



REPUBLIC OF KENYA



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**Kombe & 30 others v Suleiman & another (Environment & Land Case
101 of 2021) [2022] KEELC 3523 (KLR) (18 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 101 OF 2021**

**LL NAIKUNI, J
JULY 18, 2022**

BETWEEN

JIMMY SAFARI KOMBE & 30 OTHERS APPLICANT

AND

ABDULHAKIM OMAR MOHAMMED SULEIMAN 1ST RESPONDENT

JABALI CHONDO KAVU 2ND RESPONDENT

RULING

I. Introduction

1. The application before this honorable court for its determination is dated May 28, 2021 filed by the plaintiffs/applicants herein. It is brought under the provision of sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), cap. 21 and Order 40 Rule 1 and 2 of the [Civil Procedure Rules, 2010](#).

II. The Plaintiffs/Applicants Case

2. The plaintiffs/applicants seek the orders of temporary injunction restraining the defendants, their servants, agents or anyone claiming interest through them including purchasers from denying the plaintiffs from accessing their respective houses within the suit property known as Plot No. 502 and as misidentified by the defendants as being land Reference Numbers MN/1/1/70 pending the hearing and determination of this suit.
3. To put matters into context, this suit was instituted by way of a Complaint filed alongside this instant application on June 2, 2021. The application is premised on the grounds, testimonial facts and averments made under the 18 paragraphed Supporting Affidavit of Okiyo Akwili Lucysworn and dated May 28, 2021 and the five (5) annexures marked as “Exhibits OAL 1 to 4”). The deponent has the authority of all the other plaintiffs to plead and act on their behalf. The Plaintiffs claim that they had been residing on the parcel of land known as Plot number 502 located in Utange/Bamburi area near



Mombasa County (hereinafter, 'The Suit Property'). The plaintiffs claimed that sometime in the year 1978, the 1st defendant with the intention of grabbing the suit property and defeating the plaintiffs' interest in the suit property applied to the Recorder of Titles and in turn was issued with a Certificate of Title CR No. 15264. The plaintiffs further contended that at that time of the afore said application, the 1st defendant misidentified the suit property as being land Reference Numbers MN/1/1/70 and not Land reference Numbers 502. Thus, what was issued was a certificate of ownership in respect to Plot MN/1/1/70 instead of Plot number 502.

4. The plaintiffs averred that Plot number 502 which bore the Deed Plan numbers 103673 had all along had the status of a no claim land meaning government land. They annexed a copy of the Map and Deep Plan. She further annexed a copy of the deed plan no. 103673 alleged linked to plot number 502, surveyors report, and three letters.
5. They further deponed that upon the 1st defendant realizing that he had misidentified the suit property, he engaged the services of a surveyor, Mr. Edward Kiguru, who had since made an attempt to mix up the co - ordinates of Plot no. MN/1/1/70 with those of Plot number 502 to appear as one and the same parcel of land. He has attempted to super impose the parcel No. MN/1/1/70 on top of Plot No. 502 on to the said reference maps. Further to this, the Plaintiffs posited that the 2nd defendant realizing the misidentification of the parcel proceeded to cause the sub - division of Plot Numbers MN/1/1/70 when the actual beaconing had been done on Plot number 502 and subsequently sold off the sub - divided plots to third parties. The said third parties turned to violence and eventually kicked the plaintiffs out of the suit land. The plaintiffs pleaded that some of their houses had been demolished and the ones that still stood, they had been denied access. In the deed plan no. 103673, the phrase 'No Claim' is indicated on plot no 502.
6. As per the survey report, the surveyor, Mr. Kiguru provided the genesis on plot no. MN/1/1/70. He stated that plot MN/I/I/70 was first surveyed in 1920 and the record of 'No claim' implied that after independence, the land became government land. The surveyor stated that the 'No claim' status was extinguished on June 28, 1978 when the recorder of title issued the certificate of ownership (CR 15264) in favour of Abdulmalik Omar, the Administrator of the Estate of Bitoto Bint Suleman and the Administrator of the Estate of Khadija Bint Mohamed hence the land seized to be government land. The surveyor further reported that plot MN/I/I/70 is also recorded as MN/I/502. He added that plot No. 502 is of no title significance as it did not extinguish and or formally replace the original number of the plot which has always been MN/I/I/70.
7. The first is dated August 22, 2012 from the surveyor seeking approval from the director of surveys. It is reference 'Subdivisional survey of MN/I/502'. The second letter dated August 29, 2012 is from the Ministry of Lands to the 1st defendant (Abdulhakim Suleiman). It is reference 'Subdivision of plot MN/I/70/1 and it is approving subdivision. The third letter is dated 23rd April 2021 from the Ministry of Land under the director of survey to the plaintiffs' advocates (Messr. Richard O & Company Advocates) stating that Deed plan No. 103673 was issued for plot MN/I/502 and deed plan 14911 was issued for plot no. MN/I/70. The director of surveys stated that plot MN/I/I/70 does not exist in their records. He further stated that plot No. MN/I/502 was resurveyed but the survey plan was missing in their records.
8. The plaintiffs further averred that upon conducting investigation, it was discovered that Plot MN/1/1/70 which is contained in Deed Pan Numbers 14911 as MN/VI/1/70 did not exist in the current survey record within the survey of Kenya offices. Also Plot MN/1/502 was resurveyed under F/R//No.158/13 though the said survey records were unavailable.



