



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 140 OF 2020

MUNGA MWERO SULEIMAN & 16 OTHERS.....PLAINTIFFS

VERSUS

1. KENYA NATIONAL HIGHWAYS AUTHORITY

2. ANCIENT INLAND SEAS.....DEFENDANTS

RULING

1. The plaintiff filed a notice of motion dated 28th September, 2020 seeking the following orders:

1. That the matter is certified urgent, and service be dispensed with in the first instance.
2. An order restraining the defendants whether by themselves their agents/employees/servants and/or any one whatsoever laying claim through them jointly and severally from entering into, dwelling upon, interfering with the plaintiffs' open, peaceful, quiet, lawful continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use and or in any other manner whatsoever dealing with the suit property title No.MN/v/1791 situated in the Miritini Area Mainland North Mombasa measuring 1.8 ha or thereabouts, together with all the developments in any manner adverse to the plaintiffs' interest therein.
3. The orders subject to prayers/item 2 above be served upon the Court Bailiff, Mombasa Law Courts and the OCS Changamwe Police Station for purposes of ensuring execution of this order, provide security and ensure no public disturbance ensues, whilst maintaining law and order throughout and after execution of this order.
4. That the orders subject of prayers/items No. 2 and 3 above do persist until the hearing and determination of this application and ultimately the suit.
5. The costs of the application be provided for.

2. The application is supported by the affidavit of the 1st plaintiff and further affidavit sworn on the 14.4.2021 and grounds on the face thereof and all the documents annexed thereto.

3. The grounds of the application are: -

1. The plaintiffs were and remain lawful occupants of the PARCEL TITLE NO. MN/VI/1791 herein as well as structures and or developments thereon (suit property).
2. The 1st defendant has identified the parcel as a road reserve, within the meaning of the Roads Act 2007.
3. The 2nd defendant was, is and remains a stranger to the plaintiffs.
4. Both the 1st and 2nd defendants have laid claim to ownership/proprietorship of the suit property.
5. That the plaintiffs have been in lawful possession, occupation, enjoyment and derivative use of the property with effect from various dates earliest being year 1945 by virtue whereof they have established permanent and semi-permanent

structures thereon and maintained various economic activities thereon sanctioned by, inter alia the County Government of Mombasa.

6. That their lawful possession, occupation, enjoyment and derivative use of the suit property has been delineated by various milestones. The milestones are as items 3. I) to IX of the application.

7. That their open, peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of the suit property has persisted with effect from the diverse dates of their entry thereupon to date.

8. That they have recently received threats of eviction and demolition of their structures from one Abdul Kareem which threats have greatly concerned, them prompting them to engage M/s Ngonze Advocates herein to conduct official search in respect of the suit property to ascertain its status and registered ownership.

9. Although their efforts at obtaining a Certificate of official search from the Mombasa Land Registry have yielded nought, they have become aware that the suit property has been unprocedurally registered in the name of the 2nd defendant company, a company owned by the said Abdul Kareem.

10. By virtue of the open, peaceful, quiet, lawful, continues, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of the suit property as viewed against the backdrop of: -

a. Their interaction with the 1st defendant as regards lawful compensation prior to vacating therefrom.

b. The alleged registered ownership thereof by the 2nd defendant.

c. The fact that the 2nd defendant has never: -

- Taken up any form of possession and or occupation and or enjoyment and or derivative use thereof.

- Maintained a structure or activity thereon, the alleged registration thereof in favour of the 2nd defendant remains unprocedural or illegal therefore null and void ab initio.

11. That through further due diligence, it has transpired that the 2nd defendant has lodged proceedings based on misrepresentation and has proceeded to obtain orders of eviction against a section of the plaintiffs' neighbours.

12. That the 2nd defendant's unprocedural registration as proprietor of the suit property without the plaintiff and or the 1st defendant's consent and or sanction is improper, unconscionable, unlawful amounts to a gross violation of the plaintiffs inalienable right to property and unjustly denies the plaintiffs the benefit of continuing enjoying peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of the suit property thereby causing the plaintiff grave loss, injury and damage in-compensable by any award in damages.

4. The notice of motion is opposed by the 1st defendant vide a replying affidavit sworn on the 14.4.2021 on the following grounds among others: -

1. The suit property is on a road reserve as clearly stated in the survey map.

2. The plaintiffs and the 2nd defendants are strangers and the 1st defendant is not privy to any engagements entered into or the second defendants as regards the suit property.

3. The roping in of the 1st defendant into the proceedings was mischievous to assist it in its claim against the 1st defendant.

4. The suit property is public land incapable of being alienated to individuals or private parties.

5. The plaintiffs cannot have possibly be entitled to quiet enjoyment exclusive and uninterrupted possession over public land reserved for road construction and roadside facilities.

6. The nature of a road reserve is that it is reserved and must remain bare and unutilized until the 1st defendant requires the same for construction of road allied facilities. The fact of the 1st defendant having not taken possession or maintained any structure thereon should not entitle public land grabbers to occupy public land.

