



**Machache v Nyale & 8 others (Environment & Land Case
E058 of 2022) [2024] KEELC 1168 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E058 OF 2022**

AE DENA, J

MARCH 5, 2024

BETWEEN

JOSEPH CHALE MACHACHE PLAINTIFF

AND

MOHAMMED CHOME NYALE 1ST DEFENDANT

TSUMA NGOME 2ND DEFENDANT

JUMAA KARISA 3RD DEFENDANT

BEJA PAMU 4TH DEFENDANT

JEFA HINZANO 5TH DEFENDANT

NGOME CHARO 6TH DEFENDANT

RAI TSENGA 7TH DEFENDANT

NYAWA TSENGA 8TH DEFENDANT

LUGO CHARO 9TH DEFENDANT

RULING

1 The court has been moved by an application dated 19/12/2022 where the Plaintiff/Applicant seeks the following orders;

1. Spent
2. That this honourable court be pleased to issue temporary injunction restraining the Defendants/Respondents and/or their agents and/or employees and/or servants and/or relatives or any other person[s] acting on the Defendants/Respondents behalf from entering and/or invading and/or trespassing and/or erecting any structures and or subdividing and/



or selling the suit premises or any portion[s] thereof, being an unsurveyed parcel of land measuring approximately 164.0263 Hectares situate at Fuleye Village in Taru within Kwale County and/or dealing with the suit premises in any manner whatsoever detrimental to the rights and interest of the Plaintiff/Applicant herein pending the hearing and determination of this application.

3. That this honourable court be pleased to issue temporary injunction restraining the Defendants/Respondents and/or their agents and/or employees and/or servants and/or relatives or any other person[s] acting on the Defendants/Respondents behalf from entering and/or invading and/or trespassing and/or erecting any structures and or subdividing and/or selling the suit premises or any portion[s] thereof, being an unsurveyed parcel of land measuring approximately 164.0263 Hectares situate at Fuleye Village in Taru within Kwale County and/or dealing with the suit premises in any manner whatsoever detrimental to the rights and interest of the Plaintiff/Applicant herein pending the hearing and determination of this suit.
 4. That any structures erected on the suit premises or any portion thereof being an unsurveyed parcel of land measuring approximately 164.0263 Hectares situate at Fuleye Village in Taru within Kwale County be demolished through a mandatory injunctive order of the court pending hearing and determination of the suit.
 5. That costs of this application be borne by the Defendants/Respondents in any event.
2. The application is supported by an affidavit sworn by the Plaintiff/Applicant Joseph Chale Machache. The Plaintiff states that he is the lawful owner of unsurveyed parcel of land measuring approximately 164.0263 Hectares (hereinafter referred to as the suit property) situate at Fuleye Village in Taru as confirmed by a letter dated 3/10/2014. That further evidence of ownership is through the letter dated 18/7/2019 from the Area Chief Taru location. The Plaintiff/Applicant stated that he purchased the suit property vide a sale agreement dated 1/6/1998 from one Chuphi Ngala at a sum of Kshs 74,200/=.
 3. It is stated that a suit being Mombasa ELC No 122 of 2016 was filed by the estate of one Stephen Mwakisha by Fenny Wakesho Mwakisha and Cecilia Mwakisha Mganga but the same was withdrawn on 26/9/2022 after confirmation that the suit property belonged to the Plaintiff. The Plaintiff states that sometime in the year 2013 about 33 people invaded the suit property prompting the filing of Kwale MCELC No 79 of 2015 but a large number of the said people left leaving the 6th to 9th Defendants/Respondents who undertake farming on the suit property during rainy season. The suit was withdrawn on 24/11/2021 with no orders as to costs as it was established the then trial court had no pecuniary jurisdiction.
 4. That on 1/12/2022 the 1st to 5th Respondents encroached and/or trespassed on the suit property and threatened to subdivide the same with the sole purpose of selling the subdivided portions to third parties. That efforts to thwart these actions through the provincial administration have proved futile and hence this suit. The Applicant is apprehensive that the Defendants/Respondents might dispose off the suit property. That no prejudice will be suffered in the event that the orders sought are granted.
 5. In opposing the application, the Defendants/Respondents filed a replying affidavit sworn by Mohamed Chome Nyale the 1st Respondent on behalf of the rest of the Respondents as per the attached authority. It is averred that the instant application is an attempt to evict over 100 people who have a legitimate claim over the suit property. That the parents to the Respondents started residing on the said land sometime in 1954 and they were born and raised therein and have further buried their ancestors on the said land. The Respondents admit that they are aware sometime in the year 1976, the then Deputy Provincial Commissioner purchased the subject property from one Mkala Luvi who was



