



Bahasi & another v Prime Free Trade Zone Limited & 4 others (Environment & Land Case E008 of 2022) [2022] KEELC 14686 (KLR) (9 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E008 OF 2022**

AE DENA, J

NOVEMBER 9, 2022

BETWEEN

MDOE TUNGWA BAHASI 1ST PLAINTIFF

MLAI MREMA 2ND PLAINTIFF

AND

PRIME FREE TRADE ZONE LIMITED 1ST RESPONDENT

**ALBERT KAZUNGU MNYIKA [REPRESENTING WACHANDA
FAMILY] 2ND RESPONDENT**

NATIONAL LAND COMMISSION 3RD RESPONDENT

LAND REGISTRAR KWALE COUNTY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

RULING

Introduction

1. The 2nd respondent, a representative of the family of Kazungu Ndurya Dalu together with other representatives of the said family vide a land sale agreement dated 6/2/2017 sold portions of the land referred to as the Samburu South Group Ranch to one Sam Kairu Njonde a representative of the 1st respondent [Prime Free Trade Zone Limited]. This transaction is the genesis of the suit before this court. According to the plaintiffs, they sold properties that do not belong to the 2nd respondent and hence the 2nd respondent did not have capacity to sale the same.



Application

2. The plaint is accompanied by a Notice of Motion filed under Certificate of Urgency dated 28/2/2022 seeking the following orders;
 - a. Spent
 - b. That the honourable court be pleased to grant orders inhibiting and/or injunction against the respondents themselves, their agents, servants, and/or such persons claiming under the respondents by restraining them from demarcating distributing selling, alienating transferring, dealing, building developing or in any way interfering with the petitioners occupation and portion of the land more particularly known as Kwale/south Samburu/66 and Kwale/south Samburu/67 pending hearing and determination of this application.
 - c. That the honourable court be pleased to grant orders inhibiting and/or injunction against the respondents themselves, their agents, servants, and/or such persons claiming under the Respondents by restraining them from demarcating distributing selling, alienating transferring, dealing, building developing or in any way interfering with the petitioners occupation and portion of the land more particularly known as Kwale/south Samburu/66 and Kwale/south Samburu/67 pending hearing and determination of this petition
 - d. That costs of this application be provided for.
3. The application is based on grounds listed on its face and the supporting affidavit sworn by Mdoe Tungwa Bahasi on 17/2/2022. It is averred that the application is brought on behalf of the Malire and Mchanda Wa Mrema clans and families. The suit properties are a portion of a group ranch known as South Samburu Group Ranch and the title was attached. It is stated that there are more than 14 clans comprising the clans making up the South Samburu Group Ranch and the Wachanda Kwa Kazungu represented by the 2nd respondent is not part of the 15 clans as they were welcomed by the 2nd applicant's family/clan being Wachanda Wa Mrema and allowed them use of the land. It is stated that the families have been living in harmony without conflict up until when the 2nd respondent stated selling portions of the land.
4. It is further averred that the 2nd respondent's family when welcomed on the Group Ranch were only shown where to graze and cultivate but they were never given land as their own land. That the name Wachanda Wa Kazungu was derived from their grandfather but the 2nd respondent has gone out of the agreement to use the land by selling the same to the 1st respondent. The two parcels sold are Kwale/Samburu/66 and 67 but the sale is illegal as the vendors are not owners and hence could not pass good title to the 1st respondent as they have no good title to pass. That it is not the first time the 2nd respondents were selling the land as they had initially done so and the matter was heard and finalized by the committee where the 2nd respondent was directed to never sale the land. The complainant was lodged with the National Land Commission and was referred to the Ranch Committee but to date neither of the 1st or 2nd respondent has moved the Ranch Committee. The 3rd respondent in its recommendation also directed the 4th respondent to stop all the subdivisions and the issued title deeds be reviewed on a case to case basis.
5. According to the applicant, the 1st respondent has decided to start building on the suit property having dug trenches on the same and put up a perimeter wall. The said actions are viewed as a violation of the applicant's rights to owning land/property. That in the event that the court does not intervene the applicant's stand to suffer irreparable loss. They seek that the Land Registrar be ordered to revoke



the 1st respondents title deed and the same be issued to the applicant. They seek that the application is allowed as prayed.