7. An inspection of the site by the 1st defendant has established that the plaintiffs occupation and structures are encroaching on the road reserve while, some having constructed on top, beside and even past the road marker posts erected by the 1st defendant.

8. The structures are a risk to motor vehicle users, to the plaintiffs and would impede future road developments in the area that would benefit the entire Republic of Kenya.

9. The plaintiffs have occupied a road reserve and should not benefit from an illegality. They have not come to equity with clean hands.

10. The Court lacked jurisdiction by dint of Section 18 (2) of the Land Registration Act which mandatorily reserves boundary disputes to the Land Registrar in the first instance.

11. The orders sought are not the most efficacious in the circumstances and the plaintiffs can air their grievances to the rightful authorities, the Land Registrar in the first instance.

5. The application was canvassed through written submissions. I have considered the application and supporting affidavit and documents thereto. I have also considered the defendant's reply and submissions filed by both parties herein. Parties have also relied on various precedents to canvass their positions which I have also considered.

6. The 1st defendant has raised a preliminary point on jurisdiction by dint of Section 18 (2) of the Land Registration Act which mandatorily reserves boundary disputes to the Land Registrar in the first instance. The 1st defendant avers that the dispute is a boundary dispute arising from the plaintiffs' occupation of a road reserve and is mandatorily reserved for the Land Registrar by dint of Section 18 (2) above and therefore prematurely brought before the Court.

7. I have considered the replying affidavit of the 1st defendant and the submissions canvassed on the issue of jurisdiction. Guided by the case of **Owners of Motor Vessel 'Lillian V Caltex Oil (Kenya) Ltd (1989) eKLR**, where the Court pointed that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. It therefore behooves to address the issue of jurisdiction first before I consider the application for without jurisdiction the Court would have no power to make one more step in this matter. I note that the plaintiff in their submissions did not address the Court on the issue. Be that as it may the Court will proceed to make a finding on the issue based on the material on record.

8. The jurisdiction of the Environment and Land Court is derived from Article 162 (1) (2)(b) of the Constitution to hear and determine disputes relating to environment and the use and occupation of and title to land. This article is read together with the Environment and Land Act Section 13 which confers the Environment and Land Court with jurisdiction as hereunder: -

The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercised of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determined disputes-

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

b) relating to compulsory acquisition of land;

c) relating to land administration and management

d) relating to public, private and community land; and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including interim injunctions or permanent preservation orders including injunctions....

9. I have also considered the material placed before this Court and I am convinced that the dispute relates to occupation of land, touches on the doctrine of adverse possession and irregular allocation of land and is not merely a boundary dispute as averred by the 1st defendant. I therefore find that this Court is properly seized of this matter.

10. Having dispensed with the preliminary point on jurisdiction I proceed to address the orders sought. The crux of the application is the order being sought that is, restraining the defendants whether by themselves their agents/employees/servants and or anyone whatsoever laying claim through them jointly and severally from entering into, dwelling upon, interfering with the plaintiffs open, peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use and or in any other manner whatsoever dealing with the suit property TITLE NO.MN/V/1791 situated in Miritini Area Mainland North, Mombasa measuring 1.8 ha or thereabouts, together with all the developments in any manner adverse to the plaintiffs' interest therein. This Court is guided by the following principles as set out in **Giella v Cassman Brown**. These are:

1. An applicant must show a prima facie case with probability of success.

2. An interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

3. If the Court is in doubt of 1 and 2 above principles it will decide an application on the balance of convenience.

11. Having perused the plaint, the supporting affidavits and documents in support thereof and without going into the merits of the case, I have found no compelling evidence of prima facie case considering there was no actual documentary evidence of eminent eviction by the defendants. Moreover, while a title has been produced in respect of the suit property there seems to be material difference in the acreage while at the same time the pleadings produced in respect of ELC Case No. 238 of 2018 have no reference to the plaintiffs. I am further not persuaded that the plaintiffs will suffer irreparable injury which would not adequately be compensated by an award of damages. The plaintiffs' claims are capable of being quantified approximately for purposes of compensation if any. The value of the alleged structures can be ascertained through valuation as well as earning from business undertakings through records of accounts if the same are proved during the substantive hearing of the case. Guided by the Court of Appeal in **Ngurumani Ltd v Jan Bonde Nelson & 2 Others (2014)eKLR** that all the three principles for granting an order of injunction must be met and in view of my findings aforesaid I will not canvass the principle of balance of convenience.

12. I therefore proceed to find as follows: -

1. The Court has jurisdiction to entertain this matter.

2. The plaintiff has failed to demonstrate a prima facie case and that they would suffer irreparable damage if the injunction is not granted and I dismiss accordingly the notice of motion application dated 18.9.20 in its entirety but order that the costs be in the cause.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF JULY 2021.

C.K. YANO

JUDGE

In the presence of:

Munga for 1st respondent

Magolo Paul holding brief for Ngonze for plaintiff

No appearance for other defendants

Court Assistant – Yumna

C. K. YANO

JUDGE