then the rightful owner. That vide a letter dated 9/4/1976 the then provincial director for agriculture Coast province indicated that Mr. Mwakisha the Deputy Provincial Commissioner Coast province had purchased 300 to 500 acres to the south of Taru Trading Center.

6. It is stated that the said letter further indicated that there were developments in the suit land by the Defendants parents. That the decision to award the suit property to Mr. Mwakisha had been arrived at vide a meeting by the wale County Council and the same is captured in the letter dated 7/4/1976. That after taking over the land, Mr. Mwakisha informed the occupants of the land that he would not evict them and asked them to stay so as to help in taking care of his livestock. That in 2013 after the Plaintiff's attempts to evict the Defendants, the Defendants visited the late Mr. Mwakishas family to inquire on the documents pertaining the suit property. The Respondents insist that it is Mr. Mwakisha who is the owner of the suit property and that the Plaintiff is an intruder with no legitimate claim over the suit property. The court is urged to disallow the application as the Respondents are bound to suffer great prejudice.
7. On 26/9/2023, the Defendants filed a preliminary objection on the following points of law;
 1. The court lacks jurisdiction to hear and determine the Plaintiffs matter as it offends Section 7 of the *Civil Procedure Act* Cap 21 for being res judicata since the honourable court issued an order on 8th May 2019 which dismissed MCELC 79 of 2015 for want of prosecution brought by the same Applicant as is the case in this matter.
 2. The suit herein be struck out with costs to the Defendants for the above reason.
8. Parties filed written submissions to the application and which this court has considered. I will first render my verdict on the preliminary objection as the same touches on the jurisdiction of this court to hear and determine the suit herein.

Analysis and Determination

9. Is the preliminary objection merited? The Court of Appeal in the case of Mukhisa Biscuits Manufacturers Ltd -vs- West End Distributors Ltd [1969] EA 696 defined a preliminary objection as follows; -

“...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 argued 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.”
10. The above decision has been reiterated in several cases and which include Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR which outlined the test to be applied in determining a proper preliminary objection as follows; -
 - (i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
 - ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.



- iii) A Preliminary Objection cannot be entertained where;
 - a. The facts are disputed/contested.
 - b. The facts are liable to be contested.
 - c. Facts are to be proved through process of evidence.
 - d. What is sought is an exercise of judicial discretion.
- 11. The preliminary objection in the instant suit is seated on all fours on the doctrine of res judicata which is provided for under Section 7 of the Civil Procedure Act as here below;

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

- 12. The question therefore is whether the issues as raised in this suit were conclusively heard and determined in MCELC 79 of 2015 and hence making this suit a direct candidate of the doctrine of res judicata. The Black's Law Dictionary 10th Edition defines the terms "heard and determined" as follows: -

"of a case, having been presented to a Court that rendered Judgment."

The term "hearing" is defined in the same dictionary as follows: -

"A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

- 13. The court has seen the order dated 8/5/2019 as issued in chambers by Hon. B. Koech SRM where it is ordered that the Plaintiff's suit be dismissed with costs to the Defendants for want of prosecution. The said order is signed and issued on 17/5/2019. I however note that the case number is not indicated on the said order and as such it is difficult to tell whether the same is really in relation to MCELC 79 of 2015. However, both parties herein have alluded to the said order. The Plaintiff has further not raised any objection to it or disputing its authenticity. It is an agreed fact that the suit did exist and was dismissed for want of prosecution. The issue for determination is whether the same amounts to the said suit having been heard and determined. Order 17 Rule 2 (3) of the Civil Procedure Rules provides for dismissal of suit for want of prosecution, the same states inter alia: -

- 1). "In any suit in which no application has been made or step taken by either party for one year, the court may give Notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.
- 2).
- 3). Any party to the suit may apply for its dismissal as provided in Sub-rule 1".