Response

6. The 1st defendant despite entering appearance through the firm of Gikandi & Company advocates did not participate in this application.
7. In response to the application the 2nd defendant filed a replying affidavit sworn by one Albert Kazungu Mnyika. It is deponed that the suit properties in issue form a portion of the Samburu Group Ranch. It is denied that the deponents family which is part of the Wachanda Clan does not form part of the recognized local clans forming the South Samburu Group Ranch. The deponent states that the suit property in issue was first acquired by his father Kazungu Ndurya Dalu in 1940. That the land was first occupied by a Mr. Elency who allowed the deponents father to settle on the land and later left the same to him. It is averred by the deponent that he was born on the suit parcel in the year 1953. That the Wachanda Wa Mrema and Mlaire Clans have their lands apart from the disputed portions and that the 2nd respondents have been in occupation of the same. It is stated that the 2nd respondents sold the two disputed portions to the 1st respondent on 6/2/2017. That a title deed was processed after survey and subdivision. That a dispute arose between the 2nd respondents and the 2nd applicant's families and which was resolved by the District Officer in 2015. That however the 2nd respondent did not agree with the said report. As they have been on the suit parcel. They seek that the application is dismissed with costs.
8. Upon this matter coming up before court on 27/4/2022, parties agreed to have the application dispensed by way of written submissions.

Submissions

Plaintiffs Submissions

9. The Plaintiffs submissions are filed before court on 24/6/2022. On whether inhibiting and/or injunction orders should be issued against the Respondents, it is submitted that the principles for grant of temporary injunctions are well settled in the celebrated case of *Giella v Cassman Brown and Company Limited* [1973] EA 385. The plaintiffs state that they have shown a prima facie case with a probability of success. A copy of title to the suit property is annexed and it is stated that the same is *prima facie* proof that the person named as proprietor of the land is the absolute and indefeasible owner. Reliance is placed on the provisions of section 26 of the [Land Registration Act](#) and the case of [Margaret Njeri Wachira v Eliud Waweru Njenga](#) [2018] eKLR. On irreparable harm the plaintiffs state that the 1st respondent upon illegally buying land from the 2nd respondent has been issued with a title deed and which is contrary to the recommendations of the National Land Commission who had directed the 3rd respondent to stop all the sub division on the ranch and for the title deed issued to be reviewed. That the 1st respondents have also started developing on the suit property having dug trenches to build a perimeter wall on the same. on the application of balance of convenience, it is submitted that the same is in favour of the applicants. The court is referred to the holding in [Chebii Kipkoech v Barnabas Tuitoek Bargoria & another](#) [2019] eKLR. The court is urged to grant the injunction orders together with costs to the plaintiffs/applicants.

2nd Respondents Submissions

10. The 2nd respondent filed their submissions before court on 27/7/2022. It is submitted that the applicant has failed to demonstrate their case is meritorious. That the land belongs to South Samburu



Group Ranch and the applicants have no locus as they are not the registered owners of the land. That they have not presented proof of ownership over the parcels. It is submitted that the title deed (MTB-2) does not show the suit plots that are alleged to have been sold. That no evidence has been tendered in confirmation of the allegations that the suit properties belong to the petitioners and not the 2nd respondents. The 2nd respondents avers that the Commission after hearing the parties referred the same to the ranch committee for arbitration and ordered a restriction to be placed by the registrar. That there is no proof that the applicants were declared owners and that there is no dispute over the fact that the respondents have been in possession of the land all along, if the petitioners were the owners of the same, they would not allow the 2nd respondents occupation.

