



**Said Kalandoni Kagine & 75 others v Patrick Mwaniki Rundi & 5 others (Environment & Land Case E009 of 2022) [2022] KEELC 14533 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14533 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E009 OF 2022  
AE DENA, J  
OCTOBER 13, 2022**

**BETWEEN**  
**SAID KALANDONI KAGINE & 75 OTHERS ..... PLAINTIFF**  
**AND**  
**PATRICK MWANIKI RUNDI & 5 OTHERS ..... DEFENDANT**

**RULING**

**The Application**

1. In the Notice of Motion dated 2/3/2022, the Plaintiff/Applicants seek the following verbatim orders;
  - a. Spent
  - b. That this honourable court may be pleased to issue temporary injunction restraining the respondents by themselves, their servants, agents, employees and/or any persons acting for them from trespassing, cultivating, occupying, construction, alienating and/or in any way interfering with the applicant's occupation of unsurveyed parcel of land situate in Mackinon Road Samburu measuring approximately 500 acres pending hearing and determination of this application.
  - c. That this honourable court may be pleased to issue temporary injunction restraining the respondents by themselves, their servants, agents, employees and/or any persons acting for them from trespassing, cultivating, occupying, construction, alienating and/or in any way interfering with the applicant's occupation of unsurveyed parcel of land situate in Mackinon Road Samburu measuring approximately 500 acres pending hearing and determination of this suit.
  - d. That costs of this application be provided for.



2. The application is based on grounds as listed on its face and the annexed affidavit of Lamayani Said Kagine. It is averred that the applicants are the legal and beneficial owners of the land situate at Mackinon Road Samburu measuring 500 Acres (suit property). That the same was purchased by the 2<sup>nd</sup> applicant and one Said Kadadile in the year 2005. That the applicants have been residing on the suit property and have put up their homes thereon. It is stated that sometime in the year 2020 a dispute arose between the applicants and respondents which was heard and several decisions made by the local authorities.
3. It is deponed that in the year 2020 a dispute arose between the parties herein where the Chief found in favour of the applicants. Aggrieved by the said decision, the respondents reported the matter to the Assistant County Commissioner and Deputy County Commissioner who upheld the earlier decision. It is averred that the respondents later mischievously obtained a contrary decision in their favour from the Deputy County Commissioners office. Following this they were now trespassing on the suit property including cultivation prompting the present application.

### **The Response**

4. The respondents filed a replying affidavit sworn by Dickson Mzungu the 3<sup>rd</sup> Respondent averring the application is an attempt to deny them their constitutional rights to property and quiet enjoyment of the same. That in 2006 the Land Disputes Tribunal in a dispute pitting the respondents and the Ngoka family who allegedly sold the land to the applicants, entered judgement in favour of the respondents. That the decision of the tribunal was final as the same has never been appealed against. That instead of appealing the decision or claiming a refund of the consideration from the said vendors, the applicants had resorted to harassing the respondents.
5. It is also claimed that the applicants had initially filed a suit over the suit property which they abandoned. The respondents aver they have suffered great loss and prejudice by the injunction issued by the court on 21/3/2022. That the orders were issued without full disclosure of material facts and hence the instant application is misconceived and unmeritorious.

### **Submissions**

#### **Applicants submissions**

6. Counsel for the applicants placed reliance on the case of *Giella Versus Cassman Brown Co Ltd* [1973] EA 358 on the conditions for an interlocutory injunction to be granted. On whether the applicants have a prima facie case, Counsel submitted that the dispute is over an unsurveyed parcel of land which was bought by the applicants from one Mzee Chikoko Ngoka in the year 2005. That the applicants took occupation of the land and have been peacefully living on the same.
7. The applicants submit that the respondents have not demonstrated how they came into possession of the suit property and the origin of their ownership. That from the proceedings of the Divisional Land Dispute Tribunal and which are relied upon by the respondents, it is unclear of how one Masai Kimonge acquired the suit land. It is also stated that the proceedings at the tribunal were full of inconsistencies and the evidence was therefore unreliable. It is stated that the said Mr Kimonge did not own the disputed land and neither do the respondents.
8. It is the Applicants submission that the decision by the area chief was that the suit parcel belongs to the Waphande and which is the Chikoko Ngoka family. That from the decision the land was not sold to the Kimonge family but to Ngoka family. The said decision was further re-affirmed by the Assistant County Commissioner and later the Deputy County Commissioner. That the respondents went back



to the office of the Deputy County Commissioner months later and procured a contradicting decision in their favour. From the facts as outlined by the applicants it is submitted that they have established a prima facie case.

9. On whether the applicant will suffer irreparable injury which would not be adequately compensated by an award of damages, it is submitted that the applicants being a clan made up of different families have built their homes and cultivated the land and have livestock grazing on the said land. They state that they face the imminent exposure of being evicted from the land or have the respondents being registered as allottees of the same. Reliance is placed on the holding in *Samuel Chege Gitau Versus Joseph Gicheru* NBI ELC 1245 of 2014. The Applicants concluded their submissions by stating they had established a prima facie case to warrant the orders for injunction as prayed as the same will serve to preserve the suit property and the suit from being rendered nugatory as was held in *Robert Mugo Wa Karanja versus Eco Bank[Kenya] Ltd & Another* [2019] eKLR.

