



**Munga & 2 others (and as named in schedule 1 annexed hereto 89 others)
v Patel & 5 others (Environmental and Land Originating Summons
E006 of 2021) [2022] KEELC 14617 (KLR) (14 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2021
AE DENA, J
OCTOBER 14, 2022**

BETWEEN

**JAPHET MALAU MUNGA 1ST PLAINTIFF
SAMTI WAZAMA JOHA 2ND PLAINTIFF
JUMAPILI BECHOMBO KALA 3RD PLAINTIFF
AND AS NAMED IN SCHEDULE 1 ANNEXED HERETO 89 OTHERS**

AND

**COLFAX HOLDINGS LIMITED 1ST DEFENDANT
MEGJI NANJI PATEL 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT
MINISTRY OF INTERIOR 4TH DEFENDANT
MINISTRY OF LAND AND PHYSICAL PLANNING 5TH DEFENDANT
NATIONAL LAND COMMISSION 6TH DEFENDANT**

RULING

Background

1. The suit herein was commenced by way of Originating Summons by the plaintiffs on behalf of the residents of Mwamdudu. The Plaintiffs filed the present application on November 12, 2021 under Certificate of Urgency for orders;

a. Spent



- b. Spent
 - c. That pending the hearing and determination of the plaintiffs suit a temporary injunction be issued restraining the Defendants/Respondents by themselves and/or through their officers or agents from entering upon, transferring, leasing, dealing with and/or in any manner interfering with the Plaintiffs/Applicants occupation of the suit land.
 - d. That the 1st & 2nd Defendants/Respondents be ordered to restrain from harassing, threaten, or interfering with the Plaintiffs/Applicants harmony and enjoyment in the land.
 - e. That the OCS Taru Police Station ensures status quo is maintained
 - f. That the court be pleased to grant any other or further relief that may be necessary to meet the ends of justice.
2. The application is premised upon grounds on its face and which state that the 1st and 2nd Defendants were purporting to evict the indigenous residents using an unlawful claim of the Title Mwamdudu 913 comprising over 43.5 Acres. That the impending eviction of the parties on the suit property will lead to huge losses as already a huge portion of the land was affected by national projects. The Plaintiffs claim that they are the rightful owners of the property by way of adverse possession and that the 1st and 2nd Defendants have no good title over the property. That the attempt to evict them was therefore unlawful and illegal and will occasion a huge humanitarian crisis, irreparable loss and suffering and probably death.
 3. The application is further supported by several affidavits key among them one sworn by Japhet Malau Munga who states it is sworn on the authority of the rest of the plaintiffs. It is averred that together with the rest of the plaintiffs he was born and lived openly, continuous, uninterrupted in the suit property where his grandfather and father were buried over 20 years ago. That their claim for adverse possession has crystallised thus extinguishing the 2nd defendants title.
 4. It is further deponed that on different dates the representatives of the 4th defendant called for a meeting threatening eviction of the occupants of the land in the event that they failed to accept compensation from the 1st defendant vide his agent the 2nd defendant. That the 1st defendant and officers have continuously used the public administration to harass and intimidate everyone and might make true the eviction threat and hence cause destruction worth millions.
 5. The rest of the affidavits are sworn by Samti Wazama Joha, Saidi Dzombo Marera and Jumapili Bechombo Kala most of them averring they have lived on the suit property and that the intended eviction will cost them very heavily.

Response

6. In response to the application, the 1st and 2nd Defendants filed a replying affidavit sworn by Harji Govind Ruda on authority of the 1st defendant vide a special power of attorney which was annexed. It is deponed he is the registered owner of title no CR 7553[Plot No MN/VI/913 having been in possession of the certificate of title to the same] issued since 1924. He avers that the Plaintiffs have failed to demonstrate what specific area of the land is occupied by them. That they have further failed to state the local government institutions in occupation of the land. It is stated that the plaintiffs occupy a very small part of the suit property being 1.18 acres out of the 43.5 acres and not the area depicted in the sketch filed among their documents.



