



REPUBLIC OF KENYA



**Mikaal Limited v Dawagi Investments Limited (Environment & Land
Case 42 of 2021) [2022] KEELC 3385 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 42 OF 2021**

**JO OLOLA, J
JULY 28, 2022**

BETWEEN

MIKAAL LIMITED PLAINTIFF

AND

DAWAGI INVESTMENTS LIMITED DEFENDANT

RULING

1. By the Notice of Motion dated and filed herein on 11th May 2021, Mikaal Limited (the Plaintiff) prays for orders:
 3. That pending the hearing and determination of this suit inter-parties, an order of temporary injunction be issued restraining the Defendant/Respondent, its agents, servants or employees from interfering in any manner whether by way of wrongfully entering or trespassing or demolishing or constructing on the Plaintiff's/Respondent's property, known as Plot No. Chembe/Kibabamshe/376 situated at Watamu Beach, Kilifi County;
 4. That the OCS Watamu Police Station be directed to enforce the terms of any order that the Court may issue so as to avoid a breakdown of law and order arising from the dispute on Plot No Chembe Kibabamshe/376 situated at Watamu Beach, Kilifi County; and
 5. That the costs of this application be provided for.
2. The application is supported by the affidavits sworn by the Plaintiff's director Richard Kimani and another one sworn by one Lawrence Kazungu Ziro and is premised on the grounds:
 - (i) That the Plaintiff is the registered proprietor of all that property known as Plot No Chembe/ Kibabamshe/376 situated at Watamu Beach, Kilifi County and that the Plaintiff's right of ownership thereof was validated vide Gazette Notice dated 17th July, 2017;



- (ii) That the Plaintiff has at all material times since the early 1990s been in peaceful and quiet possession of the property which the Plaintiff has substantially developed. The Plaintiff intends to run a tourism related industry thereon and also develop high-end recreational homes for sale so as to make a profit thereof and also for the directors of the Plaintiff to occupy together with their families;
 - (iii) That on 8th May 2021, the Defendant invaded the said property and evicted the Plaintiff's caretaker/employee. The Defendant has brought building materials thereon and started erecting beacons on the property. This means that the Defendant intends to permanently take over the said property and thereby permanently dispossess the Plaintiff thereof;
 - (iv) That the Defendant's aforesaid actions are illegal;
 - (v) That unless restrained from continuing with the said acts, the Plaintiff will suffer irreparable losses as it will have lost the said property completely; and
 - (vi) That in all the circumstances, this application is well merited.
3. Dawagi Investments Limited (the Defendant) is opposed to the application. In a Replying Affidavit sworn by its Managing Director Anthony Safari Kitsao and filed herein on 24th May 2021, the Defendant avers that the Plaintiff is not entitled to the prayers sought by reason *inter alia* of laches, concealment of material facts, positing unsubstantiated facts and falsehoods.
 4. The Defendant asserts that the suit property was duly acquired, is owned and possessed by itself. The Defendant avers that the Plaintiff has failed to disclose that the Plaintiff pursued four (4) consolidated Petitions in which it sought compensation of Kshs.10,000,000/- per acre of the subject matter from the Government of Kenya. In the said Petitions, the Plaintiff's director Richard Kimani who has sworn the Supporting Affidavit herein swore that the Plaintiff Company was aware that the suit property had been bought and was occupied by the Defendant herein.
 5. The Defendant avers further that the Plaintiff knew as far back as the year 2014 that the Defendant was the legitimate owner of the suit property and that the property was in occupation and possession of the Defendant Company. Despite such knowledge, the Plaintiff has never asserted its alleged proprietary rights against the Defendant over that period of time.
 6. The Defendant avers that over that span of time, it has developed the suit property by using heavy machinery to level the land, putting up a perimeter fence and imposing a gate thereon. Those developments took a lot of time and resources and it is therefore untrue that one Lawrence Kazungu Ziro has been living on the property as the Plaintiff's caretaker.
 7. The Defendant avers that the decision by the National Land Commission contained in the Gazette Notice dated 17th July, 2017 relied upon by the Plaintiff was ambiguous and does not in fact declare that the suit property belongs to the Plaintiff. In any event, the Defendant avers that upon being properly guided, the Commission reviewed its position and vide [Kenya Gazette Notice Vol. CXX - No. 40](#) dated 25th May 2018, the Commission confirmed that the suit property should be regularized to the Defendant Company.
 8. I have carefully perused and considered the Plaintiff's application as well as the response thereto by the Defendant. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein.
 9. By this application, the Plaintiff prays for an order of temporary injunction to restrain the Defendant from entering, trespassing upon, demolishing or carrying out any constructions on all that property



known as Chembe/Kibabamshe/376. The Plaintiff also prays that the Watamu Officer Commanding Police Station be directed to enforce those orders.

