



Mazera & 3 others (Suing on their own behalf and on behalf of their families and all the members and residents of the Rabai Community, living on Plot Kilifi/Kinung'una/15 situated in Ribe Location, Kinung'una area) v Masinde & 7 others (Environment & Land Petition 4 of 2017) [2022] KEELC 3937 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3937 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 4 OF 2017

JO OLOLA, J

JULY 28, 2022

**IN THE MATTER OF CHAPTER FOUR, THE BILL OF RIGHTS, ARTICLES
19, 20, 21, 22, 23, 40 AND 159(2) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF AN ALLEGED VIOLATION OF THE RIGHT TO OWN LAND BY
THE RABAI COMMUNITY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLE 63 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COMMUNITY LAND ACT, NO. 27 OF 2016

AND

**IN THE MATTER OF A PETITION BY THE RESIDENTS AND MEMBERS OF THE
RABAI COMMUNITY FOR THE ILLEGAL AND IMPROPER ACQUISITION OF
KILIFI/KINUNG'UNA/15 BY LEAH MASINDE, HAMISI AMBALE BUGO AND MUGO**

BETWEEN

MAZERA KATEMBO MAZERA 1ST PETITIONER

EMMANUAL MASUMBUKO CHIVATIS 2ND PETITIONER

GIBSON NDENGE CHAI 3RD PETITIONER

ELIUD MWANZISE CHENGO 4TH PETITIONER

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THEIR FAMILIES
AND ALL THE MEMBERS AND RESIDENTS OF THE RABAI COMMUNITY,**



**LIVING ON PLOT KILIFI/KINUNG'UNA/15 SITUATED IN RIBE LOCATION,
KINUNG'UNA AREA**

AND

LEAH MASINDE	1ST RESPONDENT
HAMISI AMBALE BUGO	2ND RESPONDENT
JOHN MUGO	3RD RESPONDENT
LAND REGISTRAR, KILIFI	4TH RESPONDENT
CHIEF LAND REGISTRAR	5TH RESPONDENT
ATTORNEY GENERAL	6TH RESPONDENT
NATIONAL LAND COMMISSION	7TH RESPONDENT
COUNTY GOVERNMENT OF KILIFI	8TH RESPONDENT

RULING

1. By the Notice of Motion dated 23rd March, 2018, the four (4) Petitioners pray for orders:-
 3. That this Honourable Court be pleased to restrain the 1st, 2nd and 3rd Respondents by themselves, servants, agents or others from sub-dividing, selling, transferring, fencing, farming and/or in any other manner interfering with the current state of Plot No. Kilifi/Kinung'una/15 or a subdivision therefrom pending the hearing and determination of this Petition;
 4. That leave be granted to serve the Petition and this Motion by way of advertisement once either in the Daily Nation Newspaper or the Standard Newspaper upon Leah Masinde and John Mugo as per annexure "GNC – 2"; and
 5. That the costs of the application be provided for.
2. The application is supported by an Affidavit sworn by the 3rd Petitioner – Gibson Ndenge Chai and is premised on the grounds that:
 - (a) The physical address of the 1st and 2nd Respondents is not known to the Petitioners. All efforts to trace the said Respondents for purposes of service have not borne fruits.
 - (b) There is no address left with the 4th Respondent while issuing the title. The only other option is to serve by way of advertisement as prayed.
 - (c) At the beginning of this year there is increased activity by the 2nd Respondent allegedly acting on his own behalf and on behalf of the 1st and 3rd Respondents. The 2nd Respondent has in this regard gone to the property severally accompanied by surveyors and police officers giving an indication of either sub-dividing, fencing, selling or commencing farming activities on the land;
 - (d) The Petitioner will be rendered nugatory and the Petitioners will suffer irreparable loss and damage if the Respondents proceed to sell, transfer or charge the suit property; and



- (e) The Petitioners have all along been utilizing the land for cultivation and grazing their animals and the status ought to be maintained pending the hearing and determination of the Petition.
3. The application is opposed by the 2nd Respondent – Hamisi Ambale Bugo. In his Replying Affidavit sworn on 29th April 2020, the 2nd Respondent avers that it is true his name appears on the title of the former Plot No. Kilifi/Kinung'una/15 measuring around 52 acres but he no longer owns any land in the area.
 4. The 2nd Respondent avers that the said parcel of land was sub-divided and that those who were to be settled thereon were required to pay for transfer but the Petitioners and a few others have declined and are yet to collect their individual titles although they reside within the suit property.
 5. The 2nd Respondent further avers that the Petitioners are busy bodies who have collected all manner of names to create the impression of a multitude of people interested in the suit property while the Petition is purely the idea of the Petitioners borne out of malice. The 2nd Respondent asserts that there is nothing in the application showing that the Petitioners are in any danger of being evicted by either himself or any other party to warrant the injunction orders sought.
 6. John Mugo (the 3rd Respondent) is equally opposed to the application. In a Replying Affidavit similarly sworn on 29th April 2021, the 3rd Respondent avers that he procured his parcel of land in Kilifi through due process and that the land was sub-divided by the authorities and allocated to different individuals who were supposed to obtain their own individual titles upon payment for transfer and registration costs.
 7. The 3rd Respondent avers that he was in the process issued with two portions of land for himself and his son and that the nature of the orders sought therein would have the effect of stopping him from using the land and thereby completely incapacitating him.
 8. The 3rd Respondent avers that the application is discriminatory and aimed at stopping him from owning land and living at a place of his choice within the Republic of Kenya. He asserts that there is no evidence that his parcel of land was community land.
 9. I have carefully perused and considered the Motion and the response thereto by the 2nd and 3rd Respondents. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates representing the parties. The Petition as against the 1st Respondent was withdrawn by orders issued herein on 22nd January, 2021 while the 3rd, 4th, 5th, 6th, 7th and 8th Respondents did not participate in the proceedings.
 10. The Petitioners herein are seeking injunctive orders against the Respondents. The prayers for leave to serve the Petition by way of substituted service was dispensed with following another application by the Petitioners dated 18th February, 2020.
 11. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1983) EA 358 where the Court expressed itself 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. As provided under Order 40 Rule 1 of the *Civil Procedure Rules*, the important consideration before granting a temporary injunction is the proof 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 that the Defendant threatens or intends to remove or dispose of the property.
13. In the matter before me, I have looked at both the Supporting and Supplementary Affidavits sworn by the 3rd Respondent herein. It is apparent that the parcels of land occupied by the 2nd and 3rd Respondents were the result of an adjudication process carried out in the area – in the year 2010.
14. The Petitioners do not claim that the Respondents have intruded or trespassed into their parcels of land. They do not in fact cite any parcel of land owned by the 2nd Respondent. Their claim against the 3rd Respondent is that he is not a resident of Kinung’una or any of the neighbouring areas.
15. As it were, the process of land adjudication has in-built mechanisms through which one can object where land was adjudicated incorrectly. While the Petitioners aver that they have brought the suit for and on behalf of the inhabitants of the Kinung’una area in Ribe Location, there was nothing placed before me at this stage from which one can conclude that the subject properties were part of what was hitherto community land.
16. Accordingly I was not persuaded that there was any basis to grant any order of injunction. The Motion dated 22nd March, 2018 is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28TH JULY, 2022.

In the presence of:

No appearance for the Applicants

No appearance for the Respondents

Court assistant - Kendi

.....

J. O. Olola

JUDGE

