



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Sajun Limited v Kinyale & 5 others (Environment & Land Case
195 of 2021) [2022] KEELC 13717 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 195 OF 2021
NA MATHEKA, J
OCTOBER 25, 2022**

BETWEEN

SAJUN LIMITED APPLICANT

AND

ROY ROD KINYALE 1ST RESPONDENT

PAPELLOINVESTMENTS LIMITED 2ND RESPONDENT

REGISTRAR OF TITLES, MOMBASA 3RD RESPONDENT

DIRECTOR OF SURVEYS 4TH RESPONDENT

COUNTY GOVERNMENT OF KILIFI 5TH RESPONDENT

NATIONAL LAND COMMISSION 6TH RESPONDENT

RULING

1. The application is dated January 18, 2022 and is brought under Section IA, 1B, Section 3A of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 of the *Civil Procedure Rules*, Articles 27 (1) and 50 (1) of *the Constitution* seeking the following orders;
 1. That this Honourable Court be pleased to certify this application as urgent and the same be heard ex-parte in the first instance,
 2. That the honorable court be pleased to consolidate Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others with the present suit.
 3. That this court be pleased to set aside the judgement in Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others;



4. That the 1st and 2nd Respondent's defense dated September 28, 2009 in Mombasa I-ICC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others be reinstated.
 5. That pending the inter-parties hearing and determination of this application, this Honorable Court be pleased to issue order of injunction restraining the Plaintiff by themselves, their agents and or employees from in any manner interfering with the suit property being LR. MN/ 111/12214, MN/ 111/12215 and MN/ 111/12216 (previously known as MN/ 111/3348).
 6. That pending the inter-parties hearing and determination of this suit, this Honorable Court be pleased to issue an order of injunction restraining the Plaintiff by themselves, their agents and or employees from in any manner interfering with the suit property being LR. MN/ 111/12214, MN/ 111/12215 and MN/ 111/12216 (previously known as MN/111/3348).
 7. That the costs of this application be provided for.
2. It is based on the following grounds that the instant proceedings by the 1st and 2nd Respondents relate to a parcel of land known as LR. MN/ 111/12214, MN/ 111/12215 and MN/ 111/12216 (previously known as MN/ 111/3348. That the Plaintiff is seeking the following order as against the Respondents herein:- A declaration be and is hereby made and issued that the subdivision of the property known as L.R. No. MN/111/3348 by the Defendants into subdivisions numbers L.R. No. MN/111/12214, L.R. No. 12215 and L.R. No. MN/111/12216 and/or into any other subdivisions is null and void and of no legal consequence. An order of mandatory injunction be and is hereby issued directing the Registrar of Titles, Mombasa to cancel the titles numbers L.R. No. MN/111/12214, L.R. No. 12215 and No. L.R. No. MN/111/12216 and to remove the same from the Register within fourteen (14) days of this order. An order of mandatory injunction be and is hereby issued directing the Director of Surveys to cancel the Deed Plan Numbers 441054, 441055 and 441056 registered under Survey Plan No. 646/176 and to restore the property known L.R. No. MN/111/3348 into the official map and back to its original status within fourteen (14) days of this order. An order of permanent injunction be and is hereby issued restraining the Defendants, either by themselves or through their agents, assigns, attorneys, representatives, employees, officers, or any person authorized by and/or acting for the Defendants from subdividing, selling, transferring, leasing, charging, accessing, occupying, trespassing on, using or in any other manner interfering with the property known as L.R. No. MN/II 1/3348. A declaration be and is hereby made that any action taken or acts done by the 1st and 2nd Defendants in respect of the property known as L.R. No. MN/111/3348 including any development, construction, lease, charge and transfer thereof is null and void and of no legal consequence.
3. That the 1st and 2nd Respondents are the actual proprietors of the suit property by virtue of a grant issued to them vide an allotment letter dated April 1, 1991. This is the reason why the 3rd to 6th Respondents allowed the sub-division of the same since the Plaintiff has no file legitimate title to the land and its records do not exist in the database. That the Suit property has been the subject of another litigation being Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others. That the 1st and 2nd Respondent herein were until two weeks ago not aware at all of judgement in Mombasa HCCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others and the applicant's alleged Interest in the suit property. That the 1st and 2nd Respondent have been waiting for their day in court day and were shocked to see the attached judgement herein. In fact the Respondents are shocked at the turn of events as they were never informed by their advocate of the existence of a judgment or that the defense was struck out in the Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others. That upon being served, the 1st and 2nd Respondents hired counsel who prepared and filed a defense dated the September 28, 2009. That had the Respondents been made aware of the striking out of their defense, they would have acted upon it. That nonetheless,