III. The 1st & 2nd Defendants case

9. On September 20, 2021, the 1st and 2nd defendants herein while opposing the application vide a joint 15 paragraphed Replying Affidavit dated August 30, 2021 and sworn by JABALI CHONDO KAVU - the 2nd defendants. He deposed that the 1st and 2nd defendants herein were both purchasers for value without notice. They emphasized that they were not the first title owners. He added that they have further sold the suit property to third parties who were also purchasers for value without notice. Annexed to this affidavit is a certificate of ownership no. CR.15264 demarcated with deed plan No. 103673. It is dated 28th, June 1978. According to the Certificate of ownership, the first registered proprietor was one Abdulmalik Omar, the Administrator of the Estate of Bitoto Bint Suleman, and the Administrator of the Estate of Khadija Bint Mohamed. The land was then transferred to the 1st defendant and the entry was made on September 3, 1991. The next entry in the title was entered on April 25, 2013. It stated that the land was transferred to the 2nd defendant. The next entry was done on the same day, and it is an approval for subdividing of Plot No. 19802 to 19836 (Original No. 70/1/ Section I MN. The next entry was still on the same date, and it was for the issuance of new certificates of ownership 59668 to 59701 on subdivision no. 19802 to 19835 emanating from Plot No. 1/70/ Section I MN. The next entry was the issuance of new certificate of ownership 59702 for subdivision no original no. 1/70/36 section I MN to the 1st Defendant.
10. The deponent reiterated that they did not own any parcel of land with respect to the suit property and hence, any court orders against them would be of no value. He further deposed that this suit is Sub judice and Res judicata because there is ongoing litigation involving some of the parties herein in respect of the suit property. He annexed a court decree and a notice of preliminary objection for the case of ELC suit No. 299 of 2018 where some of the parties in the suit herein were parties in that suit. In that suit, the 2nd defendant herein was one of the plaintiffs therein, while the 1st defendant herein was one of the defendants therein. The decree was issued of 16th October 2019 declaring inter alia that the Plaintiffs were the legal owners of the suit properties (Plot No. 19803/I/MN, 19813/I/MN, 19814/I/MN, 19824/I/MN, 19823/I/MN, 20778/I/MN, 20779/I/MN, 20777/I/MN, 19807/I/MN, 19808/I/MN, 19803/I/MN, 20781/I/MN, 20784/I/MN, 207944/I/MN, and 20792/I/MN).
11. The deponent stated that none of the plaintiffs were in possession of the suit property. He deposed that Plot no MN/1/1/70 (CR 15264) did not exist since the same was subdivided and sold to third parties who were already in occupation. He further deposed that as per the Civil case Numbers ELC No. 299 of 2018, Plot No. 502 and or MN/1/1/70 (CR 15264) had been subdivided into 54 plots, and transferred to third parties.
12. The deponent deposed that the record of title dated June 28, 1978 was issued to Abdulmalik Omar, the Administrator of the Estate of Bitot Suleiman, and the administrator of Khadija Bint Mohamed, however on September 3, 1991, the 1st defendant bought the same in the year 2012 and 2013.
13. He deposed that the status of plot no. 502 as seen in the deed plan no. 103673 annexed in the supporting affidavit was to show the status of the plot on whether it had squatters or not. He deposed that the said deed plan was not made on the instruction of the 1st defendant, but it was made by the parties in case of ELC suit No. 299 of 2018. He added that the decree in the civil case numbers ELC no. 299 of 2018 removed the squatters from the parcels. He further deposed that the plaintiffs were well - known squatters in Utange area who squat in all empty plots with no documents to show how they took occupation of their purported properties and houses.
14. It was further deposed that the letter from the Ministry of Lands dated April 23, 2021 annexed in the supporting affidavit was meant to mislead the court because the current plots that exist were the 54



