



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Mwajinga & 16 others (Environment & Land Case
117 of 2021) [2023] KEELC 20484 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 117 OF 2021**

AE DENA, J

OCTOBER 5, 2023

BETWEEN

JANE NJERI MAINA PLAINTIFF

AND

YAHYA MWINYI MWAKURAUKA 1ST DEFENDANT

MWANAJUMA MOHAMED MWAJINGA 2ND DEFENDANT

BARBRA MUENI GIDEON 3RD DEFENDANT

MARY MWELU GIDEON 4TH DEFENDANT

ABDILLAHIBRAHIM ALIAA DEKHA HURI IBRAHIM 5TH DEFENDANT

ALIAS ABDILLAHIM HURI IBRAHIM 6TH DEFENDANT

SAID HASSAN KABANGI 7TH DEFENDANT

NASSIRI AMIYO MOHAMED 8TH DEFENDANT

MATHEW MWANZIA 9TH DEFENDANT

THE ATTORNEY GENERAL 10TH DEFENDANT

GHATER DAMARIS KILAKA 11TH DEFENDANT

EMMANUEL MUTUA 12TH DEFENDANT

HEKTTAH INNOVATION LIMITED 13TH DEFENDANT

PATRICK KARIUKI KARINGE 14TH DEFENDANT

AGNES NDUNGU 15TH DEFENDANT

WILLIAM ODONGO ATHEMBO 16TH DEFENDANT

MARTHA AMONDI NYAGAYA 17TH DEFENDANT



RULING

1. The court is tasked with determination of the application dated November 30, 2022 and the preliminary objection dated 5/12/2022 which was raised in response to the application.
2. The Plaintiff/Applicant in the Notice of Motion dated November 30, 2022 seeks the following prayers;
 1. Spent
 2. That pending interpartes hearing and determination of this application and thereafter pending hearing and determination of this suit, this honourable court be pleased to issue an order of injunction restraining the defendants whether by themselves, their employees, servants, agents or successors in title from doing the following or any other following that is to say offering or advertising for sale, selling the subdivided parcels to third parties, subdividing, developing, further developing, alienating, letting out, charging or offering as security for borrowing, disposing, transferring, completing transfer or parting with possession of all parcels of land created from parcel of land known as Kwale/Diani/101 Namely Kwale/Diani/1985, Kwale/Diani/1986 Kwale/Diani/1987 Kwale/Diani/1988 Kwale/Diani/1989 Kwale/Diani/1990 Kwale/Diani/2195 Kwale/Diani/2196 Kwale/Diani/2197 Kwale/Diani/2198 Kwale/Diani/2107 Kwale/Diani/2108 Kwale/Diani/2109 Kwale/Diani/2057 Kwale/Diani/2058 Kwale/Diani/4165 Kwale/Diani/4166 and Kwale/Diani/4167.
 3. That costs of this application be borne by the Defendants/Respondents.
3. The application is premised upon grounds on its face and the supporting affidavit of Jane Njeri Maina.
4. It is the Applicants case that she is the registered owner of land parcel no Kwale/Diani/101 having lawfully purchased the same in 1995 from one Melson Mbuko Rintari the original allottee thereof and holder of a certificate of outright purchase dated September 27, 1990 issued by the Ministry of Lands & Settlement Fund Trustees. That sometime in August 2010 she was informed that the land had been grabbed and invaded by persons who had subdivided the same and were selling the same and developing it. She tried accessing the land but received threats on her life forcing her to cease the attempts of physically going to the land.
5. The Applicant states that upon conducting a search at the land registry in Kwale she was informed that the register to the suit property could not be traced. At paragraph 7 of the affidavit, the applicant details the numerous transfers and subdivisions that have been carried out on the suit property and the registered owners who are defendants in the suit. The applicant states that she lodged cautions on the subdivisions and the same were duly registered.
6. The Applicant avers that she made an application dated September 23, 2010 before court seeking for injunction against the defendants in relation to the subdivided portions. The same was disallowed by the court vide its ruling of 26/7/2012. That it is then that the defendants further sub divided the suit property as illustrated under paragraph 11 of the affidavit. That upon discovery of the subdivisions the Applicant sought leave to further amend her Plaint which was granted. The Applicant avers that the new defendants are likely to further sub divide the land and hence the instant application, as there is no court order restraining them from further sub divisions. It is deponed that the District Land Registrar Kwale has declined to register cautions on the land claiming he can only do so upon orders from the court and hence necessitating the instant application. The applicant seeks that the application be allowed as prayed.



