people and



the Plaintiffs as a result of which the Plaintiffs are not able and cannot access the suit land without risking their lives.”

30. In my mind, given that the 5th Defendant had expressly denied any knowledge of or interest in connection with the suit land, it was incumbent upon the Plaintiffs to demonstrate that they had some reasonable cause of action against the 5th Defendant. In the absence of a demonstration of any state of facts that entitles the Plaintiffs to maintain an action against the 5th Defendant, and/or that he was a necessary party to these proceedings, it would be unfair to continue tying him to the case until full hearing on the purport, as submitted by the Plaintiffs that they will prove their case against him by oral evidence during the hearing.
31. In the circumstances of this case, I am persuaded that the 5th Defendant has been improperly joined as a party herein and I hereby strike out his name from the suit herein with costs.
32. Orders accordingly.

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

In the presence of:

Ms Meto holding brief for Ms Chepkwony and mr. Otan for the Defendants

No appearance for the Plaintiffs

Court assistant - Kendi

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J. O. OLOLA

JUDGE

