



**Mwende v Kalume & another (Environment & Land Case
208 of 2019) [2022] KEELC 13736 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 208 OF 2019
NA MATHEKA, J
OCTOBER 26, 2022**

BETWEEN

CHRISTINE MWENDE PLAINTIFF

AND

DANIEL MBOGO KALUME 1ST DEFENDANT

COUNTY GOVERNMENT OF KILIFI 2ND DEFENDANT

RULING

1. The application is dated July 29, 2021 and under Section IA, 1B, 3, 314, and 63(e) of the [Civil Procedure Act](#), Cap 21 Laws of Kenya; Order 3 Rule 5 and 6, Order 4Q Rules I (l) (a) and 2 (l) & Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 seeking the following orders:
 1. That this Application be certified as urgent and be heard *ex-parte* in the first instance.
 2. That an order do issue allowing the Plaintiff to put up structures in place of the ones demolished by the Respondents forthwith, to be used by the students of Jambo Jipya Schools, contained on the property known as Plot No MN/III/9476, pending the hearing and disposal of the Application herein and suit.
 3. That a temporary injunction do issue restraining the 1st and 2nd Defendants/Respondents by themselves and/or their agents, servants, employees, assigns or anybody authorized by them from intimidation, harassment, eviction and/or otherwise interfering with the suit property known as Plot NO.MN/III/9476, pending the hearing and determination of this Application and suit.
 4. That the suit herein be consolidated with Mombasa ELC No. 299 of 2013; Masha Birya Dena & Others vs Francis Kahindi Kalume Others for hearing and final determination.
 5. That there be conducted a site visit for the suit premises.



6. That costs be provided for.
2. It is supported by the annexed affidavit Christine Mwendu, and grounds that the Applicant runs a fully registered school on the suit premises, being pre-primary, primary and secondary education, known as Jambo Jipya School. That on/or about the June 13, 2021 Much Williams Auctioneers came to the suit premises, of the Jambo Jipya Schools with allegations of rent arrears, having been instructed by the 1st Defendant. That there being the suit herein and status quo orders subsisting in Mombasa ELC No. 299 of 2013 which affects the suit property, they wrote a letter to informing them as much. That the Respondents' agent Much Williams Auctioneers on Wednesday the July 21, 2021 together with other people unknown to the Plaintiff, stormed the school premises (being the suit property) and broke doors for the classes and carried away all the school furniture, breaking some of the school furniture in the process. That the Applicant reported the incidence to Mtwapa Police Station *vide* OB. No./23/07/2021. That meanwhile the case ELC No. 299 OF 2013 was set down for hearing on July 22, 2021, which hearing did not proceed mainly because of these developments. That the 1st Defendant, despite the orders for status quo affecting the suit property went ahead with the illegal auctioning.
3. That the Respondents, jointly and severally, on/or about the July 24, 2021 invaded the suit property, without any orders enabling such actions, with machinery and with the protection of the police forces, demolished the whole of the buildings forming part of Jambo Jipya Schools, in the suit property. That these actions were being undertaken on Saturday the July 24, 2021 when schools were to be resumed for the year 2021-2022 on Monday July 26, 2021 as per the school curriculum in Kenya. The Applicant is duly informed that despite the illegal actions, the intention is to ensure that she is not able to operate the school so that the Defendant is able to take over the suit property. For the sake of the many children and especially candidates that attend the school, it is imperative that the Plaintiff is allowed to build structures to enable the housing of the various classes and pupils/students that attend the school so as not to prejudice the rights of hundreds of children and teachers dependent on the school, even as other actions being undertaken. That unless this Honourable Court grants the orders sought, the Applicant will continue to suffer irreparable loss and the rights of the pupils and the teachers and general staff of the schools will continue to be prejudiced.
4. The 1st Defendant/Respondent stated that he is the registered proprietor of all that parcel of land known as plot no. MN/III/9476. DMK 1 is a copy of the certificate of title for the said property. The Plaintiff seeks to be allowed to build structures on Plot number MN/III/9476 yet she claims to have purchased plot number MN/II/4427 (original No. 3847/7/MN). That the Plaintiff had built illegal structures on his piece of land aforesaid without his consent and without approval of the County Government of Kilifi. Accordingly, the County Government of Kilifi served upon the Plaintiff an enforcement notice to remove the illegal structures. The Plaintiff then filed this suit and filed an application dated November 20, 2019 which sought an order of injunction to restrain the Defendants from intimidation harassment, eviction and demolishing the boundary wall belonging to the Plaintiff premises on Plot Number MN/III/9476 pending the hearing and determination of the suit. The Plaintiff's said application was heard and on the March 18, 2021 the Court (Yano J) delivered a ruling that dismissed the Plaintiff's application. Thereafter, the County Government of Kilifi demolished the illegal structures which the Plaintiff had built on his land.
5. That previously there was a tenancy agreement between the Plaintiff and him. A copy of the said agreement is marked DMK 2. The said tenancy has been determined by effluxion of time in any event the Plaintiff had breached the said tenancy by refusing to pay rent. That the land which the Plaintiff claims to have purchased is in registration section II of Mainland North whereas his land is in section III of Mainland North. Therefore, the two plots do not exist in the same locality. Section II of Mainland



