



**Chireya v Islam & 5 others (Environment & Land Case
171 of 2021) [2023] KEELC 22623 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 22623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 171 OF 2021**

AE DENA, J

MAY 8, 2023

BETWEEN

OMAR SHABAAN CHIREYA APPLICANT

AND

FATUMA HEMEDI ISLAM 1ST DEFENDANT

ESTATE OF MARIAM RASHID MKAULI [DECEASED] 2ND DEFENDANT

DISTRICT LAND REGISTRAR KWALE 3RD DEFENDANT

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER KWALE
COUNTY 4TH DEFENDANT**

DISTRICT LAND SURVEYOR KWALE COUNTY 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

The Application

1. The application subject of this ruling is filed pursuant to the -provisions of Sections 1A,1B,3A and 63 of the *Civil Procedure Act* and order 40 rules 1 and 2 of the *Civil Procedure Rules* and any other relevant provisions of the law. The applicant herein seeks for the following orders;
 - a. Spent
 - b. This honourable court be pleased to grant ex parte orders restraining the 1st and 2nd Defendants whether by themselves, their employees, servants and/or agents or assignees and/or any person acting under or on their behalf or any other third party hereto from entering, occupying erecting upon or in any way transferring charging leasing or otherwise alienating or dealing or disposing of the whole or any part of the suit property Kwale/Diani S.S/3596[or in anyway



transferring charging leasing or otherwise alienating or dealing or disposing of the whole or any part of the suit properties known as Kwale/Diani S.S/3596 and Kwale/Diani/1950 [hereinafter referred to as alien property] and

- c. The 3rd Defendant be restrained from registering or otherwise recognising any sale, transfer, charge, lease, licence or other dealing whatsoever in or over suit property Kwale/Diani SS/3596 and over the whole or any part of the properties known as Kwale/Diani/1949 and Kwale/Diani/1950 [hereinafter referred to as alien property]
 - d. The status quo in respect of the plaintiff's occupation of the suit property be maintained in the interim
 - e. That this honourable court be pleased to give directions for service of this application and to fix a date for the interparties hearing thereof.
2. The application is premised upon grounds listed on its face. In summary it is stated that the Applicant is the owner of title No Kwale/Diani SS/3596, formerly/originally Kwale/Diani/24 [herein suit property] and which they have been in occupation with his family since 1968 hitherto. That the 1st and 2nd Defendants are the lawful proprietors of title no Kwale/Diani/54 and which is presently subdivided into parcels No's Kwale/Diani/1949 and 1950 [alien properties].
 3. It is averred that the alien properties are superimposed upon the original position of the suit property on the Registry Index Map (RIM) for Diani Settlement Scheme and further that whatever is on the ground does not tally with what is on the RIM. The Applicant alleges that the RIM has been falsified either fraudulently or negligently with the aid and participation of the 4th and 5th Defendant/ Respondents. The Applicant is apprehensive that in the event the orders sought are not granted, he is bound to lose the suit property as the 1st and 2nd Defendants are subdividing the alien properties and selling off the sub divided portions.
 4. The application is supported by an affidavit sworn by the Applicant Omar Shaban Chireya. It is deponed that the suit property initially belonged to the Applicant's father one Shaban Hamisi Mwachireya [deceased]. That the suit property was identified as sitting on an area reserved for the Kwale Municipal Council and to date the parcel remains largely unsurveyed and is not registered even though the Applicant's family and ancestors are buried thereon. That in 1968 he constructed his house on the land and began subsistence farming thereon. That in 1978 the government through the 4th and 5th Defendants started to process the area under the Diani Settlement Scheme with a view of allotting the land to the rightful beneficiaries. The Applicant was given land parcel no Kwale/Diani/24 and where he proceeded to obtain title over the same on 22/10/1992.
 5. According to the Applicant, he was issued with a certificate of outright purchase from the Ministry of Lands & Housing on 20/2/1991. The Applicant states that sometime in 1992 one Mariam Rashid Mkauli informed him that the alien properties had been surplanted on the suit property on the RIM for Diani Settlement Scheme and that the suit property had been allocated a totally different position on the RIM to which it had been pushed into the unsurveyed portion belonging to the Applicant's late father.
 6. The Applicant states that he took up the matter with the then demarcation officer one J. K Gitau who on 25/5/1994 took up the matter and wrote a letter to the District Lands and Survey office in Kwale. The Applicant states that he wrote several letters to the 3rd 4th and 5th Defendants inquiring over the matter but the same were not responded to. That he learnt the alien parcels belong to the 1st and 2nd Defendants and who cannot explain the anomalies on the RIM. Apprehensive that the 1st and 2nd Defendants have the intention of disposing off his land parcel as a result of the position of the suit



parcel is seeking the orders herein. The Applicant states that efforts to have the parcels beaconed and for the mapping process to be conducted afresh have failed as the Defendants are not keen in taking part in the said exercise.

