



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 17 OF 2019

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER
ARTICLES 19, 20, 21, 22, 23, 24, 40 & 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE IMPLEMENTATION OF THE PARLIAMENTARY REPORT OF 2ND MARCH ON L.R MN/III/289
& 3545/4 IN KILIFI COUNTY**

AND

**IN THE MATTER OF: THE SETTLEMENT OF MEMBERS OF BAHARI COMMUNITY DEVELOPMENT ON LR NOS.
MN/III/528, MN/III/3545/4 (CR 30669) IN KILIFI COUNTY**

BETWEEN

JUSTUS NDORO KALAMA, STEPHEN KAREMU MUKETHA, ANNA NDORI

MWOLOLO, SUING AS CHAIRMAN, SECRETARY AND TREASURER,

RESPECTIVELY OF BAHARI COMMUNITY DEVELOPMENT, CBO...PETITIONER

VERSUS

THE MINISTRY OF LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

KENYA PORT AUTHORITY.....2ND RESPONDENT

MOMBASA CEMENT LIMITED.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

RULING

1. By the Notice of Motion dated 10th June 2019 as amended on 22nd October 2019, Justus Ndoro Kalama, Stephen Karemu Muketha and Anna Ndori Mwololo suing in their capacity as Chairman, Secretary and Treasurer respectively of Bahari Community Development CBO (the Petitioner) pray for orders:

2. That the Honourable Court be pleased to grant an interim injunction order restraining the 2nd and 3rd Respondents either by themselves, their agents, servants and or personal assignees from carrying out any activities including quarrying and/or planting of trees on the subject properties pending the hearing and determination of this Petition.

3. Any other orders and directions as this Honourable Court may consider appropriate.

4. Costs of this application.

2. The application which is supported by an affidavit sworn by the Petitioner's Secretary Stephen Karemu Muketha is based on the grounds that: -

- a. **The members of the Petitioner are squatters who have been deprived of possession of LR Nos. MN/III/289 which was combined with MN/III/273, 281 and parts of Crown lands to form MN/III/107 (now MN/III/528) which was then allocated to Kenya Ports Authority (the 2nd Respondent);**
- b. **The Ministry of Lands and Physical Planning (the 1st Respondent) was directed by the Parliamentary Committee on lands vide a letter dated 2nd March 2017 to take possession of the suit properties under a transition process that was to be administered by the National Land Commission (the Interested Party);**
- c. **The Interested Party was to immediately reserve the said land for the settlement of the members;**
- d. **Pursuant to the Parliamentary recommendations, the Director of Public Prosecutions was tasked with investigating (one) Charles Njanji on how he allegedly acquired allotment letters belonging to squatters in Bambani Settlement Scheme before selling them to Mombasa Cement Ltd (the 3rd Respondent). The Managing Director of the 3rd Respondent was equally to be investigated;**
- e. **The Director Department of Adjudications and Settlement was directed to ensure the Members who had been allocated the said land were settled;**
- f. **It is imperative that the orders sought herein are granted to enable this Honourable Court determine the application on merit; and**
- g. **It is only fair and in the interest of justice that the applicant is granted the orders sought herein.**

3. The application is opposed. In Grounds of Opposition dated 30th October 2019 as filed herein on 5th November 2019, the 2nd Respondent asserts that: -

1. **The application is bad in law, incompetent, incurably defective, an abuse of the process of the Court and should be dismissed with costs to the 2nd Respondent;**
2. **The 2nd Respondent is the absolute and indefeasible owner of LR No. MN/III/528(formerly MN/III/307) having acquired it in October 1993 from Ms Winword Limited for a consideration of Kshs 150,000,000/-.**
3. **The Petitioner has failed to plead and or prove that the 2nd Respondent obtained LR MN/III/528 (formerly MN/III/307) through fraud or misrepresentation.**
4. **The Petitioner has no proprietary interest in LR MN/III/528 (formerly MN/III/307).**
5. **The Petitioner's amended application fails the test in granting interlocutory injunctions as articulated in the locus classicus case of *Giella –vs- Cassman Brown & Company Ltd & Another (1973) EA 358***

4. In addition to the Grounds of Opposition, the 2nd Respondent has also filed a Replying Affidavit herein on 27th November 2019 in opposition to the Petitioner's application. In the Replying Affidavit sworn by its Estate and Rating Officer Ephantus Waweru, the 2nd Respondent reiterates its position that the application as filed is bad in law, incompetent, incurably defective and an abuse of the Court process.

