



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 9 OF 2016

**IN THE MATTER OF: CHAPTER FOUR, THE BILL OF RIGHTS, ARTICLES 19,
20, 21, 22, 23, 25, 28, 40, 159(2) AND 165(3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOM UNDER ARTICLES 19, 20, 21, 22, 23, 40 OF THE CONSTITUTION, RULE 11 AND 12
OF THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF PRACTICE AND
PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAWS**

AND

IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

- 1. JOEL OGADA ANGOGO**
- 2. JONATHAN KAHINDI BAYA**
- 3. JOSEPHINE NGOMBO KALU**
- 4. NGOMBO KALU TSUMA**
- 5. TIMOTHY KAZUNGU MWAROME**
- 6. PASCAL ZIRO WANJE**
- 7. MAPENZI KAHINDI**
- 8. PATIENCE MBEYU CHOGA**
- 9. MARIGA NGOMBO KALU**
- 10. KATANA SULUBU CHARO**
- 11. KAINGU KARISA TANGA**
- 12. KAZUNGU BAYA.....PETITIONERS**

AND

1. KURAWA INDUSTRIES LIMITED

2. NATIONAL LAND COMMISSION

3. THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By this Notice of Motion dated 21st September 2020, Joel Ogada and 11 others (the Petitioners) pray for an order of injunction to issue restraining Kurawa Industries Ltd (the 1st Respondent) from entering, remaining upon or otherwise being on, ploughing, digging, destroying or otherwise working on Land Parcel No. 22138 situate at Kurawa Kanagoni Fundisha Location of Kilifi County.

2. The said application is premised on the grounds that: -

a) The Petitioners have lived on the said parcel of land for several generations;

b) The 1st Respondent whose land parcel Number 13332 shares a common boundary with that of the Petitioners has embarked upon a process of encroachment on the land and has in the process evicted several members of the Petitioners' community rendering them homeless and destitute;

c) By an order issued on 3rd December 2008 it was directed that the Kilifi County Land Surveyor do visit the two adjacent parcels of land to determine their respective boundaries.

d) Despite an order that the survey fees be shared by the parties, the 1st Respondent has procrastinated on the same thereby stalling the process while at the same time moving onto the land and commencing some works thereon.

e) The Petitioners are apprehensive that the 1st Respondent is busy evading boundary features of the two parcels of land. The 1st Respondent has in the process of using earth-moving and digging equipment destroyed graves and houses belonging to the Petitioners.

3. The application is opposed by the 1st Respondent. In a Replying Affidavit sworn and filed herein by its director Mohamedhussein Kaderdina, the 1st Respondent avers that the application is frivolous, vexatious and a total abuse of the Court process. The 1st Respondent asserts that the Petitioners herein have no cognizable interest in the suit property and that the High Court had already found that the 1st Petitioner does not have a prima facie case against the 1st Respondent.

4. The 1st Respondent denies that it received any request from the Petitioners to pay half the costs of the survey and or that it has been procrastinating thereon. On the contrary, the 1st Respondent avers that it is ready and willing to have the survey done and a report prepared as directed by the Court.

5. The 1st Respondent further denies that it has encroached on the Petitioners' land and asserts that it has commissioned a survey which clearly indicates that all its operations are confined to its own parcel of land.

6. I have carefully considered the Petitioners' application and the response thereto by the 1st Respondent. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The Petitioner herein craves an order of injunction to restrain the 1st Respondent from entering, remaining on, ploughing, digging, destroying or otherwise being on his parcel of land No. 22138 situated in Kurawa Kanagoni Fundisha Location within Kilifi County.

8. The Petitioner avers that he has lived on the parcel of land which abuts the 1st Respondent's parcel of land Number 13332 for generations. It is his case that in a bid to illegally and irregularly expand the size of its land, the 1st Respondent has encroached on their land by digging dykes and large water retention pans for harvesting salt.

9. It is further the Petitioners' case that while the parties herein had agreed on 3rd December 2018 to appoint a joint survey to carry out a survey of the parcels of land with a view to establishing their boundaries, the 1st Respondent has frustrated that process by refusing to meet its part of the costs for such survey and has instead enhanced its activities on the Petitioners' land.

10. The conditions for the grant of an order of injunction were well settled in the case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358* where the Court stated as follows:

“First, 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 a balance of convenience.”

11. In *Mrao Ltd –vs- First American Bank of Kenya & 2 Others (2003) KLR 125*, the Court of Appeal defined a prima facie case thus: -

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. In the matter before me, it is contended by the Petitioners that the 1st Respondent has encroached on their parcel of land No. 22138 and that it is destroying beacons thereon. The Petitioners have however not placed any evidence before me of their ownership of the said parcel of land and the extent of any encroachment.

13. Indeed, from their own Petition as amended on 26th July 2018, it is clear that as at now, the Petitioners have no recognizable interest on the said property and hence their prayer that they be declared as the legal or beneficial owners of the part of the parcel of land they identify as Plot No. 22138. In addition, they have not annexed any survey report to their application from which an inference of encroachment could be made by this Court.

14. On the other hand, the 1st Respondent denies that any of its operations is outside its own parcel of land No. 13332. In support of their case they have annexed a survey report carried out by the Regional Survey Office within the Ministry of Lands & Physical Planning dated 15th January 2021. That report asserts that all the operations carried out by the 1st Respondent are within the boundaries of its Plot No. 13332 and that there are no encroachments on parcel No. 22138.

15. While the Petitioners in their Further Affidavit filed herein on 8th February 2021 raised issues with the unilateral nature of the Report, I note that under the consent order executed by the parties on 3rd December 2018, parties were at liberty to privately engage their own surveyors in addition to the survey that was to be done jointly.

16. In the circumstances herein, I am not persuaded on the material so far presented before me that the Petitioners have established a prima facie case with a probability of success. Accordingly, I dismiss the Motion dated 21st September 2020 with costs to the 1st Respondent.

Dated, signed and delivered at Malindi this 15th day of September, 2021.

J.O. OLOLA

JUDGE