



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 16 OF 2021

BANDARI INVESTMENTS & CO. LTD.....PLAINTIFF

VERSUS

MARTIN CHIPONDA & 139 OTHERS.....DEFENDANTS

RULING

I. PRELIMINARIES

1. This is rather a protracted, complex and convoluted matter. It involves numerous claims of land informal settlements (read squatters). The dispute had led towards mass destruction of properties, evictions and institution of series of civil and criminal cases. Which we shall see below are still pending hearing and final determination. When this matter was slated for mention on the 11th November, 2021, a lot of issues emerged raised by the Learned Counsels on record, Mr. S. M Kimani for the 1st and 18th Defendants herein and Mr. Mkan Advocate for the 2nd, 19th to 139th Defendants herein on the way the said matter was progressing. They indicated that there had been blatant demolitions of the structures and mass evictions that were going on as the case was being mentioned. In the given circumstances, the honorable court on its own motion was compelled to reserve some time to provide clear and tangible directions on how this matter was to proceed forward in the fullness of time and finally determined to its logical conclusion.

2. **The genesis of this dispute.** All said and done, what triggered this matter was the institution of this suit by the Plaintiff and a Notice of Motion application dated 19.8.2021 filed by the 2nd, 19th to 139th Defendants seeking for temporary injunction orders restraining the Plaintiff and its agents from causing further demolitions of the fixtures on to the subject land all that parcel of land known as Land Reference Numbers MN/11/817 occupied by the some parties known as interested Nguu Tatu Community based organization though sued as Nguu Tatu Self Help Group. The order sought were for restraining any further demolition of fixtures on the land, houses and engaging in any act of omission and commission to the peaceful occupations and use of the suit land until the makes any further findings.

3. When the notice of motion application was placed before the duty court it noted that the matter had already been ongoing having been instituted by the Plaintiff from February, 2021 and was at the verge of being finalized. Indeed, court further noted the existence of another injunction orders granted by this Honorable court to the 1st Plaintiff on 1st February, 2021. Besides this, arising from the reported on going evictions and the demolitions of structures belonging to the Defendants to a point of exposing them to being destitute, court felt it needful to grant interim orders to the 2nd, 19th and 139th Defendants to see how the property would be preserved and the status quo be maintained pending the hearing and final determination of *'the inter parties'* hearing on 16.9.2021.

4. On 16.9.2021, Mr. Mkan Advocate informed Court that despite of the interim orders granted there were still disobedience of the orders and his clients were rendered destitute. Additionally, Mr. S.M. Kimani Advocate, informed court that the pleadings had not closed yet the matter was being frog marched by the Plaintiff and his clients. The suit property was demolished by unknown people, on 14th September 2021 at 11.00 p.m. He sought for leave to file an application seeking for orders to have his clients reinstated onto the suit land. Mr. Wachira Advocate for the Attorney General held that the issue of ownership had been settled though he noted their clients were experiencing a lot of difficulties. They kept on mutating as different groups kept on emerging all the time on the site land. Mr. Muniythia Advocate for Plaintiff held that his clients had nothing to do with the demolitions taking place.

5. From there court directed the notice of motion application dated 19.8.2021 be canvassed by way of written submission and provided a well-structured time frame. Mr. S.M. Kimani Advocate was granted leave to file an application to have his clients reinstated and the interim orders were extended to 6.10.2021.

But prior to the above date, On 1st October, 2021, Mr. S.M. Kimani Advocate moved this court under certificate of urgency and filed an application dated 30.9.2021 to reinstate his clients who were already evicted back to the suit land. It was certified as urgent but fixed for *'inter parte'* hearing on 7th October, 2021. On the 7.10.2021 direction were taken to the effect that the said application be disposed off by

way of written submissions and the same be mentioned on 11.11.2021 for further direction. At the same time, court was informed that parties particularly the Plaintiff and the 2nd. 19th to 139th Defendants were attempting to explore an out of court negotiations and there were high prospects and with a likelihood of recording a settlement and/or consent. On this aspect, Court encouraged parties on this front for the sake of expedient disposal of the suit.

