



Pavedar Limited v Matheri & 2 others; Kwale Cement Factory Limited & another (Interested Parties) (Environment & Land Case 138 of 2021) [2022] KEELC 14773 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 138 OF 2021
AE DENA, J
NOVEMBER 16, 2022
(FORMERLY MOMBASA ELC CASE NO.157 OF 2021)**

BETWEEN

PAVEDAR LIMITED PLAINTIFF

AND

STEPHEN CHEGE MATHERI 1ST DEFENDANT

DORCAS WANJIKU CHEGE 2ND DEFENDANT

LAND REGISTRAR KWALE DISTRICT 3RD DEFENDANT

AND

KWALE CEMENT FACTORY LIMITED INTERESTED PARTY

AFRICAN BANKING CORPORATION LIMITED INTERESTED PARTY

RULING

1. The plaintiff together with the plaintiff herein filed an application dated 12/08/21.
 - a. Spent
 - b. Pending inter partes hearing and determination of this application, this Honorable court be pleased to issue a conservatory order against the respondents, their servants, officers, employees, agents and or assigns from howsoever selling, alienating, trespassing onto, dealing with, evicting and or in any other manner whatsoever interfering with the plaintiff's occupation and use of the property known as title Kwale/Shimoni Adj./280 measuring 20.62 hectares situated in Kwale County.



- c. Pending the hearing and determination of this suit, this Honorable court be pleased to issue a conservatory order against the respondents, their servants, officers, employees, agents and or assigns from howsoever selling, alienating, trespassing onto, dealing with, evicting and or in any other manner whatsoever interfering with the plaintiff's occupation and use of the property known as title Kwale/Shimoni Adj./280 measuring 20.62 hectares situated in Kwale County.
 - d. In the alternative to prayer 3 above, pending hearing and determination of this suit, this Honorable court be pleased to issue an interim injunction against the respondents, their servants, officers, employees, agents and or assigns from howsoever selling, alienating, trespassing onto, dealing with, evicting and or in any other manner whatsoever interfering with the plaintiffs occupation and use of the property known as title Kwale/Shimoni Adj./280 measuring 20.62 hectares situated in Kwale County.
 - e. Costs of this application be provided for.
2. The application is supported by the affidavit sworn by Mumbi Ngethe Waweru the plaintiffs sole director. It is averred that the plaintiff is the bona fide legitimate beneficial owner of Kwale/Shimoni Adj./280 (suit property) having purchased the same from the 2nd interested party through statutory power of sale by private treaty following default of financing arrangements by the 1st interested party. That ownership of the 1st interested party who was the 2nd registered proprietor of the suit property and charge to the 2nd interested party were confirmed through official searches on the suit property. Further that the first registered proprietor was Kassim Mzee Mwavumo on 9/4/2002.
 3. It is stated that it is on the strength of the above information confirmed from the green cards that the plaintiff negotiated by private treaty two sale agreements dated 20/1/2021 in purchase of the suit property and its limestone deposits following default by the 1st defendant on the obligations under the charge. That before transfer of the suit property to the plaintiff it emerged that the 1st and 2nd interested parties claimed through their lawyers to be the genuine owners of the suit property. That pursuant to these claims the 3rd defendant lodged a restriction which was an infringement of the plaintiffs right to property.
 4. Additionally it is averred that the 1st and 2nd defendants claim on the suit property and attendant supporting documents were patently fraudulent and irregular consequently their title thereof is illegal null and void ab initio. That pursuant to section 143 of the RLA the plaintiffs interest emanates from the Kassim Mwavumo's 1st registration which was unimpeachable except on grounds of fraud which are denied by the plaintiff. It is stated that following discovery of the fraudulent titles the plaintiff reported the same to the DCI and investigations were ongoing with no indications as to completion.
 5. The plaintiff being in occupation is apprehensive that its right to property will continue to be infringed and threatened by the defendants. The plaintiff intends to immediately commence limestone mining and cement manufacturing to start reaping from the benefits of purchasing the land.

Response

6. The 1st and 2nd respondents opposed the application through the affidavit sworn by the 1st defendant. They claim to be the joint registered proprietors of the suit property following purchase before adjudication (1980- 1982) from various people who lived on the property. That upon adjudication all the parcels were consolidated into the suit property herein and title deed issued on 8/5/2009. That since the joint registration they have never sold the property. That to date the adjudication records confirm they are the initial allottees with no mention of the said Kassim Mwavumo. It is contended that the plaintiff has failed to establish a nexus to the suit property making the suit a nullity ab initio. That



since purchase the 1st defendants have been in physical possession. That the 1st interested party never acquired good title from Kassim Mwavumo who had acquired his title fraudulently through collusion with the corrupt officers at the lands registry by interfering with the register. That the plaintiff has never been in possession and the interim orders of 17/8/21 were based on material non-disclosure. The defendant's claims that if the interim orders are not vacated they will suffer irreparable financial loss which the plaintiff will not be able to compensate.

