



**Sanders v Salim & another (Civil Case E018 of 2022)
[2023] KEELC 17086 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17086 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL CASE E018 OF 2022
MAO ODENY, J
MAY 3, 2023**

BETWEEN

KATHERINE ISOBEL MARY SANDERS PLAINTIFF

AND

KHUZEMA SALIM 1ST DEFENDANT

COUNTY GOVERNMENT OF LAMU 2ND DEFENDANT

RULING

1. This is in respect of a Notice of Motion dated 8th March 2022 by the Plaintiff/Applicant seeking the following orders:
 - a. That pending the hearing and determination of the suit herein, this honourable court be pleased to issue an order of injunction restraining the 1st respondent herein whether acting by himself or through his agents, servants, employees and/or workers from trespassing into the beach front of land parcel Lamu/Block IV/8, erecting any structures thereon, constructing fibre glass boats thereabouts, and/or in any manner interfering with the plaintiff/applicant's quiet use and access to parcel of land Lamu/Blockiv/8 at Shella beach area.
 - b. That pending the hearing and determination of the suit herein, this honourable court do issue an order directing the 1st and 2nd respondents to demolish and/or remove the structures erected in front of land parcel number Lamu/Blockiv/8 by the 1st respondent, his agents, servants, employees, workers and/or employees.
 - c. That pending the hearing and determination of the suit herein, this honourable court do issue an order compelling the 2nd defendant/respondent to suspend any license(s) issued to the 1st respondent, his agents, servants, employees, workers and/or employees to operate the fiber glass boat business in front of land parcel number Lamu/Block IV/8.



- d. That pending the hearing and determination of the suit herein, this honourable court do issue an order compelling the 2nd defendant/respondent to put a stop to the nuisance by the 1st respondent, his agents, servants, employees, workers and/or employees in front of land parcel number Lamu/Block IV/8.
 - e. That the honourable court be pleased to make such order as it deems just and expedient to award under the circumstances.
 - f. That costs of the Application be provided for.
2. The application is premised on the grounds and supporting affidavit of Ketherine Isobel Mary Sanders who deponed that she is the registered owner of parcel number Lamu/Block IV/8 and that the 1st defendant/respondent trespassed in 2019 by carrying out fiber glass boat business in front of her parcel of land thus depriving her right of access and peaceful utilization of her parcel of land.
 3. The Applicant also deponed that the respondent's unlawful activities of building fiber glass boats is a health hazard as the boats are built using toxic substances. That further that the 1st defendant has built unlawful structures on the beach front and urged the court to allow the application as prayed.
 4. The 1st respondent opposed the application vide a replying affidavit 5th April 2022 where he deponed that the boatyard is a historical area having been in operation since 1974 and that the Plaintiff is conversant with this fact having occupied the neighborhood in the recent past
 5. The respondent further stated that he operates his boat construction business with a valid license on another space other than the plaintiff's parcel of land which does not interfere with the plaintiff's proprietary interest.
 6. It was the 1st respondent's case that the plaintiff helped and contributed towards the construction of some of the sheds/shelter by channeling the money through the Beach Management Unit.
 7. Counsel agreed to canvas the application by way of written submissions which were duly filed.

Plaintiff's Submissions

8. Counsel identified and issue whether an order of injunction should issue and relied on the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, on the principles for grant of an injunction.
9. Counsel further submitted that the applicant is the registered proprietor of the suit parcel Lamu/Block IV/8 which land abuts the beach and shoreline of the Indian Ocean and has presented title documents to support her case which the Respondents have not disputed.
10. It was counsel's submission that the plaintiff/applicant is entitled to the riparian and contiguous beach in front of, next to, adjacent, abutting or adjoining the Applicant's land, and that the illegal sheds, developments and fibre glass boats construction by the 1st respondent are an eye sore and have compromised the plaintiff/Applicant's security.
11. Counsel relied on the cases of *Nguruman Limited Versus Jan Bonde Neilsen & 2others* C.A No. 77 of 2012 (2014)eKLR And *Kenya Electricity Transmission Company Limited Versus Kibotu Liimited* (2019) eKLR and urged the court to find that the applicant has proved that she has a prima facie case since she is the registered owner of the suit land.
12. Counsel further submitted that the Plaintiff will suffer irreparable harm if the an order of injunction is not issued and relied on the cases of *Pius Kipchirchir Kogo Versus Frank Kimeli Tenai* (2018) eKLR.