6. However, on 11.11.2021 when the matter was slated for mention before this Honorable Court, Mr. S.M. Kimani Advocate indicated that though he had properly served his afore stated application, none of the parties had filed any responses. Further, he strongly submitted that due to the urgency of the matter and priority caused by the eviction of his clients, he decided to file a supplementary affidavit without leave of court and which he now urged Honorable court to admit whatsoever. Coincidentally, while this was in progress before court, he brought to the attention of court that further wrongful demolition were actually taking place and that the people causing the said demolition of the structures and the mass evictions confidently indicated to be armed with a court order. He stated that they were accompanied by a battery of the police officers. He vehemently condemned these acts in the strongest term possible as barbaric, travesty of justice and an abuse of the due court process.

7. At this juncture, Mr. Makuto Advocate for the 140th Defendant confirmed to court that, indeed there existed a court order issued by this court on 13th October, 2021 in the ELC. Number 160 of 2021, yet another different suit with the same parties and same subject matter. At the same time, Mr. Munyithia further pointed out that there existed another notice of motion application dated 18.3.2021 for contempt of court order pending hearing. This is where there had been destruction of the perimeter wall. He stated that direction on it had already been granted by court on 23.6.2021 for it to be heard on priority basis before any other whatsoever.

8. Apparently, these revelations and incidences on the suit land extremely disappointed Mr. S.M. Kimani Advocate particularly on learning that all these acts of evictions and demolition of structures were orchestrated against his clients by the Attorney General. Equally, he was upset from the assertion made by the Plaintiff's Advocate, Mr. Munyithia that since his clients, 1st and 18th Defendants were not on the list prepared by Mr. Mkan Advocate's pleadings then they were not affected and so they had no interest in the matter and/or the alleged out of court negotiations which would have been driven by collusion by some of the parties.

It was a result of all this, the interest of justice, equity expeditious and tranquility and to make progress in the matter, the Honorable court directed to provide a more comprehensive directions by 15th November, 2021.

II. BRIEF FACTS

9. In order to be in a position to fully appreciate this case, it is imperative that I recount on the facts briefly based on the filed pleadings on record. On 29th January, 2021, immediately the constitution Petition No. 15 of 2017 was dismissed by this court the Plaintiff – Bandari Investments Company Limited instituted this suit through a Plaint and on 10th March 2021 filed an Amended Plaint against 139 Defendants. The Plaintiff is incorporated as a Sacco wholly owned by the Bandari Savings and Credit Co-operative Society Limited, a member based SACCO. Unfortunately, court has not been able to see any certificate or proof of the legal registration as yet. It averred that its membership Sacco was comprised of 19, 000 who had constitutional or statutory mandate to defend their properties against armed invaders such as the Defendants. By filing this suit, their intention was to protect their parcel of land and even if it meant by forcefully removing the invaders.

10. The 1st to 139th Defendants are male and female adults of sound mind and understanding residing in the County of Mombasa, Kisauni Constituency, within Kiembeni location. At all material times of this suit they were operating at Kaguta Self Help Group and Nguu Tatu Self Group while the 140th Defendant is the Honorable Attorney General who is the Chief legal officer of the Government of Kenya well established under Article 156 of the Constitution of Kenya sued in this suit on his own behalf and on behalf of the Ministry of Interior and internal Co - ordination as the Ministry in charge of protecting private property and lives of all Kenyans under the Constitution of Kenya.

The Plaintiff stated that it acquired for a valuable consideration a plot sub - division No. 817 (Original Number 324/2) section II/MN. It measures approximately 59 acres situated at Nguu Tatu area Kiembeni within the County of Mombasa in the year 2012. (herein after referred to as "the suit property"). For this reason, the Plaintiff has claimed being the proprietor to the suit property and absolute discretions to use it for its benefits in exploitation of constitutional and statutory rights and the Constitution of Kenya. According to the Plaintiff, at the time of its acquisition, the property was an open farm actively utilized by the previous owner with no squatters. Upon acquiring the suit land, it engaged and installed some private security guards to watch on it.

