REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

civil Case 70 of 2009

1. **NELSON KAZUNGU CHAI**
2. **LAWRENCE KAZANI GOHU**
3. **SAID HASSAN HEMED**
4. **IBRAHIM ABDI**
5. **FESTUS MWARERE LENGA**
6. **KENGA KILUMO CHAI**
7. **LEONNOX MKUTANO NGALA**
8. **SHADRACK NDHULI**
9. **PRUDENCE MAPENZI MWANGORI……PLAINTIFFS**

=VERSUS=

PWANI UNIVERSITY COLLEGE……DEFENDANT

RULING

By a Chamber Summons dated 22nd July 2009 made under Order XXXIX Rules 1, 2 and 9, Civil Procedure Rules and Section 3A Civil Procedure Act, the applicant seeks for orders to restrain the Defendant/Respondent by itself, servants, agents and/or any person acting for it, by way of temporary injunction, from fencing, trespassing, evicting, removing, demolishing or in any manner interfering with the Plaintiff's use, possession and occupation of part of the land parcel known as LR No.5046/1 and part of LR NO.5024/1 occupied by the Plaintiffs, together with the improvements, building works erected and being thereon, until the suit is heard and determined.

It is based on grounds that the Defendant had issued a public notice in the Newspapers known as Daily Nation of 23rd June 2009, alleging that the Plaintiffs have trespassed on its land. In the same the Defendant threatened to evict the Plaintiff/applicant unless they vacate the land by 31st July 2009. The Plaintiffs numbering 308, are in occupation of part of LR No.50461 and part of LR No.5024/1 on authority of the Government of Kenya, with the concurrent knowledge, approval and participation of the Defendant. The Plaintiffs have carried out improvements, developments, constructions and put up homes of a permanent nature and threatened eviction would cause them irreparable harm, loss and damage. The notices by Defendant are termed as unlawful, illegal, irregular and unreasonable. That unless restrained by orders of this Court, the Defendant would carry out the threats of unlawful eviction.

The application is supported by the affidavit sworn by Nelson Kazungu Chai (the 1st applicant) who has sworn this affidavit on his own behalf and on behalf of other Plaintiffs. He is the Chairman of Mtaani Kisumu Ndogo Self Help Upgrading Project (Kibaoni Extension), Kilifi Township. He depones that the project has 308 members occupying approximately 55acres of part of LR No.5046/1 and 5024/1 in Kilifi Township – a copy of the Plan showing the location of the parts occupied by the applicants is annexed and marked in green. The upgrading Project which begin in 1992 was part of the small Township Development Project (STDP) a joint project of the Ministry of Local Government and Deutsche Gellschaft for Technische Zusammetiarbert(GTZ) and Kilifi Town Council.

He was involved in the implementation of the project which was to assist in upgrading part of Kilifi Township, Mtaani and Kisumu Ndogo informal settlements on a pilot project which would then be used as a model in upgrading other areas of the town. As a result of the said project, some members were displaced from the areas where they had structures. With the agreement and concurrence of Kilifi Town Council, the District Commissioner Kilifi and Ministry of Agriculture, it was agreed that the structure owners who were displaced on road reserves, overcrowded plots or from plots reserved for public purposes spaces would be settled

as Mtaani/Kisumu Ndogo Upgrading Self Help Project (Kibaoni Extension), and land was obtained by the Government as Public Land from Kilifi Institute Of Agriculture. That is how the other 307 members found themselves on parts of the parcels now forming subject of this suit. The documents to support this are annexed as NKC 4. It is pointed out that Kilifi Institute of Agriculture owned over 700 acres of land and surrendered 100 acres which were allocated to a number of schools, that is Kilifi Township School, Kibarani Boarding Primary School, Kibarani Primary School for the Deaf and Kibarani Secondary School for the Deaf, the applicants and others – exhibit NKC supports this.