plots as per the surveyors report. He deposed that plot MN/1/70 did not exist in the current record since the director of surveys allowed the subdivision of the plot into 54 subplots.

IV. Submission

15. On November 18, 2021, while all parties were present in court, they directed to canvass the application by way of written submissions. They were directed on how to do so with clear time frame. Unfortunately, at the time of writing this ruling, it is only the Advocate for the defendants who had fully complied. The plaintiffs' counsel had not filed his submissions.

A. The 1st and 2nd Defendants written Submissions

16. On January 19, 2022, the Learned Counsel for the 1st and 2nd defendants herein the Law firm of M/s Mogaka, Omwenga & Mabeya Advocates filed their written submissions dated January 13, 2022. Mr. Omwenga Advocate submitted that while considering granting interim injunction orders, this court should be guided by the principles set out in the case of "*Giella v Cassman Brown & Co Ltd* (1973) EA 358. The Counsel argued that the plaintiffs had failed to establish "a *prima facie* case" with a probability of success as they sought for the injunctive orders in respect of Plot No. 502 and/ or MN/I/I/70 which were non – existent and the Defendants never owned. The Counsel submitted that this suit was sub judice as there was an ongoing suit being ELC Case No. 299 of 2018. Mr. Omwenga further submitted that the Applicants had failed to demonstrate that they had a right over the suit property. He added that Plot no. 502 was also non - existent and as such the Plaintiffs had no right in law to warrant issuance of the orders they were seeking.
17. To buttress his points. The Counsel referred court to the cases of "*Kenleb Cons Limited v New Gatitu Service Station Limited & another* (1990) eKLR and the case of "*Caliph properties limited v Barbel Sharma & another* (2015) eKLR. He submitted that the maxim of equity demanded that he who came to equity should come with clean hands. The Counsel held that on the contrary, the plaintiffs had been misleading the court by stating that they had been residing on Plot no. 502. He submitted that when the defendants bought and sold the suit property none of the plaintiffs were in occupation of the suit land. In summary, he submitted that the Plaintiffs had no *prima facie* case, neither would they suffer any substantial loss not capable of being compensated assuming they were to succeed in the suit. The balance of convenience tilted in favour of the 1st and 2nd defendants herein.
18. The upshot of all this he urged court to dismiss the application with Costs.

V. Analysis and Determination

19. I have considered all the filed the pleadings, the written submissions by the Counsel, the cited authorities, the relevant provisions of the *Constitution* and laws with regard to the said Notice of Motion application dated May 28, 2021 by the Plaintiffs/Applicants herein. The main three (3) issues for determination are as follows. These are:-
 - a) Whether the plaintiffs/applicants through their filed Notice of Motion application dated May 28, 2021 meets the laid - down threshold for granting of orders of temporary injunction as founded under Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules, 2010*.
 - b) Whether the Parties herein are entitled to the relief sought.
 - c) Who will bear the Costs of the application?



Issue No. a). Whether the Plaintiffs/Applicants through their filed Notice of Motion application dated 28th May, 2021 meets the laid - down threshold for granting of orders of temporary injunction as founded under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010.

20. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

The conditions for consideration in granting an injunction were settled in the celebrated case of “Giella v Cassman Brown (*supra*), where the court expressed itself on the condition’s that a party must satisfy before the court grants an interlocutory injunction. It was stated as follows: -

“Firstly, 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.”

21. In this instant application, the plaintiffs’ main claim is that they are residents of the plot of land known as Plot No. 502 which is distinct from plot no. MN/I/I/70. The Plaintiffs have not provided any documentary evidence that they are the registered or beneficial proprietor of plot no. 502. Their case is built on the premise that they are residents of Plot no. 502. The plaintiffs’ also claim that MN/1/1/70 was subdivided and sold to third parties, who due to the misidentification that Plot 502 and MN/1/1/70 are one and the same plots, the third parties have moved to evict them, demolish their houses, and take possession of Plot no. 502 ‘thinking’ its MN/1/1/70.