7. The 2nd interested party opposed the application through the affidavit of Kajuju Marete its legal manager. She narrated the background on the loan facility (Kshs. 250,000,000/=) to the 1st interested party culminating into the registration of a charge against the suit property registered in the 1st interested party's name, subsequent default thereof, exercise of statutory power of sale, emergence of the 1st and 2nd defendant's claims on the suit property before transfer to the plaintiffs and the registration by the 3rd defendant of restriction pursuant to these claims. It is stated that the exercise of statutory power of sale by the 2nd interested party was premised by legitimacy established through a lawful process with no fraud attributable to the 2nd interested party. According to the 2nd interested party the plaintiff is the legal and beneficial owner of the suit property pursuant to the legitimate/lawful sale agreements dated 20/01/2021. That the claims by the 1st and 2nd defendant remained foreign to the 2nd interested party who is only aware of the certificate of title in the name of the 1st interested party presented during the financing transaction. It is stated the plaintiff is in possession and the only pending issue was the registration of the legal transfer by chargee.

Submissions

8. The application was canvassed by way of written submissions which the parties exchanged I have considered the same in my determination of this application.

Analysis and Determination

9. Having considered the application, the responses, the evidence placed before the court and submissions of the parties, I see the main issue for determination as whether the plaintiffs have met the requirements for grant of the reliefs sought in the application dated 12/08/22. In determining this and specifically in respect of the prayer for conservatory orders I will be guided by the following dictum in *Platinum Distillers Limited v Kenya Revenue Authority* [2019] eKLR where the court stated thus; -

“The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant. 9. The tenor, import and scope of a conservatory order was highlighted by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”



10. From the foregoing, the applicant is firstly expected to demonstrate a prima facie case like in the test for grant of injunction with probability of success and this is not necessarily a case which must succeed at the judgement stage. I will therefore not spend so much time into analysis lest I delve into the merits of the case which must await the hearing. The plaintiff in support of his claim has presented evidence supporting the fact that they bought the property through a private treaty with the 2nd interested party and has annexed to the supporting affidavit a copy of title deed registered in the name of the 1st Defendant Kwale Cement Factory Limited and copy of green card for the same showing the charge to African Banking Corporation the 2nd Interested Party. This information is supported by a copy of official search also attached and further corroborated by the Banks Legal Manager who annexes the same documents and sets out how the transaction was undertaken. What was remaining was only the registration of the transfer in favor of the plaintiff, which was hampered by the restriction herein. Without belaboring the point, I find that the plaintiff has demonstrated a prima facie case with a likelihood of success. At this stage the impeachment of the 1st interested party's title, or even that of Mr. Mwavumo and whether the charge was valid or not is immaterial until the hearing and determination on merit. But is this enough?
11. Having found that the applicant has established a prima facie case the next step is to determine whether denial of conservatory orders will prejudice the applicant. It is plaintiffs' case the 3rd defendant lodged a restriction on the title effectively preventing them from using the property including the registration of the transfer herein which was an infringement of the plaintiffs right to property under Article 40 of *the Constitution*. On the other hand, the defendants have also demonstrated they hold title to the property and have displayed their evidence in support of how they purchased the property before adjudication, the position of the adjudication register bearing their names and issuance of title deed in their joint names. They also claim to be in possession as earlier stated for over 30 years doing bee keeping, dug a well and constructed structures for farm employees. Photos were annexed as proof. On the other hand, the plaintiffs state that their intention was to commence mining activities but which have not been commenced. To me from the material placed before the court both the parties have a right to the protection of their property and faced with the highly contested ownership of the suit property I'm inclined to take the path of determining where the balance of convenience tilts and the need to preserve the suit property pending the determination of who owns the suit property. See the rationale and objectives of status quo as explained in *Thugi River Estate Limited & another Vs National Bank Kenya Limited & 3 others* [2015] eKLR. I also find backing in Practice Direction No. 28(k) (Gazette Notice No. 5178/2014) which gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
12. From the material before me the status quo with regard to the suit property on the ground is that the 1st and 2nd defendants are in possession and are undertaking farming thereon and the balance of convenience tilts in their favor. There have been no major developments on the property except the structures for workers and the borehole. As it is the plaintiff has prima facie not taken physical possession. In respect to the register of the suit property there is need to protect its integrity, including prevention of its alienation to third parties as feared by the applicants and therefore the restriction herein requires to be maintained until further orders of this court.
13. The upshot of the above is that the status quo on the suit property known as title Kwale/Shimoni Adj./280 measuring 20.62 hectares situated in Kwale County shall be preserved as described in paragraph 12 of this ruling. Costs shall follow the event.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF NOVEMBER, 2022



A.E. DENA

JUDGE

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

Mr. Waroto Plaintiffs/Applicants

Mr. Mungai for 1st Defendant & 2nd defendants

No appearance for 1st interested party

Gakunga for 2nd interested party

Mr. Denis Mwakina- Court Assistant.