11. On irreparable harm it is submitted that the respondents stand to suffer greater harm than the applicants. That the land was sold way back in 2018 and the money was shared by the clan and transfers effected to the new purchasers who are in possession to date. The 2nd respondents also state that they had been in occupation of the suit properties way before they decided to sale the same. That there is no harm as of now which can be suffered by the applicants and which cannot be compensated by way of monetary returns. The value of the sold properties can be established and adequate compensation awarded in the event that irreparable harm is established at the conclusion of the matter.
12. On the balance of convenience, it is submitted that the same tilts in favour of the respondents. That ownership of the disputed portions was determined in 2018 in favor of the 1st respondent and who have been in possession of the same since then. That it would be adverse to issue orders against them and for the benefit of the applicants who have not been in possession of the two portions since 1940's.

Discussion and Determination

13. I have considered the submissions by both counsel for the applicant and the Respondents. The applicants seek for orders of injunction and inhibition of the respondents from any interference or use of the suit parcels Kwale/South Samburu/66 and Kwale/South Samburu/67. I have perused the evidence on record by the affidavits filed herein. The applicants have annexed a copy of the title deed for Kwale/South Samburu/130 which indicates that the same is registered in the name of the South Samburu Group Ranch. The title was issued on 16/2/2021. The 2nd respondent on the other hand claims that the suit properties belong to them. That it is upon such ownership that they sold the same to the 1st respondent. I have come across a letter dated 12/2/2017 and though it does not show the addressee the contents are to the effect that the Wachanda family clan members are the correct bonafide ancestral land owners of 100 acres of land at Gora village, Matope sub location, Samburu location in Kwale county. The letter is signed by amongst other parties the 1st plaintiff Dzivo Mdoe the chairman of the Samburu South Group Ranch. This fact points to one issue, ownership of the disputed parcels is not confirmed. The report of the National Lands Commission also reveals there are issues surrounding the disposition of land within the entire Samburu South and without going into the merits of the case there is a recommendation that titles already issued be reviewed on a case by case basis. Both parties to the suit claim to be the owners of the said parcels. The title deed to the parcels is registered in the name of the 1st respondent, the title deed was issued on 2/8/2016. This was way before the title deed relied upon by the applicants was issued. The court is at a cross road on whether the two parcels are distinct.
14. In view of the foregoing I'm inclined to exercise this courts general jurisdiction. I think the appropriate orders to grant will be orders that will maintain the status quo to preserve the two parcels which are the substratum of this dispute and prevent prejudice between the parties herein. Orders of status quo need not necessarily be prayed by the parties but can be given by the court based on the circumstances of a case and under its general jurisdiction. In this regard I'm persuaded by the courts dictum in *Thugi*



River Estate Limited & another v National Bank Kenya Limited & 3 others [2015] eKLR where the court stated thus

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

15. This court also relies on 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.
16. My understanding of the status quo obtaining on the ground is that vacant possession has been given to the 1st defendant. I have seen the photographs exhibited by the applicants as MTB 6 which don’t reveal much in terms of development of the plot. Further that there is fear by the applicant that they will lose the property and therefore the register in respect of the said two titles should be preserved. The 1st defendant has also not responded to the application to shed light on irreparable loss to be suffered if any should the orders be granted. The meaningful relief to the parties herein is to have the status quo maintained.
17. The following orders issue to dispose of the application dated 28/2/2022; -
 - a. That pending the hearing and determination of this suit the status quo in respect of the suit parcels Kwale/South Samburu/66 and Kwale/South Samburu/67 shall be maintained. There shall be no developments by the respondent, their agents, servants, and/or such persons claiming under them on the said parcels. The 1st respondent shall not sell or alienate or charge the suit parcels.
 - b. Costs shall be in the cause.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 9TH DAY OF NOVEMBER, 2022.

A.E. DENA

JUDGE

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

Mr. Shimaka Plaintiffs/Applicants

Ms. Kayatta/Mulei for 1st Defendant

No appearance for 2nd and 3rd defendants

Mr. Denis Mwakina- Court Assistant.

