



REPUBLIC OF KENYA



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**Yereh v Board of Management Wadhajiri Kilimani and Madrassa School & 5 others
(Land Case 99 of 2021) [2022] KEELC 14710 (KLR) (7 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 99 OF 2021
MAO ODENY, J
NOVEMBER 7, 2022**

BETWEEN

ASILIA YEROW YEREH PLAINTIFF

AND

**BOARD OF MANAGEMENT WADHAJIRI KILIMANI AND MADRASSA
SCHOOL 1ST DEFENDANT
COUNTY PHYSICAL PLANNER 2ND DEFENDANT
LAND REGISTRAR LAMU 3RD DEFENDANT
COUNTY SURVEYOR 4TH DEFENDANT
COUNTY GOVERNMENT OF LAMU 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated 17th November 2021 by the Plaintiff/ Applicant seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of this suit, this Honourable court be pleased to order and direct that the 2nd, 3rd and 4th Defendants/respondents to produce and file in court certified copy of the record of title and/or register of dealings in Plot Number Lamu/Mokowe Old Town/806.



- e. That upon inter-parties hearing of the instant application, this Honourable court be further pleased to issue an order of temporary injunction restraining the 1st Defendant/respondent by themselves, their agents, servants, assigns, representatives or any other person claiming under them from laying claims of ownership, trespassing, encroaching, selling, leasing, disposing of, digging foundations, ferrying and depositing building and/or construction materials, adversely dealing with the Plaintiff's/applicant's portion of land and from commencing or continuing to construct and/or erect any temporary or permanent structure and/or building on the Plaintiff's/applicant's plot Number Lamu/Mokowe Old Town/806 situated at Hindi Ward, Mokowe Location and Kilimani Sub-Location within Lamu County pending hearing, determination and final disposal of the suit filed herein.
 - f. That upon inter-parties hearing of the instant application, this honourable court be pleased to issue an order of temporary injunction restraining the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants/respondents by themselves, their agents, servants, assigns, representatives or any other person claiming under them from laying erroneous claims of ownership, trespassing, encroaching, constructing, selling, disposing of, leasing, alienating, transferring, wasting, or engaging in any transaction for the purposes of disposing of the suit property or interfering in any way and/or from adversely dealing with plot Number Lamu/Mokowe Old Town/806 situated at Hindi Ward, Mokowe Location and Kilimani Sub-Location within Lamu County pending hearing, determination and final disposal of the suit filed herein.
 - g. That costs of the application be borne by the Defendants/respondents.
 - h. That this Honourable court be further pleased to make such other interlocutory orders as may appear to the court to be just and expedient.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Plaintiff/applicant's Submissions

3. Applicant relied on the grounds on the face of the application together with her supporting affidavit sworn on 17th November 2021 wherein she deponed that around the year 1994 she settled on the portion of land which was later in 2017 demarcated and registered as Plot No. Lamu/Mokowe Old Town/806.
4. The Applicant further stated that she was registered as the beneficial owner of the suit property. She added that, before she was issued with the title, the 1st, 2nd and 3rd Defendants visited the suit property while she was away on medical treatment, the 1st Defendant altered the boundaries and records whereby the 1st Defendant was registered as the owner of the suit property.
5. Counsel submitted that the Plaintiff has established triable issues and relied on the case of *Desbro Kenya Limited v Polypipies Limited & Another* [2018] eKLR where triable issue was defined.
6. Mr. Omwancha submitted that the Plaintiff is entitled to prompt compensation where her right to ownership of land was denied and cited Article 40 (10 and (3) of *the Constitution* of Kenya and the case of *Adan Abdirahman Hassan & 2 others v The Registrar of Titles & others* Nbi Petition No. 7 of 2012 [2013] eKLR.
7. On whether the Plaintiff had satisfied the conditions for grant of injunctions, counsel relied on the provisions of Order 40 rule 1 of the Civil Procedure Rules and the cases of *Bel Salim & others v Okong'o & others* [1976] KLR, *Nguruman Limited v Jan Bonde Nielsen & 2 others* and *Giella v Cassman Brown & Co Limited* [1973] EA 358 where the conditions were set out. That an Applicant must



establish a prima facie case; that he or she will suffer irreparable injury which cannot be adequately be compensated by an award of damages if an injunction is not granted; and thirdly if the court is in doubt, it will decide on a balance of convenience.

8. It was counsel's further submission that the Plaintiff has satisfied the conditions for grant of injunction and urged the court to grant the orders as prayed as the Plaintiff risks to suffer irreparable injury since the 1st Defendant has constructed a structure on the suit property with no arrangements that address the plans to allocate her another parcel.

