



**Akaran c/o Sheria na Haki Human Right Institute & 2 others v Fort Properties Limited & 11 others; Director of Criminal Investigation & another (Interested Parties) (Environment & Land Petition E014 of 2024) [2025] KEELC 1184 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1184 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E014 OF 2024  
SM KIBUNJA, J  
MARCH 12, 2025**

**BETWEEN**

**ETORE JOHN AKARAN C/O SHERIA NA HAKI HUMAN RIGHT INSTITUTE  
& 2 OTHERS & 2 OTHERS & 2 OTHERS ..... PETITIONER**

**AND**

**FORT PROPERTIES LIMITED & 11 OTHERS & 11 OTHERS & 11  
OTHERS ..... RESPONDENT**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATION ..... INTERESTED PARTY  
ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**

**RULING**

[Notices of Motion Dated 29<sup>th</sup> May 2024 & 31<sup>st</sup> July 2024 And Preliminary Objection Dated 7<sup>th</sup> August 2024]

1. The petitioners filed the notice of motion dated the 29<sup>th</sup> May 2024 seeking for inter alia the following orders:
  - a. Spent.
  - b. Spent.
  - c. That pending the full hearing of this main suit, this honourable court be pleased to issue a conservatory orders restraining the respondents/defendants either by themselves, their servants, agents, or any other persons



claiming through them from evicting/demolishing the plaintiffs' structures, subdividing, selling, trespassing upon, attacking or in any other way interfering with the plaintiffs' quiet possession of the parcel of land known as Plot Number 11MN/1872,CR.No. 1755, situate at Kiembeni area in Mombasa; the Police through OCS Kiembeni Police Station, Kisauni Sub-County Police Commander and Mombasa County Police Commander to enhance security and help enforce court's orders.

- d. That the honourable court be pleased to impound and then cancel or revoke the fake certificates of titles which are alleged, to have emanated from Plot Number 11MN/1872 CR. NO. 17055, situate at Baburi area in Mombasa; the police through OCS Kiembeni Police Station, Kisauni Sub-County Police Commander and Mombasa County Police Commander and are said to have been registered in the cluster of (CR. NO. 17055 under the names of Fort Property Limited, which were illegally and fraudulently issued by the purported Land Registrar.
- e. That the occupants of Plot Number 11MN/1872, CR. NO. 17055 that were brutally displacement be reinstated to their pieces of land forthwith.
- f. That any other orders that this honourable court may deem fit to grant.
- g. The costs of this application be provided for.”

The application is predicated on the thirty six (36) grounds on its face marked (i) to (xxxvi), and supported by the affidavit of Etoe John Akaran, 1<sup>st</sup> petitioner's executive director, sworn on 29<sup>th</sup> May 2024, inter alia deposing that he has brought the application on behalf of the occupants of Plot No. 11MN/1872,CR NO. 17055, the suit property, who were affected by the illegal transfers of the parcel by the 2<sup>nd</sup> to 4<sup>th</sup> and 6<sup>th</sup> respondents to the 1<sup>st</sup> respondent, rendering them destitute; that the said titles are a product of a fraudulent scheme that led to massive massacre and loss of lives of innocent civilians; that those living on the suit property have always made use of the land for their domestic needs; that the 3<sup>rd</sup> petitioner and other occupants of the suit property were given agreement/consents by the chief and Ministry of Agriculture office to be compensated so as to vacate and remove their households but they declined as they know of no other home; that it is doubtful how the 1<sup>st</sup> respondent got the title to the suit property while those living on it have been making effort to acquire title; that goons and police officers attacked the residents on the suit property with crude weapons, beat them up and demolished their houses while chanting the 1<sup>st</sup> respondent's name; that the orders sought should be granted.

2. The application is opposed by the 2<sup>nd</sup> interested party through the replying affidavit of Mark C. Ndiema, regional manager, sworn on the 11<sup>th</sup> June 2024, inter alia deposing that the petitioners have not disclosed any cause of action against the 2<sup>nd</sup> interested party, and it should be exempted from this proceedings to minimise on the use of public resources; that the 2<sup>nd</sup> interested party has not received a formal complaint from the petitioners.
3. The 1<sup>st</sup> respondent filed the notice of motion dated the 31<sup>st</sup> July 2024 seeking for among others injunction order against the petitioners restraining them from invading, trespassing, invading, breaking and destroying the perimeter wall, and interfering with the vacant, open and peaceful enjoyment of the suit property, pending the hearing and determination of the petition; and for the OCS Kiembeni to ensure compliance of the order issued. The application is based on the nine (9) grounds marked (1)