### **Respondents Submissions.**

10. The Respondents filed their submissions on 10/6/2022 and submitted that the sale agreements dated 7/11/2005 and December 14, 2005 as relied upon by the applicants were entered into at the time when the dispute over the suit property was at its peak. That the Land Dispute Tribunal later made its finding in a judgement dated 20/7/2006. That the sale was simply an unsuccessful effort to defeat the respondent's interest over the suit property. It is the respondent's submission that the applicants are prone to abusing the court process as they had previously filed Mariakani Civil Suit No 386 of 2015 over the suit property. That the present proceedings were actuated by malice and are an abuse of the court process.
11. It is urged that the respondent's family that of Maasai Kimonge have never owned the suit property. The allegations claimed to be falsified are listed under paragraph 14 of the submissions. It is submitted that the applicants lack locus to institute the suit as well as the application since they have not demonstrated their interest on the suit property. Citing the holding in *Law Society of Kenya versus Commissioner of Land & 2 Others* [2001] eKLR the court is urged to deny the applicants audience.
12. It is also submitted that the applicants suit offended the nemo dat quod non habet rule which means that one cannot purport to sale that which does not belong to them. The applicants have failed to prove ownership of the suit property as the only acquisition of the suit property is the purported land sale agreement which does not state which parcel was being sold and who the land belonged to. Reliance was placed in *Diamond Trust Bank Kenya Ltd Versus Said Hamad Shamisi & 2 Others* [2015] eKLR. That no legal right or remedy can flow from illegal act as was held in *Munyu Maina Versus Haram Gathiba Maina* [2013] eKLR and *Daudi Kiptugen Versus Commissioner of Lands & 4 Others* [2015] eKLR.
13. It is submitted that the plaintiffs have failed to submit evidence that can warrant grant of a prima facie case and which will meet the threshold for grant of the orders sought as was held in *Giella Versus Cassman Brown & Co Ltd* [1978] EA 358. That it has not been demonstrated they will suffer any irreparable damage if the interlocutory injunction is not granted. The respondents pray that the application is dismissed with costs.

### **Analysis And Determination**

14. The facts of this suit are straightforward, both parties herein claim ownership of the suit property. It is trite that when seeking to establish ownership of unregistered land, it is proper to trace its ownership history. This was aptly put in *Caroline Awinja Ochieng & Another Versus Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR. Each side of the divide has presented their case stating the history of how they



came to have an interest in the property, the applicants by dint of an alleged sale agreement and the respondents by dint of a decision of the Land Disputes Tribunal. From the facts and material presented before court and without getting into the merits of the case it may not be possible to convince the court as to which party is the rightful owner of the suit property and is entitled to grant or denial of the orders sought. The evidence placed before court needs further interrogation through hearing of the parties and their witnesses viva voce.

15. As it stands the ownership of the land was conferred on the respondents by the Land Disputes Tribunal. It is clear that the said decision has not been appealed against but neither has it been adopted as an order of court as provided by the law. The dispute herein has been protracted over the years despite the continued habitation of the suit property. It is also clear that both parties are in occupation of the suit property on different areas of the same as per their developments thereon. The genesis of the dispute is the occupation of the Maasai in the year 1992 as gathered from the pleadings. Their occupation led to wrangles between the Kimonge and Chikoko families and which has escalated to the present suit.
16. To grant the orders sought would mean that the respondents are barred from using the suit property and stopped from carrying out their activities as was previously. This court is not convinced that in the circumstances stated there is need to grant the orders sought. I will be inclined towards finding a compromise that will secure the interests of both parties. Of importance would also be the need to preserve the substratum of the subject matter and to prevent prejudice between parties pending the determination of who is the bonafide owner of the suit property.
17. I will therefore invoke this courts inherent powers as given by section 3A of the *Civil Procedure Act* to grant such orders that will meet the ends of justice. To maintain the *status quo*. I will be guided by the dictum in *TSS Spinning & Weaving Company Ltd Vs NIC Bank Limited & another* [2020] e KLR, where the court stated; -

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”
18. Further in *Kenya Airline Pilots Association (KALPA) vs Co-operative Bank of Kenya Limited & another* [2020] e KLR, the purpose of a status quo order was explained as follows:
  - i. “..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”
19. The upshot is that it is hereby ordered that the *status quo* shall be maintained and there shall be no alienation of the suit property pending the hearing and determination of this case. Costs shall follow the event.

It is so ordered.

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022**

**A.E. DENA**

**JUDGE**



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

Mr. Shimaka for the Plaintiff /Applicants

Ms. Lenjo for the Defendants/Respondent

Mr. Denis Mwakina- Court Assistant.