7. It is averred that the Plaintiffs started invading the suit property from the year 2006 as evidenced from the satellite imaging maps and as such their claim for adverse possession could not be sustained. Further that the true status of the actual people who are legitimately residing on the suit property cannot be verified at the interlocutory stage. It is also averred that fourteen households had shown the desire to relocate from the suit property pending negotiations between them and the 1st Defendant.
8. It is deponed that the eviction claims were untrue and which the 1st and 2nd Defendants were unaware. That it is the Plaintiffs who were depriving them of the use of their property. The court is asked to dismiss the application together with the originating summons subject of this suit.
9. The application was canvassed by way of written submissions which the parties exchanged. It is noteworthy that the 3rd, 4th and 5th Respondents despite entering appearance through the office of the Attorney General by state counsel Mrs Mvoi did not participate in this application. The 6th Defendant has not filed any pleadings in response to the application.

Plaintiffs/Applicants Submissions

10. Relying on the case of *Noor Mohamed Virji Vs Jan Mohamed V Kassamali Madhani* [20 EAC8] it is submitted that in determining whether *status quo* herein should be maintained, the court should give due regard to the balance of convenience and the extent to which an award of payment of damages may cure the damage that could occur in the event that *status quo* is not maintained. It is submitted that the Plaintiffs have been in occupation of the suit land for generations and that no amount of money may adequately compensate them in case of an eviction.
11. The Plaintiffs also submit that they have met the three main principles for the granting of an interlocutory injunction as stated in *East African Industries Ltd V Trufoods Ltd* [1972] EA 420 as was reiterated in *Giella Vs Cassman Brown*. It is submitted that since the Plaintiffs have been in peaceful occupation of the suit property for generations this entitles them to adverse possession. That they were bound to suffer irreparable loss and harm in the event that the eviction threats were made good and that the balance of convenience was in their favour.
12. The plaintiffs further submitted on the adverse possession doctrine and stated that they had met the threshold of being granted the suit land as they had been in occupation of the suit land openly, uninterrupted for more than 12 years. The Plaintiffs seek for orders that the OCS Taru Police Station ensures that the status quo is maintained.

1st and 2nd Respondents Submissions

13. The 1st and 2nd respondent's submissions were filed on 16/5/2022. It is submitted that the applicants had not established a prima facie case with a probability of success since the plaintiffs did not have a registered title in proof of ownership of the suit property and that most of the plaintiffs claiming ownership by dint of adverse possession were not bonafide candidates for the same as they had taken occupation on the suit land recently. Relying on an excerpt from the case *Geoffrey Kiania Kamwara Vs Mwikamba Kagembe* [2021] eKLR where the court while preventing the eviction of the plaintiffs from the property pending hearing and determination of the suit gave the respondents continued access of the land. Reliance was also placed in the case of *Mzee Wevi Versus Thomas Njeru Nthuni* [2021] eKLR. The court is urged to allow the 1st defendant access to his land as registered owner pending a determination of the claim for adverse possession at the full hearing.
14. It was further submitted that the applicants had failed to demonstrate they will suffer any irreparable harm in the event that the orders sought were not granted since their allegations had not been



substantiated by any evidence. Reliance is placed in the case of *Christopher Menge Kiyaka & Another Vs FMM* [2020] eKLR where the court held that it is imperative for a party to demonstrate the irreparable harm they stood to suffer.

15. Additionally, it was contended that the plaintiffs having failed to establish a prima facie case and the anticipated harm to be suffered in the absence of the orders sought the balance of convenience does not tilt in their favour. The court was urged to dismiss the applicants application with costs.

Determination

16. I have considered the application, the response and submissions. I have also considered the authorities relied on by the respective parties. It is also worth mentioning that at the first instance of being filed, the application was certified urgent and orders issued to the effect that the status quo on the suit property be maintained.
17. The issue for determination in my view is whether the orders sought by applicants should be granted. The orders are being sought under section 1A, 1B, 3A and 22 of the *Civil Procedure Act*, Sections 152 A-F of the *Land Act*, Sections 7, 17 and 38 of the *Limitations of Actions Act*, Order 22 of the *Civil Procedure Rules* and all enabling provisions of the law. Sections 152 A-F of the *Land Act* 2012 are in respect to eviction of unlawful occupiers of both public and private land, provisions as to notice and how it should be effected. A person aggrieved by such notice upon service may apply to court under 152(F) for relief and the court after considering the provisions has the jurisdiction to uphold, cancel, rectify and suspend the notice inter alia. The notice envisaged is a written notice. In the present application no written notice has been presented. The eviction is alleged to be an impending eviction pursuant to a threat. A threat is not a notice for purpose of section 152 of the Act.
18. The applicants dwelt at length on adverse possession and I will state at the outset that at this stage a determination of the same is not on the table. This could have been the basis upon which Sections 7, 17 and 38 of the *Limitations of Actions Act* were cited. It is premature and has to await a conclusive determination after both parties have ventilated their claims at a full hearing. I will therefore invoke the other remaining provisions in the interest of substantive justice and the overriding objectives of the Act. This notwithstanding I will still be guided by the established principles in considering the orders sought.
19. The applicants seek orders of injunction. The conditions for consideration in granting an injunction are now well settled in the celebrated case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself as follows: -

“First, 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”

Whether plaintiff has established a prima facie case with a probability of success?