- to (9) on its face and supported by the affidavit of Ketan Patel, director, sworn on the 31<sup>st</sup> July 2024, in which he among others deposed that the petitioners have invaded the 1<sup>st</sup> respondent's suit property destroying part of the perimeter wall in the process; that the petitioners have been pressuring the police through multiple letters, and their application should be granted as sought.
4. The 1<sup>st</sup> respondent then filed the notice of preliminary objection dated the 7<sup>th</sup> August 2024, raising the ground that the court is without jurisdiction in the suit as filed as it is for adverse possession claim that should be filed through originating summons under Order 37 of the Civil Procedure Rules but has been filed by way of constitutional petition.
  5. The application is also opposed by the 1<sup>st</sup> respondent through the replying affidavit of Yunus Haroon, property manager, sworn on the 11<sup>th</sup> October 2024, in which he inter alia deposed that contrary to the petitioners' claim that they have been living on the suit property, the land is vacant save for the 1<sup>st</sup> respondent's construction blocks and store; that the suit property measuring 38 acres has been subdivided into several plots for a housing scheme, with about 15 to 20 acre portion remaining for the next phase of the project; that the petitioners are intent in grabbing the suit property, while they have never been in occupation by the time this petition was filed; that upon the court issuing the inhibition order on 24<sup>th</sup> June 2024, the petitioner with others went to the suit property, demolished part of the perimeter fence and attempted to construct thereon on 27<sup>th</sup> July 2024, 28<sup>th</sup> July 2024 and 30<sup>th</sup> July 2024; that the attack on the 30<sup>th</sup> July 2024 was so serious that the police had to fire gun shots in the air to disburse the rowdy gang and arrested some people; that the petitioners have not met the threshold for the injunctive orders sought to be issued.
  6. The court issued directions on the 22<sup>nd</sup> October 2024, for the two applications and the preliminary objection to be canvassed together through written submissions, and for filing and exchanging submissions within the given timelines.
  7. The learned counsel for the 1<sup>st</sup> respondent filed their submissions dated the 4<sup>th</sup> February 2025, on both applications, which the court has considered.
  8. During the subsequent mention of 5<sup>th</sup> February 2025, the learned counsel for petitioners requested for more time to file and serve replying affidavit to the 1<sup>st</sup> respondent's application, supplementary affidavit to their application and submissions. The application was opposed and in a short extempore ruling, the court declined the application observing that the petitioners had been granted last adjournment on 22<sup>nd</sup> October 2024.
  9. The issues for the court's determinations in the two applications and the preliminary objection are as follows:
    - a. Whether the court has jurisdiction in this suit as framed.
    - b. Whether the applicants in each of the two applications have met the threshold for the court to issue the orders sought at this interlocutory stage.
    - c. Who pays the costs?
  10. The court has carefully considered the grounds on each of the two applications, ground on the notice of preliminary objection, affidavit evidence, submissions filed, the pleadings, record and come to the following findings:
    - a. That as is the practise, whenever a preliminary objection is raised, on a ground that if upheld could determine the suit, the court is bound to determine it first. That is because if upheld, the



court will be obligated to down its tools. See the decision in the case of The Owners of Motor Vessel “Lillian S” versus Caltex Oil Kenya Limited [1989] KLR.

- b. The 1<sup>st</sup> respondent raised a single ground in their preliminary objection that the court is without jurisdiction in the suit filed, as it is for adverse possession claim that should be filed through originating summons under Order 37 of the Civil Procedure Rules but has been filed by way of constitutional petition. In the case of Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696, the court held that:

“... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion....”

- c. I have perused the record and noted the 1<sup>st</sup> respondent is yet to file their reply to the petition dated 29<sup>th</sup> May 2024, that among others seeks for nine (9) declaratory orders, permanent injunction, two (2) judicial review orders, general & punitive damages and costs. It is trite preliminary objections should raise pure points of law that if upheld without calling evidence should determine the suit, and that the court is not expected to pronounce itself with finality at this interlocutory stage on the matters of laws and fact before it. With that in mind, and as the 1<sup>st</sup> respondent is yet to file a reply to the petition so as to establish whether the preliminary objection arises from uncontested facts, I find the ground raised would require evidence to be considered for it to be determined, and is therefore not a pure point of law. It is therefore rejected.
- d. The record confirms that on the 24<sup>th</sup> June 2024, the court heard counsel for the petitioners and 1<sup>st</sup> respondent and issued an order of inhibition under section 68 of the *Land Registration Act* No. 3 of 2012 to be registered against the suit property pending the hearing and determination of the petitioners’ application dated the 29<sup>th</sup> May 2024. Then upon the filing of the 1<sup>st</sup> respondent’s application dated the 31<sup>st</sup> July 2024, the court issued an order for the “Deputy Registrar to visit the suit property in the presence of the parties and or their counsel and prepare a report on the physical status, use and occupation of the suit properties.....”
- e. The Deputy Registrar filed a report of the visit to the locus on 23<sup>rd</sup> August 2024, that confirms the petitioners and 1<sup>st</sup> respondent were represented by their respective learned counsel. Also shown present was Chief Inspector Hassan Polleh, OCS Kiembeni Police Station. The following are the highlights of the report that are undoubtedly relevant to the determinations of the two applications:

“Physical Status

The physical location of the suit property is in Kiembeni, Mombasa sited as 11MN/1872 CR NO 17055. The land is vast with a murrum road running through. Part of the property is demarcated by a permanent wall fence while another section



is open without fencing. The surrounding area is developed with houses, shops and mosques.