The Planning and Development of the area was carried out and part development plan for the areas approved as per the original approved Development Plan NKC 6. The applicants paid survey fees and surveying work was done by S. N. Wabaru, a licenced surveyor at a total of Kshs 2.4million which is supported by NRC 7. Letters of allotment dated 8th August 2002 were issued by the Commissioner of Lands as per the sample copies marked NKC 8.

Upon issuance of allocation letters to the members, they carried out development by building houses including permanent houses at great expense – photographs marked NKC 9 bear samples of the houses.

The Plan was then submitted for approval by the Commissioner and after cancellation of the first plan and they await issuance of Certificate of Title.

Pwani University issued a public notice in the Daily Naiton Newspaper of 23rd June 2009, purporting to be a caveat emptor claiming to be the owner of the land and that the applicants were trespassers for whom measures would be taken to evict them.

Further to that, a letter dated 18th June 2009 from Lawrence Mungai & Co. Advocates on behalf of

Pwani University College, was sent to the applicants alleging that they had unlawfully entered onto its land and erected illegal structures and/or carried out other unauthorized activities and threatened eviction by 31st July 2009.

Applicants state that they have invested heavily in their respective portions of land, and if the properties are destroyed and they are evicted, then the applicants will lose and will result in irreparable harm and undue hardship – it is said that each individual has spent between 250,000 – 1,000,000. They are prepared to offer suitable undertaking as to damages if so directed. Further that

Pwani University College is a successor to the Kilifi Agriculture Training Institute within all rights, liabilities and assets vesting therein, and applicants have a Provisional Certificate of Title awaiting issuance of Certificates of Title.

The application is opposed, and in a replying affidavit sworn by Professor Mohamed S. Rajab, (the Principal of Pwani University College) he depones that Kilifi Town Council, the District Commissioner Kilifi and the Ministry of Agriculture did not have any power or authority to excise any part of the land allocated by the Government of Kenya to Kilifi Institute of Agriculture, (the predecessor of the respondent).

The alleged surrender of land to a number of schools, was fully permitted and/or allowed by the relevant authorities, but the alleged allocation of the land to applicants was without justification and/or authority and was fraudulent so that applicants took unjustified advantage of the legitimate allocation of land to the educational institutions, to trespass onto the defendant/respondent's land, with the purpose of enriching themselves.

That upon the establishment of the respondent, pursuant to Presidential Order of October 2007, the Government of Kenya, through the Ministry of Lands issued a letter of allotment to the respondent for 623 acres, meaning that the alleged previous excisions of its land had not taken place – the allotment letter is annexed as MSR 1 (a) and a copy of receipt for payment of requisite fees is MSR 1 (b).

The alleged Part Development Plan (PDP) approved by the Minister for Lands and Settlement was cancelled/or revoked by the director of Physical Planning as per the letter annexed as MSR 2.

The revocation/annulment of that PDP was pursuant to a ban on all land allocation as per annexed notice dated 08-05-02 (marked MSR 3)

which banned the allocation of government and

Trust Land, including land reserved for public purposes or owned by public bodies in all areas, including urban area. Following that cancellation of the PDP, the claims by applicants cannot hold and the letters of allotment issued and dated 08th August 2002 were null and void and any settlement done on the strength of those letters was illegal ab initio. Further, that the alleged plan has not been approved and neither Pwani University College, nor its predecessor, Kilifi Institute of Agriculture ever consented or approved occupation of its land by the applicants and the caveat emptor issued confirms this.

The respondent and its predecessor in title have constantly and on various occasions requested the government Agencies to look into the matter and resolve the same amicably as evidenced by a bundle of correspondence marked MSR 4.

It is respondent's contention that if the applicants have incurred any expenses, then it was not involved in that and the applicants are authors of their own misfortune. In any event the anticipated losses can easily be quantified and adequately compensated by money.