20. A prima facie case was defined in *Mrao Ltd Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C Mubia Njoroge & 2 others Vs Jane W Lesaloi and 5 others*, (2014) eKLR, where the Court of Appeal stated thus:-

“ 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”.

21. The plaintiffs have stated in their affidavits that they were born and have lived on the suit property their ages ranging from 50 years onwards. They also state that their fathers and grandfathers have also lived and were buried on the suit property. Part of their documents include reports outlining their history and which demonstrate from when their grandfathers and community leaders started agitating for the allocation of the suit property as far back as 1965. The respondent state that many of the applicants started entering the land in the year 2006 and attached google map photos showing the settlements therein which appear to have progressively increased over time since then. It is therefore not in dispute that there are people in the suit property who are laying an interest in the same. The extent of their occupation, when and how they came into the suit property is again a matter to be decided at the hearing. At this stage the court must not get into the merits of the case and regardless of whether the opponent holds a title to the property. The Plaintiff have in my view established a prima facie case with a probability of success.
22. The above however is not sufficient for the orders sought to be granted. The applicants must establish that they will suffer irreparable injury which cannot be compensated by damages unless a temporary injunction is granted. The application is based on threats of an impending eviction which has not been supported by any documentary evidence except depositions that a meeting was called by the 4th defendant working with the respondent’s agent where they were threatened. Others were use of public administration to harass and intimidate the applicants. They claim that were the threats to be actualised it will cause destruction worth millions without any supporting evidence. The 1st and 2nd defendants have stated that they have been keen on compensating parties that will be asked to vacate from the land. It is their evidence that so far, they have set in motion discussions with over 14 families as to sufficient compensation. The letter by the Assistant County Commissioner Kasemeni Division dated December 20, 2021 indicates that indeed there has been talks with a view of resettlement. A list of the parties that have agreed to be compensated is also attached to the said letter. From the material placed before this court it is my view that the plaintiff has not satisfied this criterion.
23. The most pressing relief that necessitated the present application was in my view to forestall any intended eviction of the applicants by the 1st and 2nd Respondents. Both parties have acknowledged that a specific part of the suit property is occupied by the applicants. This court will be inclined to agree that there should be no eviction. The 1st and 2nd defendants are ready and willing to give an undertaking that the structures set up currently on the suit property will not be interfered with as long as no new structures will be put up by the inhabitants pending the hearing and determination of the suit. But the plaintiff wants the status quo to be maintained and which from the submission appear to me to capture a wider scope considering the respondents concern that it would be prejudicial to issue prayers for status quo on the whole suit property as the same will not only interfere with the plaintiffs right to protection of their land but also put a stop to development of the vast areas of land which are unoccupied by the plaintiffs. Nothing has been presented as proof of the intended developments and their imminence and the best this court can do in the circumstances will be to expedite this case.



24. The upshot of the foregoing is the following orders shall issue to dispose of the application dated November 12, 2021; -

1. The 1st and 2nd Defendants are hereby restrained from evicting the applicants from the suit property [Title No CR 7553[Plot No MN/VI/913] or demolishing their houses as per the satellite map annexed to the defendants affidavit indicating their occupation pending the hearing and determination of this suit.
2. An order of inhibition is hereby granted barring the applicants by themselves, their agents or assignees from making any new and further developments on the suit property [Title No CR 7553[Plot No MN/VI/913] pending the hearing and determination of this suit.
3. That this matter be heard on priority basis.
4. Costs of the application be in the cause.

It is so ordered.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 14TH DAY OF OCTOBER ,2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff /Applicants

Borona for 1st and 2nd Respondents for the 1st and 2nd Defendants.

Mwandeje for AG

Mr. Denis Mwakina- Court Assistant.