III. The invasions by the Defendants.

11. According to the Plaintiff herein, on or about the month of September, 2016, the 1st to 139th Defendants and their agents without any good reasons and/or justifiable cause invaded the suit property by wrongfully and illegally entering and taking possession of portion of the suit property and commenced constructions of some temporary structures and remained on it which was a clear case of trespass. Upon invading the suit land, they chased away the private security guards amidst threats of causing their deaths if they resisted or refused to abide. It appears this had been going on for many years from the year 2016.

12. **The Court Cases.** Following these acts of illegal and unlawful invasion by the Defendants, a complaint was lodged at the Bamburi Police station whereupon some of the Defendants were arrested and charged where various charges were preferred against them in court. As a result of the alleged and perpetrated illegal invasion and trespass by the squatters, it has generated several cases pending before the sub - ordinate and other courts being the SRMCC No. 1686/2016, Judicial Review 7 of 2017 and over other 8 criminal cases where orders of eviction had been issued. There has existed over eight (8) Civil and Criminal Cases over the said property (ELC 201/2013; ELC No. 298 Const. Pet. No. 74/2014; ELC No. 301 of 2013 (O.S.); Criminal (Shanzu) No. 822 of 2015; Criminal Shanzu 1252 of 2015; Criminal Shanzu 1040 of 2016) which are still to be heard and determined thereof.

13. On 1.12.2017 the Plaintiff filed a Constitutional Petition No. 15 of 2017, ELC, Mombasa whereupon some orders were issued on 4th

December, 2017, 19th December, 2017 and 8th July 2019 restraining the squatters from selling, sub-dividing and interfering with the construction of the perimeter walls. The said orders directed to the National Police Service to provide armed security to the contractor and ensure the construction of the said perimeter wall took place and that peace prevailed where the wall was not destroyed. According to the plaintiffs, they intended to initiate a housing scheme there on the suit property.

14. Between the years 2018 and 2020, the Plaintiff undertook and completed the construction of the perimeter wall as per the court order of 18th July, 2019. The Plaintiff has claimed being the absolute proprietor to the suit property absolute and has the discretion to use it for its benefits in exploitation of constitutional and statutory rights and the Constitution of Kenya. It was noted that most of the squatters left. It is a few that remained behind. The Petitioner sought for a declaration to have the Defendants operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others not as squatters but Criminals who were armed and who had forcefully breached the Constitutional rights of the Plaintiff to own private property contrary to the provisions of Article 40 (1) & (2) of the Laws of Kenya and who were being discriminated against by the County Government of Mombasa. They sought for permanent injunction against the Defendants. They alleged that these were tricks being cleverly applied by some influential land grabbers in coast, to the effect that a first group would have in a suit land using violence and takes possession of the property. Once in possession, they would bring in a second level of invaders to purchase portions of the target plot and similarly construct temporary structures. This process goes on and unless evicted, permanent structures are set in complicating the whole process of possible eviction.

15. During the electioneering period of June - November 2017 the Defendants embarked on massive sale of portion of the suit land. It is averred that invasion of private property in Kisauni Constituency by use of force is a matter of public notoriety and urged court to reserve the trend by enforcing the rule of law and Defendant the sanctity of the title and they risked losing its property as happened to Waitiki Farm where the proprietor lost his property to squatters.

The Defendants have argued that the eviction of squatters or invaders of private land physically dispossess the title owners and in whose favour time may run is not the work of the National Police Service or the County Government of Mombasa. They have pleaded that trespass or squatting upon private land which physically dispossess the title owners is neither criminal nor does such trespass or squatting contravene the right against discrimination of property under the provisions of Articles 27 and 40 of Laws of Kenya.

16. They averred that the acquisition of the suit property by the Plaintiff when it was occupied by squatters did not place the purchaser in any better position than the vendor who could only pass title to such land subject to any accrued overriding interest/rights of occupation or claim under land adverse possession or rights by prescription. They averred that the issues of wrongful entry or trespass and squatting on private land or even forcible entry of detainer of development with intent to annoy did not raise any constitutional issue or issue involving the constitutional interpretation. On the contrary they have submitted that trespassers who enter land with intent to annoy should be dealt with under the Trespass Act and the Penal Code. If they damage any property or take anything of value they are subject to criminal law on Malicious Damage to Property or theft as well as an action for damages or ejection.