North is located between Nyali Bridge and Mtwapa Bridge in Kisauni /Bamburi areas whereas Section III is located from Mtwapa bridge onwards. There can be no confusion between the two plots of land.

6. This court has considered the application and submissions therein. The Plaintiff/Applicant seeks a temporary injunction do issue restraining the 1st and 2nd Defendants/Respondents by themselves and/or their agents, servants, employees, assigns or anybody authorized by them from intimidation, harassment, eviction and/or otherwise interfering with the suit property known as Plot No.MN/III/9476, pending the hearing and determination of this Application and suit. The 1st Defendant/ Respondent stated that he is the registered proprietor of all that parcel of land known as Plot No. MN/III/9476. DMK 1 is a copy of the certificate of title for the said property. The Plaintiff seeks to be allowed to build structures on Plot number MN/III/9476 yet she claims to have purchased plot number MN/II/4427 (Original No. 3847/7/MN). I find that the Applicant has not established a *prima facie* case to warrant the grant of the orders of construction and a temporary injunction. This court cannot deal with finality on disputed facts as is the case here. Indeed from the record the Applicant had filed a similar case for injunction which was dismissed by a ruling delivered on the March 18, 2021.
7. The Applicant also seeks that the suit herein be consolidated with Mombasa ELC No. 299 of 2013; Masha Biry Dena & Others vs Francis Kahindi Kalume and Others for hearing and final determination. The Court held in the case of *Korean United Church of Kenya & 3 Others vs Seng Ha Sang* (2014) eKLR that;

"consolidation of suits is done for purposes of achieving the overriding objective of the *Civil Procedure Act*, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."
8. However, the Court in the case of *Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa* (2004) eKLR held that;

"there was however situations where consolidation is undesirable....The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such a situation, the hearing will be longer the purpose of saving time will be defeated."
9. In the case of *Law Society of Kenya vs The Center for Human Rights and Democracy* Supreme Court of Kenya Petition No. 14 of 2013, the Supreme Court of Kenya had this to say about consolidation of suits;

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it"
10. I have perused the pleadings in ELC No. 299 of 2013 Masha Biry Dena & Others vs Francis Kahindi Kalume Others and find that the prayers sought therein and the present are different. It is pleaded in this suit paragraph 10 that the suit pending ELC No. 299 of 2013 is a representative suit and the cause of action is different. Any orders in that suit can be enforced in the said suit. I find that this application is not merited and I dismiss it with costs. Parties are advised to comply with order 11 and set this suit down for hearing.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2022.

N.A. MATHEKA

JUDGE