Since the applicants occupation of the disputed portions are without any legal basis, the applicants are trespassers and if their occupation was with the full knowledge of the Government of Kenya, then they should have been settled in a more planned manner. The list of applicants is questioned because some of the members identity cards numbers are not indicated and in any event the Provisional Certificate of Title annexed does not reveal ownership of the subject land nor were any reasons given for the Government compulsorily acquiring land, whether to settle the applicants or for other uses.

Whats more, that even if the letters of allocation were legitimate, then the applicants have not complied with the conditions set there which remains invalid for non-compliance. Further that the deponent of the applicant's supporting affidavit and some of the applicants have been involved in the business of selling government land to unsuspecting members of the public, as shown by the sale agreement dated 15-02-2000 marked MSR 5, so applicants are not destitutes, but individuals who just want to enrich themselves under the guise of being landless.

In a supplementary affidavit sworn by the 1st applicant he points out that the very authority which allocated the land to the institute is the one which allocated the land to them in 1995.

They deny having taken advantage of the legitimate allocation of land to educational institutions to trespass on the land for purposes of enriching themselves and insist that what was cancelled was the Part Development Plan, NOT the allocation of the land as the area in question was public land or trust land. Further that they were allocated the land as persons who had been affected by the upgrading project so the alleged ban on land allocation did not affect them.

However the respondents insist that the alleged allocation to the applicants was irregular and clouded in fraudulent acts, since the land where the respondent land stands has never been trust land nor has it been vacant and there was no approval for settlement.

At the hearing counsel for both parties filed written submissions Dr. Khaminwa submits that from the inception of the project upon the allocation of the land to the applicants, representatives of the Government were involved, ie. The Deputy Commissioner of Lands who was the chairman of the Projects Promotion Committee and the development project was a joint project between GTZ (a German Technical Corporation) Ministry of Local Government and

Kilifi Town council.

Once the applicants were displaced they were settled on the disputed portion with the agreement of Kilifi Town council, the Dc Kilifi and the Ministry of Agriculture – this was in 1995.

The parcels of land were obtained by the government under compulsory acquisition. The land was subdivided and allocated to applicants and several educational institutions, - this land was under the Ministry of Agriculture, and the DC was a Chairman of the District Plot Allocation Committee, while the Town clerk was the secretary. Planning and development of the area was carried out and a part development plan was

approved. The applicants were shown the area they occupy by the then Principal of Kilifi Institute of Agriculture, in the presence of the DC and the Town clerk. The plaintiffs were issued with allotment letters in August 2002 by the Commissioner of Lands. However the first part development plan had errors and that is why it was cancelled. The errors were

1. that applicants had indicated 0.5acres per member instead of 50 x 100ft

2. most of the plaintiff members were not the ones in the book.

So the Council wrote to the Commissioner of Lands to cancel the ½ acre and follow the part development plan.

Dr. Khaminwa submits that the cancellation of the part development plan did not constitute cancellation or revocation of the allotment done in 1995.

Further that the land was compulsorily acquired by the Government under the Land Acquisition Act and the government is under no obligation to explain such action, so the letters of allotment issued to the respondents are null and void. He refers to section 83 of the Evidence Act which provides that:

> ***"1. The Court shall presume to be genuine, every document purporting to be a certificate, certificate copy or other document which is:***
>
> ***1. declared by law to be admissible as evidence of any particular manner, directed by law in that behalf and purporting to be duly certified by a public officer***
>
> ***(2) the court shall also presume to be signed or certified held, when he signed it, the official alienation which he claims in such document"***

Dr. Khaminwa submits that the legal maxim Omnia *Prarasumuntur legitime facta domecprobetur in cont tatum.* i.e *"all things are presumed legitimately done until the contrary is proved"* – he refers to the decision **E.A. Power and Lighting Co. Ltd v Dandora Black Trays Quarries**. Further that section 119 of the Evidence Act fortifies the position that the final documents issued by the Government to indicate ownership met all legal requirements this resulting in the applicants being issued with a Provisional Certificate of Title. He urges this court to consider section 23 (1) of the Registration of Titles Act in finding that such title is conclusive evidence of proprietorship as was held in the case of **Mbothu and 8 others v Waitimu and 11 others KLR 1986**. Having met all the requirements, the applicants then embarked on development and defendant/respondent is estopped from asserting that that plaintiff/applicant occupation of the land is unlawful.