13. Counsel also submitted on the cancellation of the permits issued by the 2nd respondent as the plaintiff has a legal right to the suit property and that no proper public participation was undertaken by the 2nd respondent before issuance of the alleged licenses to the 1st respondent.
14. Counsel relied on the case of *Chesubwa Limited vs. Yew Investment Ltd t/a Dorado Cottages Mld & County Government [of Kilifi]* (2016) where Angote J issued an order of injunction stopping the illegal sun beds structures and development on the shore line next to and adjacent to plot No 1365 until the suit is heard and determined.
15. Ms Bosibori submitted that the dumping and fiber glass business at the entrance of the Applicant's parcel is unplanned, illegal and a violation of the Applicant's right to clean air, unpolluted environment and pollution of the suit property and urged the court to allow the application as prayed.

1st Respondent's Submissions

16. Counsel identified four issues for determination on whether the defendant is legally doing business and whether the plaintiff is entitled to the orders sought. Counsel submitted that the 1st defendant has a valid license to carry out business of which license the respondent displayed in the replying affidavit.
17. Counsel relied on the Lamu County *Trade Licence Act* No. 10 of 2015 And Particular Sections 4(1) & 6(1) of the Act that provides: -

“Section 4(1) “A person shall not conduct a business within the county unless the person is the holder of a trade licence for that particular business.

Section 6(1) The chief licensing officer shall grant an application for a trade license within 21 days if;-

 - a) the licensing officer is satisfied that the applicant has complied with all laws relating to health, hygiene and safety applicable to the trade license applied for; and
 - b) the licence fee has been paid in full to the receiver of revenue.”
18. Mr Omwancha submitted the 2nd Defendant's licensing officer duly issued the trade license having been satisfied that all the legal formalities have been complied with and additionally, the Beach Management Unit that is in conduct of the business and commercial activities carried out at the beach properly allocated the 1st Defendant a space upon which the shelter/shade hereafter known as 'the banda belonging to the 1st Defendant is situate.
19. It was counsel's submission that the 1st Defendants shade is constructed after two other shades belonging to other parties not brought before this court and the allocation, management and regulation of the riparian section is done by the Beach Management Unit (B.M.U) to whom the owners of the 'bandas' and/or shelter pay cess which the unit remits to the Lamu County government
20. Mr Omwancha submitted that the Plaintiff's right over the parcel of land Lamu/Block IV/ 8 do not extend beyond the gate or any other extent further hence the 1st defendant has not trespassed and urged the court to dismiss the application with costs.

Analysis and Determination

21. This application came up for hearing under certificate of urgency where the court had granted interim orders. The Applicant on the strength of the interim orders filed an application for contempt which



was heard and determined and the court dismissed the application for lack of proof. This is the reason why the hearing of the application inter partes for injunction took time to be concluded.

22. This is an application for injunction but the Applicant is asking for more than what can be granted at an interlocutory stage. The principles for grant of an interlocutory injunction are well settled.
23. In an application for injunction, an applicant must meet the threshold for grant of injunctions as was laid down in the *Cassman Brown case (supra)* where the court held that:

“Firstly, 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.”
24. The Applicant must satisfy the above conditions before the court can grant an order of injunction. In this case it is not disputed that the plaintiff is the owners of the suit property and that the issue for determination is not on ownership of the suit property. The issue is the use of the beach front where the respondent is operating a fiber boat building business which has been licensed by the County Government of Lamu.
25. It is on record that the boat building has been in operation since 1974 and the licensing of the business is done jointly by the Beach Management Unit in conjunction with the County Government of Lamu.
26. The Applicant has complained that the respondent trespassed in 2019 and that the materials used is toxic to the environment. The applicant has not given any scientific proof that the materials used is toxic to the environment and the level of pollution. In such cases of pollution and the toxicity there must be additional evidence either from NEMA or any other qualified persons to prove the same.
27. Further it was the plaintiff’s case that there was no proper public participation of the boat building site and the sheds, the plaintiff seems to be a newcomer in the area as the boat building site has been in operation since 1974. Would there have been public participation before she came to the neighborhood. The Plaintiff’s title was issued on 19th June 2005. Is it that she noticed the boat building site recently in 2019?
28. The Plaintiff was required to prove that the respondent is illegally blocking her access to the beach and the level of pollution and toxicity of the material used in the boat building. It is not enough to say by word of mouth that a person is doing or not certain things without proof.
29. Where an applicant has not established a prima facie case in the first instance then that is the end of any claim to interlocutory relief as was held in the case of [*Naftali Ruthi Kinyua v Patrick Thuita Gachure & another*](#) [2015] eKLR the Court of Appeal stated that:-

“With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid v Ethicon Limited* [1975] AC 396 stated thus, “If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant’s proposed activities that is the end of any claim to interlocutory relief.”
30. I find that the Plaintiff has not established a prima facie case in order to benefit from an order of injunction and therefore the application is dismissed with costs to the respondent.
31. This is a case where it would be in the interest of the Applicant to fast track the case for a full hearing,



DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF MAY, 2023.

M.A. ODENY

JUDGE