22. On the other hand, the defendants have claimed that they used to be the registered owners of MN/1/1/70 but that land was subdivided and sold to third parties, hence, they have no claim in the land and any orders given in this suit will be of no consequence to them. They have annexed the certificate of ownership to buttress this claim.

23. Therefore, at this interim stage, have the Plaintiffs shown in any way that they have a right that is being infringed? Have the Plaintiffs met the threshold for the grant of temporary injunction? In “Mrao Limited v First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in “Moses C Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, the Court of Appeal defined a prima facie case as follows:-

“A *prima facie* case in a civil application includes but 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 later”.

24. In the present case, the plaintiffs/applicants while instituting this case against the defendants have not furnished court with adequate information to warrant being granted interim injunction orders. For instance, while I have taken notice from the survey report and the letters that there is a mention of Plot no. 502, Plot no. MN/1/70, and Plot no. MN/I/I/70, it is not clear whether they are similar or distinct plots. Further, it is not clear which plot the plaintiffs actually reside in. This can only be ascertained during the full trial. It is not the duty of this court at this stage to conduct a mini-trial. The Plaintiffs also have not provided any evidence of ownership or any right to plot no. 502.



Appeal Case of “ *Kenya commercial Finance Co. Limited v Afraba Education Society* (2001) 1 EA 86 as follows:-

““The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction isSequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No 8 of 2015 –*Hassan Huri v Abdulrazak Huri Ibrahim*”,

Issue No. b) Whether parties are entitled to the relief sought

25. Based on the analysis made out under the above sub heading, I am therefore not satisfied that the plaintiffs/applicants have established a prima facie case so as to warrant the granting of the orders of temporary injunction. Needless to say, it is trite law that he who comes to equity must come with clean hands and in this case, the plaintiffs cannot be said to have clean hands owing to the fact that several plaintiffs were parties in ELC No. 299 of 2018, which in one way or the other dealt with some of the subject properties in this suit and they did not inform the court. Nondisclosure of material fact is frowned upon as it can lead to a miscarriage of justice. I am guided by the decision of Ringera J. (as he was then was) in the case of “*Showind Industries v Guardian Bank Limited & another* (2002) 1 EA 284 where the Learned Judge stated as follows:

“...an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straightforward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity, or his equity has been defeated by laches”.

ISSUE No. c). Who will bear the Costs of the application

26. It is now settled law that Costs are at the discretion of the honorable court. Costs mean what is awarded after every legal action, act or proceedings in a litigation. The proviso of section 27 (1) of the [Civil Procedure Act](#), cap. 21 provides that Costs follow the events. The events here means the result of the said legal action, act or proceedings in the litigation.

27. In the instant case, the results from the filed Notice of Motion application dated May 28, 2021 is that the same has been dismissed for being unmeritorious. For that reason, the Costs for the application should be borne by the Plaintiffs/Applicants and awarded to the Defendant/Respondent herein. That is all.

VI. Conclusion & Disposition

28. For the above reasons, the issues framed for analysis, and on the preponderance of probability, this Honorable Court makes the following Orders: -

- a) That the Notice of Motion application dated May 28, 2021 by the plaintiffs/applicants herein seeking to be granted the temporary injunction orders be and is hereby dismissed for lack of merit.
- b) That for expediency sake this suit should be heard and disposed off within the next one hundred and eighty days from this date hereof. Thus, there should be a Mention on the October 6, 2022 for purposes of holding the Pre – Trial Conference under Order 11 of the [Civil Procedure Rules](#) and fixing a hearing date.



- c) That the Plaintiffs/Applicants to bear the costs of the application to be awarded to the Defendants.

29. It is orders accordingly.

RULING, SIGNED, DATED AND DELIEVERED ON 18TH THIS JULY OF 2022

HON. JUSTICE (MR.) L.L. NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT,

MOMBASA

In presence of:-

M/s. Yumna, Court Assistant.

Mr. Abaja Advocate holding brief for Mr. Omwenga Advocate for the Plaintiffs.

No appearance for the Defendant