- 14. It is trite that in the event that the court is not moved to hear a suit filed over a certain period of time, it can at the instance of either parties or suo moto dismiss the same for want of prosecution. It is clear that such dismissal is occasioned by the failure to have the matter litigated upon. The argument that a suit reinstated or rather filed afresh after dismissal for want of prosecution is res judicata does not hold



water. I am guided by the dictum in the case of Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 where the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata”.

15. Based on the above, I find that the preliminary objection is not merited as the issues raised in this suit are yet to be heard and determined by any other competent court on merit.
16. I will now visit the application dated 19/12/2022. The Plaintiff seeks for orders of injunction against the Defendants pending the hearing and determination of this suit and further for a mandatory permanent injunction which will enable the eviction of the Respondents from the suit property pending the hearing and determination of this suit. I will deal with both prayers for injunction consecutively. It is established that the grant of a permanent injunction fully determines the right of the parties before the Court. In most instances, grant of the said prayer fully determines the issues laid before court for determination and might dispose of a suit at an interlocutory stage.
17. The circumstances under which the Court may grant a Mandatory Injunction were set out by the Court of Appeal in Nation Media Group & 2 Others v John Harun Mwau [2014] eKLR, where it was stated:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted...’

18. Arising from the above, it is clear that for the court to issue a prayer for mandatory injunction, the Applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. The grant of an interlocutory injunction on the other hand is premised on the three principles of establishment of a prima facie case, proof of substantial loss and damage and the balance of probability. These guiding principles were stipulated in the case of James Njoro Kibutiri -vs- Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) eKLR, as follows: -

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries -vs- Trufoods (1972) EA 420”.

19. Considering the nature of the prayers sought in relation to the facts that have been stated by both parties, it is clear that at this point the court is unable to tell which of the two parties is the legitimate owner to the suit property. A letter is most definitely not conclusive proof of ownership of land, on the other hand, the court will also need to interrogate the history



of the suit property as put across by the Defendants. However, one thing remains clear; the suit property is in occupation. I am of the view that status quo orders will suffice at this point pending the hearing and determination of the suit.

20. The term status quo in my understanding is for things to remain as they are. I have used the simplest of explanations for ease in understanding what the term really denotes. According to the Black's Law Dictionary, status quo is defined as a Latin word which means 'the situation as it exists'. The question that lingers in mind is what purpose are status quo orders meant to serve. In the case of Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] e KLR, the court explained the purpose of status quo orders as follows;

“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”.

21. The court in the case of Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others [2015] eKLR, stated that an order of status quo need not necessarily be prayed by the parties and can be made by the court on its own motion. Further, the considerations placed in granting injunctive orders need not be necessary proved or be present while granting status quo orders.

22. The upshot is the court hereby issues status quo orders with regards to the suit property herein as follows;

1. The suit property being an unsurveyed parcel of land measuring approximately 164.0263 Hectares situate at Fuleye Village in Taru within Kwale County will remain as it is pending the hearing and determination of this suit. The Defendants are not to be evicted from the said land until the suit herein is heard and determined.
2. Each party to remain in use and occupation of the portions they currently are on as was before but neither the Plaintiff nor the Defendants are allowed to further erect any structures and or subdivide and/or sell the suit premises or any portion[s] thereof.
3. Costs of the application be in the cause.

It is so ordered.

RULING DATED AND DELIVERED THIS 5TH DAY OF MARCH 2024.

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A.E DENA

JUDGE

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

Mrs. Chengo holding brief for Mr. Kenga for Plaintiff

Mr. Mbwiza for Defendants

Mr. Disii - Court Assistant.