the present suit has reopened this matter to litigation and the only way for the court to find out the true position as to ownership is to first set aside the judgement dated the June 29, 2012 by Hon. Edward M. Muriithi (Judge) consolidate the two suits and allow the Respondents an opportunity to provide a robust defense to the suit. That with the above information, it is only fair that the judgment in Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others be set aside and the Respondents defense be allowed. That the proceedings initiated by the Applicant herein have a bearing on the 1st and 2nd Respondents rights over the suit property and also have a bearing on the two matters. That for the expedient delivery of justice, it is only fair that this present lawsuit and Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others be consolidated. That as at the time the Plaintiff purports to have acquired the suit property, as alluded to by the court in its judgement, there was a subsisting allotment letter issued on the April 1, 1991, a whole 5 years before the Plaintiffs alleged allotment. That the Plaintiff has not disclosed all these facts to this honorable court and yet matters land being emotive have grave repercussions, the court ought to give the 1st and 2nd Respondent an opportunity to present their facts and documents against those presented by the Plaintiff and decided based on merit and not mere technicalities. That the instant proceedings are nothing but a backdoor attempt by the Plaintiff to solidify and to sanitize its attempts to fraudulently secure ownership of the suit property. That the Plaintiff is attempting to legitimize an outright illegality. That no prejudice will be occasioned if the orders sought are granted.

4. This court has considered the application and the submissions therein. On the issue of consolidation the Supreme Court in *Law Society of Kenya vs Centre for Human Rights & Democracy & 12 others* (2014) eKLR held that;

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. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the Respondents if consolidation is ordered as prayed.”

5. The applicant seeks to have Mombasa HCC Case No. 289 of 2009; Sajun Limited vs the Attorney General & 2 Others consolidated with the present suit. It has been established that Mombasa HCCC 289 of 2009, was filed in the High Court before this court was established, the suit was heard and judgement delivered by Muriithi J on June 29, 2012. Consolidation is a process by which two or more causes are combined by an order of court into one cause. The jurisdiction to consolidate arises where it appears to court that some common questions of law or facts arises in both suits or the cause of action arise out of the same transaction. Consolidation cannot occur where one suit is heard, determined and judgement delivered. Consolidation is meant to enable court meet its overriding objective as envisioned in Section 1A of the *Civil Procedure Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. The prayer of consolidation as prayed by the 1st and 2nd defendants does not further expeditious disposal of cases and also does not enable court meet its overriding objective and is denied.
6. On the issue of setting aside the judgement in Mombasa HCCC No. 289 of 2009 and reinstatement of a defence. Article 162 (2)(b) of *the Constitution* establishes this court as a specialized court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to, land. This court and its judges are bound to the specific jurisdiction given to it by *the Constitution* and Section 13 of the *ELC Act*. Before the creation of this court land matters



were heard by the High Court, after the court was created and it became operational land cases were transferred into this court. It seems that HCCC No. 289 of 2009 was not transferred into this Court and was heard to its finality by at the High Court. Despite this court being clothed by jurisdiction to hear and determine land disputes, this Court has neither original nor appellate jurisdiction to review the judgement which is of a superior court. In the case of Karisa Chengo & 2 others vs Republic (2015) eKLR, the Court of Appeal held that;

to our minds, by using the words, ‘with the status of the high court’ is clear that the high court is not higher in hierarchy than the ELRC and ELC; these are courts of equal rank. By being of equal status, the high court therefore does not have jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the say however, ELRC and ELC are not the high court and vice versa.”

7. This Court cannot therefore set aside, stay and/or review the judgement in HCCC 289 of 2012. The court lacks jurisdiction to set aside the decision of the High Court that was delivered in HCCC 289 of 2012 on June 29, 2012.

On the issue of interlocutory injunction, the law governing the relief of temporary injunction is Order 40 Rule 2 (1) of the Civil Procedure Rules, which states that:-

In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

8. It is clear to the court that the relief of temporary injunction pending the hearing and determination of a suit is only available to a Plaintiff against a defendant. Upon perusal of the Court file I find no defence with a counterclaim from the 1st and 2nd defendants that would warrant them to be Plaintiffs in the counterclaim. In Elizabeth Mumbi vs Timothy Kimani Muigai & 2 others (2015) eKLR, the court held that;

This Court has considered the 3rd defendant’s statement of defence and note that it did not file a counterclaim. Had he filed a counterclaim which meant that he had a claim against the Plaintiff, he would be entitled to apply for temporary orders of injunction to preserve the suit property pending the heading and determination of the suit. Since the applicant/3rd Defendant has no counterclaim the orders sought in the application dated 28th January 2013 are not available.”

9. The Court finds that the 1st and 2nd Defendants have not filed a counterclaim against the Plaintiff that would invoke Order 40 Rule 2 of the Civil Procedure Rules to preserve the suit property. The Defendants have not established a *prima facie* case to warrant the grant of an injunction. Having now considered the application and the prayers sought therein, I find the Notice of Motion dated January 18, 2022 is devoid of merit and is dismissed with costs to the Plaintiff and the 6th Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2022.

N.A. MATHEKA



JUDGE