1st 3rd and 6th defendants' submissions

9. The 1st, 3rd and 6th Defendants opposed the application vide joint grounds of opposition dated 7th February 2022 and stated that the 1st Defendant school started in the year 2000 and was located on the suit property way before the Plaintiff's alleged occupation.
10. The 1st Defendant stated that the Plaintiff has not demonstrated any occupation or being in possession of a title deed registered in her name. Further that the Plaintiff did not lodge any complaint with the committee and that the only disputes were over Plot No. 271 and 809 hence the Plaintiff has not established a prima facie case against the Defendants.
11. On whether the Plaintiff had established a prima facie case, counsel for the 1st, 3rd and 6th Defendants relied on the case of *Mrao v First American Bank of Kenya & 2 others* [2003] KLR cited in *Josphat Njoroge Mwangi & another v David Omonge & another* [2014] eKLR and submitted that the Plaintiff had failed to establish a prima facie case since there was no cogent evidence to demonstrate her occupation.
12. Mr. Mkalla submitted that the 1st Defendant's title could only be defeated on instances provided under Section 26 of the *Land Registration Act* such as fraud, misrepresentation, unprocedural acquisition which the Plaintiff failed to particularize as required by law.
13. On whether the Plaintiff would suffer any irreparable loss, counsel argued that the committee having resolved to compensate the Plaintiff and other residents, demonstrated that the Plaintiff can adequately be compensated.
14. Mr. Mkalla also stated that the balance of convenience tilts in favour of the 1st Defendant since there is already established on the suit property, a public school with children who stand to suffer greater loss and urged the court to dismiss the application.

2nd 4th and 5th defendants

15. The 2nd, 4th and 5th Defendants filed a Replying Affidavit sworn on 28th February 2022 by one Paul Munyendo, the Lamu County Assistant Physical Planner who deponed that only Plot 271 and 809 had disputes and that the suit property was cleared during the verification process that started in the year 2017. He added that during the verification process, the Plaintiff had neither developments on the suit property nor was she in occupation.
16. Mr. Paul deposed that the Plaintiff lodged a complaint over the suit property vide a letter dated 27th August 2021, after the hearing of the other disputes which were resolved on 19th August 2021.
17. It was the Respondent's averment that the Lamu County Government through the office of the County Physical Planning Department held a meeting on 28th October 2021 where it was resolved that the people claiming interests in Plot Numbers 271, 806, 807 and 809 be allocated other plots of equal acreage within Mokowe new town.



Analysis And Determination

18. This is an application for injunction and the issues for determination are as to whether the Applicant has met the conditions for grant of injunction as was set out in the case of *Giella Vs Cassman Brown* (1973) EA 358 and as was reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that; -

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

19. The Applicant seeks orders of injunction to restrain the 1st to 6th Defendants from trespassing, disposing, digging foundations, depositing construction materials, and or constructing on the suit property or in any manner whatsoever adversely dealing with the suit property.
20. Order 40 Rule 1 of the Civil Procedure Rules requires proof 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 that the Defendant threatens or intends to remove or dispose the property. Where an Applicant proves this then the court is enjoined to issue orders to preserve the suit property pending the hearing and determination of the suit. This was held in the case of *Robert Mugo Wa Karanja v Eco Bank (Kenya) Ltd & Another* (2019) eKLR.
21. It is also trite that the established conditions are sequential in that the second condition can only be addressed if the first one is met. The Court of Appeal in *Kenya Commercial Finance Co. Ltd v Afraha Education Society* (2001) 1 EA 86 held as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

22. It is not in dispute that the suit property is registered in the 1st Defendant’s name, it is further not disputed that the 1st Defendant is a public school which has been in occupation of the suit property since 2000. I also note that the Lamu County Physical Planning Department held a meeting on 28th October 2021 where it was resolved that the Plaintiff together with other complainants be allocated alternate plots of equivalent acreage to the plots they claimed within Mkowe which the court has not been told whether this process has been kick started or not.
22. This shows that the Plaintiff has an interest but it is not through obtaining an injunction to stop the school from operating. There are other dispute resolution mechanisms which can unlock this stalemate without having a protracted case in court. One of them is Court Annexed Mediation as the Defendant acknowledges that the Plaintiff was supposed to be allocated an alternative land within Mkowe area.
20. On whether the Plaintiff stands to suffer irreparable loss that may not be adequately compensated by an award of damages, the Plaintiff admitted that she is not in occupation of the suit land and stated that she had initially constructed a temporary two bedroomed house which had since been demolished.



The Plaintiff actually is in need of compensation or alternative land which in essence is quantifiable in terms of damages.

20. Similarly, the balance of convenience would tilt in favour of the 1st Defendant who is a public school and an injunction would interrupt the learning flow. I find that this is not a case where an injunction would issue and in the interest of justice I order that for the preservation of the suit land the same should not be transferred to any 3rd party pending the hearing and determination of this suit.
20. This is a case that can benefit from mediation and if the parties so wish can engage alternative dispute resolution for expeditious resolution of this case.
20. The application is therefore partially allowed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