17. On 28th January, 2021, upon being heard, the Environment & Land Court Constitution Petition No. 15 of 2017 was dismissed. While dismissing it, court held that the remedy for the Petitioners relied in ordinary Civil Law and not in Constitutional Petition and that no construction issue arose termed as "Principle of Constitutional avoidance" court will not determine a constitutional issue when a matter may properly be decided on another basis. It relied on the Supreme Court Cases of "**Communication Commission of Kenya & 5 Others –VS- Royal Media Services Limited & 5 others [2014] eKLR.**"

IV. The Plaintiff's case.

18. Immediately after the dismissal of the Constitution Petition, the Plaintiff herein instituted a fresh suit being ELC No. 16 of 2021. From the filed pleadings, the Plaintiff sought for the following prayers:-

(a) A permanent injunction restraining the 1st to 139th Defendants from entering upon, remaining continuing in occupation, constructing destroying the existing perimeter wall or any other way interfering with the Plaintiffs quiet possession and enjoyment of the suit property.

(b) A mandatory injunction compelling the 1st to 139th Defendants by themselves, their servants and/or agents at their own costs to demolish the constructions erected on the suit land property, remove and dispose the materials from the suit land, to so demolish, remove and dispose the material and in default the Plaintiffs be at liberty to demolish, remove and dispose the materials and in default plaintiffs be at liberty to demolish the structures and dispose of the materials at the Defendants Costs.

(c) Vacant possession of property.

(d) An order for compensation of the value of destroyed wall since February, 2018.

(e) An order directing 140th Defendant through the County Commander Mombasa, OCPD Kisauni and OCS Kiambeni to ensure full implementation of the Decree.

(f) Costs of the suit together with interest.

IV. THE CASE OF THE 1st TO THE 140TH DEFENDANTS

19. From the records, it is clear that so far defence has been filed by any of the Defendants. Indeed the pleadings have not yet closed. Instead, they have filed interlocutory applications and preliminary objections. Subsequently, the 2nd, 19th to 136th Defendants filed a

Preliminary Objection dated 2nd June, 2021 on grounds that the Plaintiff's suit was "Res judicata" contrary to Section 7 of Civil Procedure Act, Cap. 21 of the Laws of Kenya and whether the dismissal of the Constitution Petition No. 15 of 2017 was a bar to institution of a fresh suit by the Plaintiff against the 1st to 140th Defendants. Parties filed written submissions on the Preliminary Objection and notice of Motion application dated 12.3.2021. The Plaintiff's submission, 15.6.2021 and dated – the two preliminary Objections 26.2.2021 and 12.3.2021.

20. Pursuant to this, on 28th May, 2021, the 1st and 18th Defendants filed an application dated 27.5.2021. It sought several orders. These included:- a). The directions of court given on 15.3.2021 that the two preliminary objections on record be heard first should be vacated; b). Court to give fresh directions with regards to the amended Plaintiff c). leave to amend the 1st and 18th Application to strike out the Plaintiff and to add and serve new Defendants; and d). application to be heard alongside the preliminary objection. Thereafter, the Plaintiff filed grounds of opposition to notice of motion application dated 27.5.2021.

Acts of deceit and perjury by the Plaintiff & the Advocates.