7. In opposing the application, the 5th Defendant Abdillahi Huri Ibrahim filed an affidavit in response to the averments raised in the Notice of Motion and supporting affidavit thereto. He states that the application is an abuse of the court process as the plaintiff had previously filed a similar application which was heard and determined by the court vide its ruling of 26/7/2012. That the application is therefore re judicata and should be dismissed in limine.
8. The 5th Defendant further raised a preliminary objection to the Plaintiff's application dated November 30, 2022 on the following grounds;
 1. The Plaintiff had filed a similar application dated September 23, 2010 which was heard and determined by the court [M K Ibrahim J as he then was] by a ruling dated July 17, 2012 and delivered on July 26, 2012
 2. Therefore, the matter raised in the Plaintiff's application dated November 30, 2022 are res judicata and the application is an abuse of the court process.
9. The 7th, 9th, 12th and 18th defendants filed grounds of opposition in opposing to the application dated November 30, 2022 on the following grounds;
 - a. The issues raised in the application are res judicata having been heard and conclusively determined in the ruling delivered on July 17, 2012 [Justice Mohammed Ibrahim] and the ruling delivered on November 2, 2012 [lady justice M Odera]. The plaintiff's application is essentially an appeal against the said rulings disguised as an application.
 - b. The plaintiff's application does not disclose a prima facie case with probability of success,
 - c. Since the defendants hold original title documents to their properties, have developed them and have been in actual possession of the same for a long time, the validity or otherwise of those title documents can only be properly ventilated viva voce during the main trial and not through the application,
 - d. The Plaintiff's application is incompetent, frivolous, misconceived and amounts to an abuse of the court process.
 - e. Consequently, the Plaintiff's application ought to be dismissed in limine with costs.
10. The application, and preliminary objection were both canvassed by written submissions. The 7th, 9th, 12th and 18th Defendants submissions were filed on 26/4/2023, the 5th Defendants on 7/6/2023 and the applicants on 24/4/2023. The court has duly considered the submissions by all the parties.
11. The Preliminary Objection herein seeks to oust the application herein on the basis that the same is res judicata. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable as the same will automatically determine the viability of the application. The Supreme Court in *Aviation & Allied Workers Union Kenya - Versus - Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, held that a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
12. Section 7 of the *Civil Procedure Act* stipulates as follows:

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.”

13. The court has had the chance to read through the ruling by Justice Ibrahim dated 17/7/2012 and delivered on 26/7/2012 with the above provisions in mind. The ruling is the decision referred to in the preliminary objection as res judicata. The Applicant therein and who is the Applicant in this application sought for an injunction against the defendants who at that time were 10. The court in disallowing the said application noted that some of the defendants were in actual possession of the suit property which had then been subdivided and had certificates of title to the said portions. I note that the Applicant has added more parties in the suit being new purchasers as alleged. This in my view is an attempt to circumvent res judicata as the prayers sought were earlier denied with the court indicating that enough evidence had not been rendered to establish a prima facie case and the threshold set in the case of “Giella Versus Cassman Brown”. Clearly the issue of injunction is res judicata.
14. However, I should note that the gist of the suit is ownership of the suit property Kwale/Diani/101 which as per the averments raised by parties herein has been subdivided to parcels currently occupied by the defendants herein. A decision on who between the Applicant and the 1st defendant is the lawful proprietor of the land has not been rendered. In my opinion that is the main reason why the parties are before court. To me the appropriate orders to grant given the way issues have mutated over time should be orders geared towards maintenance of the current status quo. This will not only preserve the substratum of the dispute and which is the suit parcel albeit the numerous subdivisions of the same but will also prevent further prejudice between the parties pending hearing and determination of the main suit.
15. Let me state that, orders of status quo need not necessarily be prayed by the parties but can be given by the court based on the circumstances of a suit and under its general jurisdiction. I associate myself with an excerpt the case of *Thugi River Estate Limited & camp; another Vs National Bank of Kenya Limited & 3 others* [2015] eKLR where the court stated that;-

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”
16. The applicant intimated in her pleadings that efforts to place an inhibition on the suit sub divided portions have proved futile as the land registrar stated the same can only be by an order of the court. In effecting the status quo orders, it will be proper to particularise the same to the extend that further dealings are prohibited on the parcels.
17. The upshot of the foregoing is, the preliminary objection has merit and is upheld.
18. The meaningful relief to the parties herein is to have the status quo with regard to the registers maintained pending the hearing and determination of the suit. in accordance to the provisions of sections 68 and 69 of the *Land Registration Act*. The following orders hereby issue;-



- i. In order to maintain the status quo for purposes of preserving the suit property, I do issue an order of inhibition , inhibiting the registration of any disposition by the Land Registrar Kwale, in the register of all the land parcels, created from parcel of land known as Kwale/Diani/101 Namely Kwale/Diani/1985, Kwale/Diani/1986, Kwale/Diani/1987 Kwale/Diani/1988 Kwale/Diani/1989, Kwale/Diani/1990 Kwale/Diani/2195 Kwale/Diani/2196, Kwale/Diani/2197 Kwale/Diani/2198 Kwale/Diani/2107 Kwale/Diani/2108 Kwale/Diani/2109 Kwale/Diani/2057, Kwale/Diani/2058 Kwale/Diani/4165 Kwale/Diani/4166 and Kwale/Diani/4167 pending the hearing and determination of this suit.
- ii. For the avoidance of doubt there shall be no further subdivisions, sale , transfer, charge of the above parcels created from parcel of land known as Kwale/Diani/101 pending the hearing and determination of this suit.
- iii. Costs shall be in the cause.

DATED SIGNED AND DELIVERED THIS 5TH DAY OF OCTOBER 2023.

A E DENA

JUDGE