Dr. Khaminwa argues that since the defendant's predecessor's principal, together with the DC and the Town Council were involved in authorizing division and settlement of the applicants, and extensive Permanent development on the land which was ongoing for a long time, with the knowledge and full view of the respondent, the respondent both by words and conduct represented to the plaintiff's that they could so act.

He seeks support in the provisions of section 120 of the Evidence Act which provides that:

> ***"When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representatives, to deny the truth of the thing."***

Dr. Khaminwa points out that this position is further echoed in the case of **Century Automobiles Ltd v Hatchings Biemer Ltd Civil Appeal No. 68 of 1964.**

It is further argued that even if the applicants did not have documents of title to the land, the same land being government land, and the plaintiffs/applicants are not trespassers but would be under implied licence from the government, to occupy the land – then the existing status of their occupation should be preserved by way of grant of an injunction. It is his submissions that applicants have established a prima facie case with very high probability of success.

Secondly the massive developments on the land would result in such great loss that cannot be compensated by way of damages.

Even on a balance of convenience, the applicant's prays should be granted.

In response Mr. Mungai for the respondent submits that the project was not a government project and the alleged participation of government officers is not supported by any evidence rather this is a convoluted scheme by land grabbers in collusion with Kilifi County Council.

With regard to the compulsory acquisition, it is Mr. Mungai's contention that the land was not acquired for any other purpose other than for establishment of the Kilifi Institute of Agriculture and not for settling of the applicants. The applicants are termed as imposters and illegal occupants.

But who authorized the applicant's occupation, since they even have allotment letters marked NKC 8?
Mr. Mungai argues that there is no tangible evidence to indicate that there was authorization and/or approval for occupation of the land by applicants and that from the time the applicants took possession and continued in occupation, their status has always been challenged as evidenced by various correspondences availed.

He argues that the effect of cancellation of the part development plan resulted in the Director of Physical Planning withdrawing the said plan and that meant there was no land available for allocation and the process of acquiring allotment letters was flawed as vetting, documentation of Part Development Plans and issuance of approved plan number did not meet the required standards.

It is also submitted that applicants have not come to court with clean hands because some of them eg 1st applicant although claiming to be a slum dweller, was involved in selling of plot No. 841 (an excision of LR NO. 5084/671).

As regards the Provisional Certificate of Title, it is Mr. Mungai's argument that this is rather confusing because that Provisional Certificate confirms that the original certificate of title is lost, yet on the other hand they claim to be awaiting issuance of certificates of title and that it is significant to note that the Provisional Certificate does not bear any of the applicant's names.

Mr. Mungai's contention is that the application has failed to meet the test set out in the celebrated case of **Giella V Cassman Brown EALR (1973)** because the Kilifi Town Council, the District Commissioner Kilifi and the Ministry of Agricultural did not have the mandate or authority to allocate land which had been acquired by the Government for other purposes – that this is confirmed by the cancellation of the Part Development Plan.

Secondly the letter of allotment was issued after a Presidential Order banning allocation of public institution's land all over the country and applicants did not in any event meet the terms set out in the letter of allotment.

With regard to irreparable loss, Mr. Mungai submits that applicants have actually quantified the loss each one of them would suffer in the event of eviction and so they would be adequately compensated in monetary terms. Further not all applicants have developed their plots and some of the buildings are incomplete.

On the principle of balance of convenience, Mr. Mungai contends that applicants are authors of their own misfortune, having entered the respondent's land without respondent's consent.