21. While all these were taking place, this court has actually taken judicial notice that, on 17th August, 2021, the Plaintiffs here the Bandari Investment Company Limited, instructed another law firm Messrs. of Mwamuye, Mzungu, Solomon Advocates to file a suit – ELC No. 160 of 2021 against 16 Defendants some of them particularly one Mr. John Shauri, Mr. Mathian Mwangemi, Mr. Robert Mujambe Lugo and Mr. Martin Chiponda are the same ones as the 19th, 27th 22nd and 1st Defendants respectively in that order in the existing and pending ELC no. 16 of 2021. For obvious reasons, they deliberately failed to disclose such material facts to court and seen here below, the court when it later on found out the truth and/or intended mischief was not impressed. They sought injunction orders and were granted over the same suit property until 27th September, 2021. The Plaintiff was directed to serve the pleadings and come back for "inter parte" hearing on the 27th September, 2021. On the 27th September, 2021, the Defendants informally appointed an Advocate called Mr. Arika who appeared and requested for more time to file the replies and which was granted. The interim orders were extended to 13th October, 2021. On 13th October, 2021, its only Mr. Mwanyika Mzungu Advocates for the Plaintiff who appeared for the Plaintiff. There was no appearance for the Defendants/ Respondents. He urged court to grant the orders as prayed taking that the application was unopposed. He had an affidavit of service. The courts hands were tied and it allowed the application. Now on close reflection of the matter, the court sees numerous anomalies, some serious and total abuse of the due process and an affront caused by the Advocates for the Plaintiff in the matter as follows. Firstly the Advocates for the Plaintiff never disclosed to this court any material to the effect that the Plaintiff had filed similar matters over the same subject matter and same parties as already pointed out above before this court and which were still pending hearing and final determination. Indeed, from the averments under Paragraph 14 of the Plaintiff, and based on the provision of order 4 Rule 4 of the Civil Procedure Rules the Plaintiff held verbatim:- **"There is no other suit pending before any court between the parties herein over the same subject matter..."** and which and where the Chairman of the Plaintiff, one Mr. Ken Tobias Odero Sungu signed the Verifying Affidavit dated 16th August, 2021 holding that – **"the averments contained in the Plaintiff are correct and according to the Plaintiff's instructions and I hereby swear this affidavit in verification of the Plaintiff"** knowing too well that this were incorrect as there were other suits pending before this court. This is serious and borders on perjury.

22. Secondly, Mr. Arika Advocates appeared in this matter on 27th September, 2021 purporting to be representing the Defendants/Respondents yet he had not complied with the provisions of Order 6 (1) and 9 (7) of the Civil Procedure Rules of having filed a Notice of appointment of Advocates and Memorandum of appearance. He took advantage of the court's trust on him. Later on, on 13th October, 2021 he conveniently failed to appear in court, perhaps acting in collusion with the Plaintiff's Advocates to enable him obtain the orders as prayed from unopposed application. It is these orders which were obtained ex-parte that the Plaintiffs used to cause the mass demolition and illegal mass eviction.

Thirdly, upon looking at the Affidavit of service of one Alex Phillip Nzuki, dated and filed in court on 24th September, 2021 particularly the contents of paragraphs 3 and 4 respectively, clearly he admits never properly having served the Defendants. Hence, it is safe to say no service was ever effected upon the Defendants. This is unacceptable, unprofessional, unreasonable and irregular.

III. THE DIRECTIONS

23. While making these directions, this court has derived its inherent powers vested on it in what is now termed as the overriding objectives (or loosely known as "the Oxygen rule"). The said powers are founded under the provisions of Sections 1, 1A, 3 and 3A of the Civil Procedure Act, Cap. 21, Section 3 of the Environment Land Court Act, 2012 and Article 159 (1) and (2) of the Constitution of Kenya and in particular the principles which guide proceedings before this court being "the Practice directions on proceedings in the ELC" developed pursuant to the Provisions of Sections 18, 19, 20, 24 and 30 of the ELC Act specifically being just, expeditious disposal of cases, proportionate and accessible to resolution of disputes pertaining to land. Therefore, I do proceed to provide elaborate directions as follows:-

(a) **THAT** for ease of reference and case management all the multiplicity of the civil cases and/or proceedings, filed by the same parties and same subject matter hereof pertaining to this suit property should be brought to be under one court. For avoidance of any confusion, these are namely:-

- (i) Constitution Petition No. 15/2017 - Bandari Investment Company Limited – Vs – The National Police Services & others;
- (ii) ELC No. 16 of 2021 - Bandari Investment Company Limited – Vs – Martin Chiponda & 140 others;
- (iii) ELC No. 160 of 2021 - Bandari Investment Company Limited – Vs – Vincent Lusige & 15 others.