10. It is the Plaintiff's case that at all times material, it was the registered proprietor of the suit property and that its right to that ownership was validated by the National Land Commission vide a Gazette Notice dated 17th July, 2017. The Plaintiff told the Court in the various affidavits filed herein that since the early 1990s, it has been in peaceful and quiet possession of the property until sometime on 8th May, 2021 when the Defendant invaded the said property, evicted the Plaintiff's caretaker and commenced some constructions thereon.
11. The Plaintiff asserts that the Defendant's said actions are outrightly illegal and aimed at permanently depriving itself of the suit property. Accordingly it urges this Court to issue the orders of injunction sought herein as it otherwise stands to suffer irreparable loss if the Defendant were allowed to continue with its said activities.
12. It is trite law that a party seeking an interlocutory injunction must satisfy three conditions before the Court can grant such an injunction. As was stated in the oft-cited case of *Giella v Cassman Brown Company Limited* (1973)EA 359:

“First, an applicant must establish a prima facie case with the 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.”
13. A *prima facie* case was defined in *Mrao Limited v First American Bank of Kenya Limited & 2 Others* (2003) eKLR as a case where based on the evidence presented before it, the Court having the conduct of the matter can conclude that there exists a right which has apparently been infringed by the opposite party so as to warrant calling for an explanation or rebuttal from the said opposite party.
14. Arising from the foregoing it is incumbent upon the Plaintiff in a matter such as this to show by material evidence the existence of a right over the suit property which has apparently been infringed or is about to be infringed by the Defendant. Such evidence ought to demonstrate a clear and unmistakable right which is directly threatened by the Defendant's act that is sought to be restrained.
15. In the matter before me both the Plaintiff and the Defendant lay claim to the suit property – Chembe/Kibabamshe/376 said to be measuring some 2.5 acres. Both Parties have produced copies of Certificates of Lease pursuant to which they lay claim to the land. I note however that while the Plaintiff has produced a Certificate of Lease indicating the date of registration as 30th December 1996, there was no evidence of registration of the same at the Lands Registry. I say so because the Plaintiff has neither produced a Certificate of Official Search or a White Card or any other documentary evidence indicating the registration of the Lease in any official record.
16. On its part, the Defendant has produced a copy of a Title Deed dated 10th March, 2015. The Defendant has also produced several copies of Certificates of Official Searches issued over the years by the Land Registrar as proof of its registration as the proprietor of the land. The Defendant has equally availed the history of the land indicating how the same was transferred and discharged from the Settlement Fund Trustees to its successors in title before it acquired the same through a Sale Agreement.
17. While the Plaintiff contends that its ownership of the suit property was validated by the National Land Commission through a Gazette Notice published by the Commission on 17th July 2017, it was clear to me that the Commission had since reviewed its position and that by another Gazette Notice dated



25th May 2018, the Commission did recommend that the suit property “be regularized” in favour of the Defendant.

18. Again, while the Plaintiff contended that it had been in occupation and possession of the suit property since the 1990s, I was not persuaded that the Plaintiff was being candid with the Court. From the Defendant’s Replying Affidavit, it was apparent that the Plaintiff had filed ELC Petition Nos 12 of 2011; 13 of 2011; 14 of 2011 as well as ELC Petition No. 17 of 2015 which Petitions were later consolidated. A perusal of the pleadings in the said Petitions reveal that the Plaintiff had sought recovery orders against the Government to be availed the suit property on the ground that it had been unable to take possession and carry out development thereon because of an embargo placed against the property by the Government. In the alternative the Plaintiff had sought recovery for compensation for the loss of use of the suit property.

19. In its Supporting Affidavit sworn by its director Richard Karanja in Petition No 17 of 2015, the Plaintiff states at Paragraph 5 and 7 thereof as follows:

“5. That it is apparent that the Interested party (one Daniel Runya Gamba) has apparently sold his interest in Plot No. Chembe/Kibabamshe/376 to Changawa Mranai Mulila and Rollingstone Jefa Mrandzi who had apparently also sold their interest for a consideration of Kenya Shillings Fourteen Million Two Hundred Fifty Thousand (Kshs.14,250,000/-) to Dawagi Investments Limited. The said Parties’ transactions thereon is evidenced in an Agreement of Sale dated 30th June, 2014 between the said parties. I annex a copy of the said Agreement for Sale as annexure “MJK-2”.

7. That following the dismissal of the Petition herein, the Interested Party and his aforesaid agents have moved on to the suit property and have threatened that they will physically and forcefully remove the Petitioners therefrom with regard to Plot No. Chembe/Kibabamshe/376.”

20. Arising from the foregoing, it was apparent that the Plaintiff was aware that the Defendant had acquired an interest in the suit property as far back as the year 2014 and that it did not take any steps to restrain the Defendant from dealing with the suit property.

21. As the Court of Appeal stated in *Nguruman Limited v 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.”

22. In the circumstances herein I was not persuaded that the Plaintiff had established a prima facie case and/or that it stood to suffer any loss irreparable or otherwise as a result of the Defendant’s alleged actions. It follows that I did not find any merit in the Motion dated 11th May, 2021. It is dismissed with costs to the Defendants.

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

In the presence of:

Mr. Gwahala holding brief for Gikandi for the Plaintiff



Mr. Shujaa holding brief for Mwadilo for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