Basically the issues for consideration are:

1. Have the applicants established a prima facie case with probability of success. It is apparent that applicants relied on the allocation letters issued to them to occupy the land as owners. It is also apparrent that the allocation to the respondents was made AFTER the allocation to the applicant – in both instances, it was the government allocating the land. Thereafter the applicants submitted part development plans, which were eventually cancelled – the cancellation of the PDP did NOT cancel or invalidate the allocation.

Of course, there then followed the Presidential order banning any allocation of public land – was the effect of this ban a revocation to the allotments?
Oddly enough, the applicants were issued with a Provisional Certificate which they say they hold while waiting for issuance of certificates of Title. The Provisional certificate is not in their name, and yes all it says is that as at 20th January 2009, the original certificate had been lost. From the annextures, the District Commissioner, the Town Council of Kilifi, the Ministry of Agriculture, and the Commissioner of Lands were either directly involved or informed of the settlement by applicants on the land. That is why their belief and perception was that the Government was facilitating their occupation – because these are senior government representatives.

From the annexture signed by Judy Okungu (Registrar of Titles) and by L. W. Muchiri on behalf of Commissioner of Lands, its abundantly clear, that the land had been compulsorily acquired by the government under the Land Acquisition Act – was the purpose of that acquisition strictly for use of the defendants only? If that was the case then how was it that the same government's officials got involved in facilitating the applicant's stake on the land. I think it is due to this pattern of events that the applicants were persuaded they were on the right path when they moved to occupy the land even though they did not have documents of title.
So that although respondents have documents giving them rights over the land, the respondents were duly guided by certain conduct to believe they too had a right on the land.

Secondly it is not as though the applicants carried out development in secret, or that one day officials from the respondent woke up and just found that permanent buildings and an assortment of other structures had sprouted on the land. From the pictures annexed, some of these buildings have been extensively developed that it is safe to conclude that whatever construction activity was taking place was open to all and sundry and that the respondents were aware of the activities and did nothing – in which event it would be totally unjust to now turn round and suddenly tell the applicants.

"move out, and remove your structure, this is our land"

The applicants were not in secret occupation.
This is a matter that can only be resolved by hearing of viva voce evidence at a full trial.
The applicants have adequately demonstrated that they have a prima facie claim with probability of success, thus fulfilling the first limb of the **Giella v Cassman Brown Case.**

Would damages be adequate compensation? It is true that applicants have more or less attached a monetary value to the property and now they cannot turn around to say money would not be adequate compensation. Thus this compels me to look at what is popularly known as the doubt principle i.e when in doubt or when the first two limbs have not been adequately met, then the court has a duty to look at the balance of convenience and determine whither it sways!

I have already indicated that a prima facie case has been made out, but even if that had failed, I take note that:

(a) It is not disputed that some of the applicants have

erected structures on the land – some are complete dwelling houses, some are at different stages of construction, some are temporary structures – but nonetheless there are structures dotting the landscape in dispute.

2. currently on the disputed portion, the respondents have not erected any of their structures nor is it shown that respondent has embarked on an intended construction or development, or brought building materials for that purpose, or is suffering such an imminent crisis that it urgently needs to move into occupation of the land.

3. It would be more inconvenient to evict the applicants being 308 in number, demolish their structures, then if the case were to succeed, expect them to start afresh – not with the current economic trends and even escalating prices of building materials. It is thus more convenient to preserve the status quo as exists on the ground now until the matter is heard and determined.

My finding then is that the balance of convenience tilts greatly in favour of the applicants who are currently in occupation and have erected various structures

In consequence therefore, I find that the application is merited and is allowed as prayed.

For the sake of preserving the property I will however direct that applicants must not commit acts alienating the property such as sub-dividing, transferring, leasing or selling the suit property until the same is heard and determined.

Delivered and dated this **23rd** day of **September 2010** at Malindi.

H. A. Omondi
JUDGE

Mr. Kuria for respondent

Mr. Mwadilo holding brief for Dr. Khaminwa for applicant