(b) **THAT** arising from the acts of deceit by the Plaintiff and both the Advocates for the Plaintiff and Mr. Arika Advocates I do direct as follows:-

The Chairman for the Plaintiff, Mr. Ken Tobias Odero Sungu , Mr. Mwanyika Musungu Advocate of the law firm of Mwamuye, Mzungu, Solomon Advocates and Mr. Arika Advocate to appear before this Court on Thursday, 18th November, 2021 without failure to:-

i).show cause why stern action should not be taken against them for their acts of deceit and perjury. Notices to issue accordingly. In the meantime

ii). In the meantime, the interim orders granted on 17th August, 2021 and 13th October, 2021 respectively in the ELC 160 of 2021 be and are hereby “Suo Moto” set aside, vacated and/or discharged pursuant to the provisions of Order 40 Rule 7 of the Civil Procedure Rules.

iii). From onwards and until they are consolidated the ELC Number 160 of 2021 and ELC number 16 of 2021 will always be mentioned together where the ELC Number 16 of 2021 will be the lead file.

(c) **THAT** there shall be a site visit (“*Locus in Quo*”) of the suit land by court on Friday the 19th November, 2021 from 9.00 to 5.00 p.m. purposely to critically examine the happenings and evidence on the ground pertaining to the subject in question. During the visit only Counsels and a few representatives to be allowed to be present. There shall be maximum security under the Sub – Commander, Kisauni Sub – County.

(d) **THAT** all the pending interlocutory applications being 28th May, 2021, 19th August, 2021 and 30th September, 2021 and the 2 preliminary objections on the said subject matter be disposed off simultaneously by way of written submissions. Parties will be granted 10 minutes each to highlight their submissions.

(e) **THAT** all the Defendants will be granted 21 days to fully comply with the provisions of Orders 6 (1) and 7 (1) and Order 11 of Civil Procedure Rules on case management by:

(i) Filing their statements of Defence and Counter claim by the 1st and 139th Defendants.

(ii) Filing of Replying to the Defence and counter claim by the Plaintiff.

(iii) List of Documents, witness and witness statements.

(f) **THAT** court has invoked its powers vested on it under the provision of Order 40 Rule 10 (1) and Order 18 Rule 11 of the CPR to conduct a site visit (“*Locus in Quo*”) on the 19th November, 2021, from 9.00am to 1.00pm in order to inspect, examine and gathering further evidence on the suit land arising from the three (3) issues namely i). the acquisition of the property by the Plaintiff ii). The invasion of the land by the 1st to 139th Defendants and iii). The forceable evictions of the Defendants and demolitions of properties by the Plaintiffs in order to assist court in having a better perspective of the case and in its decision making function and/or process. Nonetheless, the purpose of the visit will not be to adduce fresh evidence nor on the veracity of the evidence already on record through cross examination.

(g) **THAT** in the meantime and in order to preserve the suit property the following should take place.

(i) There be peace tranquility and quiet possession on the suit premises.

(ii) The Temporary interim injunction orders issued by this court on 1st February and 19th August 2021 respectively be extended until the matter is heard and determined.

(iii) The Status Quo to be maintained until the case is heard and determined.

(iv) The Land Registrar Mombasa is directed to register an inhibition order against all that property known as Land Reference Numbers MN/11/817 under the provisions of Section 68 (1) & (2) and 69 of the Land Registration Act of 2012.

(d) **THAT** the already out of Court negotiation process that had been initiated with a view of attaining an amicable settlement to the matter under the provision of Article 159 (2) (c) of Laws of Kenya is encouraged and once finalized a consent be recorded to be adopted as an order of this court.

IT IS SO ORDERED.

Ruling **Delivered, Dated** and **Signed** in Open Court This **16TH** Day of **NOVEMBER, 2021.**

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna Hassan – the Court Assistant

Mr. Munyithia for the Plaintiffs

Mr. Mkau for 19th to 139th Defendants

Mr. S.M. Kimani for 1st and 18th Defendant

Mr. Makuto for the 140th Defendant