#### Use

The suit property is generally an idle and undeveloped land with thickets. There is no inhabitant on the property. there are a few mango and coconut trees. The land is characterized by burrows and gullies. At about the center of the property is located a crusher site, an open storage store, concrete blocks as well as cabro blocks.

#### Condition

At the time of the site visit the condition of the land was idle with only the stated crush site on the ground. At one end of the property was a dumping site as seen in the images below.

#### Other Findings

##### Court:

The court further collected the following data:

- a) The petitioners indicated that there were coconut and mango trees which had been on the property for a long time. The court saw the trees which were between six to ten in number.
- b) The petitiones indicated that this suit property had graves of their deceased relatives. The court was led to the site but none was visible. The petitioners blamed the 1<sup>st</sup> respondent for covering the said graves.
- c) The petitioners indicated that the property had a church and a mosque. The court observed that none of these was present. The petitioners indicated that the 1<sup>st</sup> respondent had demolished them and covered hence not visible.
- d) On the other far end of the property were three coconut trees and a partially sunken concrete structure which the petitioners indicated to have been a toilet that had been covered by the 1<sup>st</sup> respondent.”

Attached to the report at pages 3 to 9 are twelve (12) coloured photographs.

- f. The petitioners’ application dated 29<sup>th</sup> May 2024 seeks for inter alia a conservatory orders restraining the respondents/defendants from evicting/demolishing the plaintiffs’ structures, subdividing, selling, trespassing upon, attacking or in any other way interfering with the plaintiffs’ quiet possession of the parcel of land known as “Plot Number 11MN/1872,CR.No. 1755, situate at Kiembeni area in Mombasa;” to impound and then cancel or revoke the fake certificates of titles which are alleged, to have emanated from “Plot Number 11MN/1872 CR. No. 17055, situate at Baburi area in Mombasa;” That the occupants of Plot Number 11MN/1872, CR. No. 17055 that were brutally displacement be reinstated to their pieces of land forthwith. On the other hand, the 1<sup>st</sup> respondent, vide its application dated 31<sup>st</sup> July 2024, seeks for injunction order against the petitioners restraining them from invading, trespassing, invading, breaking and destroying the perimeter wall, and interfering with the vacant, open and peaceful enjoyment of the suit property, pending the hearing and determination of the petition; and for the OCS Kiembeni to ensure compliance of the order issued. That while the petitioners’ case is that they have been living on the suit property for a long period of time and



had established their households thereon, the 1<sup>st</sup> respondent position is that the suit property has been exclusively in its possession and that the petitioners attempts to enter on 27<sup>th</sup> July 2024 to 30<sup>th</sup> July 2024 was stopped. These apparent contestations on the status on the ground informed the court's directions of 31<sup>st</sup> July 2024 for the Deputy Registrar to visit the locus and file a report that is summarised in (b) above.

- g. It is apparent from the Deputy Registrar's findings that despite the petitioners' protestations that they had lived on the suit property for a long time, had buried their deceased there and had a church and mosques on the land, no physical evidence of the same was visible. Indeed, the report confirms the 1<sup>st</sup> respondent's position that the petitioners were not on the suit land and that it was exclusively in its possession. I therefore do not find from the available evidence, any basis upon which the prayers sought by the petitioners can be issued against the 1<sup>st</sup> respondent or any other respondent at this interlocutory stage. Indeed, the party who has shown it deserves injunction orders to be issued against the petitioners as prayed in their application dated the 31<sup>st</sup> July 2024, that is unopposed, is the 1<sup>st</sup> respondent, as it has shown it is the registered proprietor, though the title is under challenge by the petitioners. However, so as to safeguard the legal status of the suit property as the petition is heard and determined, the inhibition order issued on the 24<sup>th</sup> June 2024 will be extended.
  - h. On the issue of costs on the two applications and the preliminary objection, I am of the view that justice will be better served by an order that the costs abide the outcome of the petition.
11. Flowing from the above conclusions on the two applications and preliminary objection the court finds and orders as follows:
- a. That the 1<sup>st</sup> respondent's notice of preliminary objection dated the 7<sup>th</sup> August 2024 is rejected.
  - b. The Petitioners' notice of motion dated the 29<sup>th</sup> May 2024, is without merit and is hereby dismissed in its entirety.
  - c. The 1<sup>st</sup> respondent's notice of motion dated the 31<sup>st</sup> July 2024 has merit and the injunction order sought in prayer [4] is granted as prayed pending the hearing and determination of the petition.
  - d. The inhibition order issued on 24<sup>th</sup> June 2024 and registered against the suit property's title to remain inforce pending the hearing and determination of the petition.
  - e. The costs in the preliminary objection dated 7<sup>th</sup> August 2024, applications dated 29<sup>th</sup> May 2024, and 31<sup>st</sup> July 2024 to abide the outcome of the petition.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12<sup>TH</sup> DAY OF MARCH 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Petitioners : M/s Kimathi

Respondents : Mr Matheka for 1<sup>st</sup> Respondent

Interested Parties : Mrs Waswa for 1<sup>st</sup> Interested Party.

Shitemi- Court Assistant.



**S. M. KIBUNJA, J.**  
**ELC MOMBASA.**