5. The 2nd Respondent avers that it is the absolute and indefeasible owner of all that parcel of land measuring about 173.6 Ha identified as LR No. MN/III/528 having acquired the same in 1993 from Ms Winword Ltd and that it did in its 19th Strategic Committee meeting held on 12th-14th October 2010 earmark the same for the development of an Export Processing Zone or Industrial Park.

6. The 2nd Respondent further avers that by an advertisement in the Daily Nation of 14th May 2013, it invited bids from eligible consultancy firms to carry out a feasibility study for the proposed development of the land for various economic activities. Development of the area has however been hampered by squatters who have continued to occupy the suit property.

7. The 2nd Respondent while conceding that the Interested Party did at the behest of the Area Member of Parliament request for a section of its property to be hived off for the benefit of the squatters asserts that the said request which was declined, was made in the full knowledge that it is the absolute proprietor of the property.

8. Mombasa Cement Ltd (the 3rd Respondent) is equally opposed to the Petitioner's application. In a Replying Affidavit sworn by its Director Hasmukh Patel and filed herein on 11th November 2019, the 3rd Respondent asserts that the Petitioner has no capacity to file the Amended Petition on behalf of the alleged groups of people as no authority from the other parties has been annexed to the application.

9. The 3rd Respondent further avers that the issues raised herein are similar to those raised in *Mombasa ELC Petition No. 17 of 2018*

wherein the 3rd Respondent obtained conservatory orders stopping the Ministry of Lands and Physical Planning from implementing the Parliamentary Report dated November 2015 and adopted on 2nd March 2017.

10. I have perused and considered the Petitioners' application and the response thereto by the 2nd and 3rd Respondents. The 1st and 4th Respondents filed a response to the Petition but did not file anything in response to the application for injunction. On its part, the Interested Party neither filed an appearance nor a response to the application.

11. In respect of the grant of an interlocutory injunction as sought herein, Rules 1 (a) and (b) of Order 40 of the Civil Procedure Rules provides that: -

“Where in any suit it is proved by affidavit or otherwise-

a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit;

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

12. The conditions for consideration in granting such an order were long settled in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*, where the Court expressed itself as follows: -

“First, an 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 would 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.”

13. The definition of the phrase “prima facie case” has been the subject of numerous Court pronouncements. Considering the phrase in the old case of *Ramantlal T. Bhat –vs- R (1957) EA 332, 335*, the East African Court of Appeal expressed itself as follows: -

“A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

14. Considering the phrase more recently in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR*, the Court of Appeal delivered itself as follows: -

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In the matter before me, it is contended that the Petitioners are squatters who have been deprived of possession of the suit properties. It is their case that vide a letter dated 2nd March 2017, the Parliamentary Committee on Land had directed the Ministry of Lands and Physical Planning (the 1st Respondent) to take possession of the suit properties and to have the same immediately reserved by the National Land Commission (the Interested Party) for the settlement of the Petitioners. It is apparent that as at the time of instituting this Petition, the said directive was yet to be complied with.

16. As it were, the Petitioners admit that the suit properties are registered in the names of the 2nd and 3rd Respondents. Having styled themselves as squatters, it would appear to me that the Petitioners have settled on portions of the suit properties without any legal claim or title at the moment. Their claim on the same is hinged on the direction by the Parliamentary Committee that the same be acquired by the Interested Party for their settlement. I did not therefore think that they have established a prima facie case as defined.

17. As the Court of Appeal stated in *Nelson Kazungu Chai & 9 Others –vs- Pwani University College (2017) eKLR*: -

“A right can only be protected when it exists in reality and not when it remains an illusion or a mere expectation. The right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways after one comes into the world. One cannot acquire property rights over another property other than in the manner prescribed in law. In this case, the appellants claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International law.”

18. Having so found that the Petitioners have failed to establish a prima facie case capable of protection in the manner sought herein, I did not think that I needed to delve any further into the matter. In this, I am guided by the Court of Appeal decision in *Kenya Commercial Finance Company Ltd –vs- Afraha Education Society (2001) 1EA 86 at 89* where the Learned Judges of Appeal stated thus: -

“The sequence of granting an interlocutory injunction is first that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly, where the Court is in doubt it will decide the application on the balance of convenience. See Giella –vs- Cassman Brown and Company Ltd (1973) EA 358 at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt then the third condition can be addressed.”

19. In the premises, I say no more save that I find no merit in the application dated 10th June 2019. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.

J.O. OLOLA

JUDGE