The Response

7. The 1st Defendant filed a replying affidavit on 5/3/2021. She avers that the 2nd Defendant now deceased was her mother. The deponent denies being in use or having trespassed or entered the suit property Kwale/diani SS/3596. That she has further not interfered in any way with the original title No. Kwale/Diani/24. It is averred that the 1st Defendant's late mother was the original registered owner of Kwale/Diani SS/54, which was subsequently subdivided into Kwale/Diani SS/49 and 50. She denied having any knowledge of Kwale/Diani/1949 and 1950. The 1st Defendant further states that she has no capacity to prepare or change or alter the RIM of the Diani Settlement Scheme as alleged and that the Applicant has no legitimate claim against her.
8. According to the 1st Defendant, she has been in use and occupation of Title Nos Kwale/Diani SS/49 and 50 for more than 30 years and in the circumstance, it would be unfair to restrict her from the lawful use of her properties. It is stated that the Plaintiff has failed to disclose a prima facie case and the orders sought should not be granted.
9. Mr Makuto State Counsel for the 3rd to 6th Defendants intimated to court on 14/3/2023 that the said parties would not be participating in this application.

Submissions

10. The Plaintiff's submissions are filed on 12/3/2021. It is submitted that the Applicant is expected to meet the principles laid down in the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 before grant of the orders sought. On establishment of a prima facie case with a chance of success, the Applicant submits that though he holds title to the suit property and being in occupation of the same, the parcel is reflected as being located on a different position in the cadastral map from the real position on the ground. That the 1st and 2nd Defendants alien parcels are the ones reflected as occupying the Plaintiffs parcels true position on the said cadastral map. Based on this, the Applicant states that a prima facie case has been established.
11. On whether the Applicant may otherwise suffer irreparable injury which would not be adequately compensated by an award of damage, it is submitted that the Applicant has settled on the suit parcel for more than sixty years and in the likely event that he is dispossessed the same will lead to immense loss and damage. That nothing could ever imaginably compensate for such loss. It is lastly submitted that the balance of convenience tilts towards grant of the orders to the Applicant in view of the evidence presented herein.
12. The 1st and 2nd Defendants submissions are filed before court 24/5/2021. It is submitted that a prima facie case with a probability of success has not been demonstrated by the Plaintiff. That the court cannot make orders in vain as against the 1st and 2nd Defendants who have been wrongly sued and have nothing to do with the suit property as pleaded. It is lastly submitted that given the circumstances of the case, damages would be an adequate remedy for trespass if the trespass were to be proved at trial.

Determination

13. The solitary issue for determination in the present suit is whether or not the Plaintiff/Applicant is entitled to the injunctive orders sought. The Plaintiff contends that the suit properties despite being registered and titled in his name have variances in area and their physical location on the ground does



not correspond with the RIM. The Plaintiff avers that there is need for rectification of the registers and amendment of the RIM. The Plaintiffs' evidence points to a problem on the ground as the alien parcels belonging to the 1st and 2nd Defendant are said to have superimposed on the suit property. The Plaintiff seeks for injunctive orders to be able to restrain a possible interference with his use and occupation of the suit property by the 1st and 2nd Defendants.

14. The court has noted the 1st and 2nd Defendants' response to the application. The deponent denies being in use or having trespassed or entered the suit properties. That she has further not interfered in any way with the original title Kwale/Diani/24. From the evidence that has been adduced by the Applicant, it has not been demonstrated in what manner the 1st and 2nd Defendants have trespassed on the suit property.
15. The court is however not disputing the possibility of the RIM to the property having an issue as intimated by the Applicant. However, at this stage the court is not dealing with the disputed facts to finality. I'm of the view that this can only be established once the matter has been heard substantively where parties will be called to give evidence and further espouse on the issue. Indeed, it is apparent that expert evidence will guide the court in making an informed determination on whether or not there is an anomaly on the RIM.
16. Given the circumstances herein, it will be proper for status quo orders to issue pending the hearing and determination of the suit. The issue to me is not whether the 1st and 2nd Defendants have denied they do not occupy the suit properties and have no interest in it. It is the alleged superimposition by the Defendants title that warrants attention. There is also the fear of disposition by the defendants. To me the Applicants apprehension is justified. I am guided by the dictum of Lord Diplock in *American Cyanid Co.-v- Ethicon* [1975] 1 All ER 504 at 511 as referred in *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR where the court stated that where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.
17. Additionally, I have to state at this stage that it is paramount to protect and safeguard the interests of any person claiming a right over land. This court finds it necessary to also preserve the status quo in respect of the parcel files/register at the Lands Registry. The Applicant has raised a relevant issue on what might happen in the event that the 1st and 2nd Defendants dispose of their properties should the superimposition be confirmed to exist. Given the alleged variance in the physical locations of the suit properties, restricting any dealings on the parcels will protect the stakes of both parties herein.
18. The following orders shall therefore issue to dispose of the application dated 30th December 2020.
 - i. There will be an order of status quo to be maintained by all the parties, the Plaintiff/Applicant is to remain in the use and occupation of Kwale/Diani S.S/3596 as the registered proprietor pending the hearing and determination of this suit.
 - ii. An order is hereby made directed to the Land Registrar Kwale to be restrained from making any further entries in the proprietorship register for land parcel no's Kwale/Diani S.S/3596, Kwale/Diani/1949 and Kwale/diani/1950 and from any dealings whatsoever pending the hearing and determination of this suit.
 - iii. Costs shall follow the event.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 8TH DAY OF MAY, 2023



A.E. DENA

JUDGE

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

Mr. Oduor Opalo for the Plaintiff/Applicant

Mr. Asige for the 1st & 2nd Defendant/Respondents

Mr. Daniel Disii- Court Assistant.

