



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 2 OF 2021 (OS)

RASHID SILVANUS MWAMUYE & 36 OTHERS..... APPLICANTS

-VERSUS-

JUBILEE JUMBO HARDWARES LIMITED..... 1ST RESPONDENT

JUMBO-STEEL MILLS LIMITED.....2ND RESPONDENT

ZAINAB JUMA ALI..... 3RD RESPONDENT

KARISA GANGIRANI..... 4TH RESPONDENT

RULING

1. By the Notice of Motion dated and filed herein on 18th February, 2021, the 37 Plaintiffs pray for a temporary order of injunction to restrain the 4 Defendants herein or any person acting on their instructions from evicting them, leasing, constructing on, mortgaging or dealing in any manner with Land Parcel No. 458/Kilifi/Chasimba (*Originally known as Parcel No. 240/Kilifi/(Chasimba)*) pending the hearing and determination of their suit as filed herein.

2. The Motion which is supported by an affidavit sworn by the 1st Plaintiff – Rashid Mwamuye is premised on the grounds that:

(i) The Plaintiffs have just discovered that the 2nd, 3rd and 4th Defendants recorded a consent over the suit property in Kilifi ELC No. 37 of 2020; Jumbo Steel Mills Limited -vs- Zainabu Juma Ali & Karisa Gangirani without the knowledge or participation of the Applicants;

(ii) The effect of the consent is to have the Plaintiffs evicted from the suit property contrary to the express provisions of Article 50 of the constitution and their right to fair hearing;

(iii) The Defendants in the said Kilifi ELC No. 37 of 2020 do not and have never occupied the suit property and hence the orders for eviction will not affect them.

(iv) The Plaintiffs have been in occupation of the suit property together with others for the past 15 years and the 2nd, 3rd and 4th Respondents are aware of the occupation which is open, continuous and uninterrupted.

(v) Jumbo Steel Mills Limited which is the Plaintiff in the said ELC No. 37 of 2020 is not the registered owner of the property. The registered owner is Jubilee Jumbo Hardwares Limited; and

(vi) The orders for eviction by consent was aimed at catching the Plaintiffs by surprise and the Plaintiffs only came to learn of the same when the Police went to the land and asked them to vacate.

3. Jubilee Jumbo Hardwares Limited (the 1st Respondent) is however opposed to the grant of the orders sought. By their Grounds of Opposition dated 3rd April, 2021 and filed herein on 3rd May, 2021, the 1st Respondent opposes the application on the grounds that:

1. The orders sought in the application cannot be granted in this suit as they amount to stay of the order issued by Hon. S. K. Kituku, SPM on 29th July, 2020 in Kilifi ELC No. 37 of 2020; Jumbo Steel Mills Limited –vs- Zainabu Juma Ali and Another. Orders granted by the Kilifi Court cannot be stayed in this case save by way of appeal which is not the case here. The Applicants should

apply to Kilifi Court for stay of the subject order but not through this application which is distinct and separate.

2. This suit and the application are a guised appeal against the order issued by Hon. J. M. Kituku, SPM on 29th July, 2020 in Kilifi ELC No. 37 of 2020; Jumbo Steel Mills Limited -vs- Zainab Juma Ali and Another.

3. This suit is a knee-jerk reaction to the order issued by Hon. S. M. Kituku, SPM on 29th July, 2020 in Kilifi ELC No. 37 of 2020; Jumbo Steel Mills Limited -vs- Zainabu Juma Ali and Another.

4. The application and the Originating Summons are supported by an affidavit sworn by a person who is not a party to the suit. The 1st Plaintiff is one Rashid Silvanus Mwamuye yet the Supporting Affidavit has been sworn by one Rashid Mwamuye.

5. Rashid Mwamuye has no authority to swear the supporting affidavit because he is not among those who were given authority by the other Plaintiffs to act on their behalf.

6. Even if Rashid Mwamuye was one and the same person as Rashid Silvanus Mwamuye, he cannot solely act in the matter because three people were the ones given authority to act and they must do so jointly and not individually.

7. The 2nd and 3rd Plaintiffs have not given Rashid Mwamuye authority to act on their behalf and he therefore has no authority to swear the affidavits on behalf of all the Plaintiffs.

8. The application cannot be granted because it is based on (a) fatally defective Originating Summons. The Originating Summons is fatally defective because;

(i) It is supported by a defective Affidavit whose jurat is hanging on its own page contrary to the law;

(ii) It is brought against the 2nd, 3rd and 4th Defendants who are strangers since the Plaintiffs have admitted and pleaded that they are not registered owners of the suit property. A claim of adverse possession does not lie against persons who are not the registered owners of the suit property. The joinder of the 2nd, 3rd and 4th Defendants herein makes the entire suit fatally defective and nothing can stand on the suit.

4. In addition to the Replying Affidavit, the 1st Defendant has filed a Notice of Preliminary Objection dated the same 3rd day of May, 2021 wherein it objects to the entire suit and the application on some 5 grounds similar to the averments in the Affidavit.

5. Zainab Juma Ali and Karisa Gangirani (the 3rd and 4th Defendants respectively) are equally opposed to the application. Through their Notice of Preliminary Objection dated 21st May, 2021 as filed herein on 2nd June, 2021, they object to the suit and the application on the single ground that:

1. The entire suit is fatally defective for having been brought against the 3rd and 4th Respondents who are not registered owners of the suit property and against whom an adverse possession does not lie.

6. I have carefully considered the application and the response thereto by the 1st, 3rd and 4th Defendants. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. It is the Plaintiffs' case that the 2nd, 3rd and 4th Defendants recorded a consent order in respect of the suit property in Kilifi ELC Case No. 37 of 2020; Jumbo Steel Mills Limited -vs- Zainabu Juma Ali and Karisa Gangirani without the knowledge or participation of the Plaintiffs. The Plaintiffs told the court that the effect of the said consent order is to have the Plaintiffs evicted from the suit property contrary to **Article 50 of the Constitution** and in violation to their right to a fair hearing.

8. The Plaintiffs aver that the Defendants in the said Kilifi case do not and have never occupied the suit property and that thence they will not be affected by the orders they consented to. On the contrary, it is the Plaintiffs who reside on the suit land and that are now faced with imminent eviction.

9. In response to the suit and the application, the 1st Defendant filed a Notice of Preliminary Objection dated 3rd May, 2021. It is the 1st Defendants case that the suit as filed is fatally defective as the same amounts to an appeal against the said Kilifi ELC No. 37 of 2020 without following the known appellate legal procedure.

10. Jurisdiction of a Court is that authority reposed on the court of law to take cognizance of matters placed before it for adjudication. That jurisdiction may be general or specific, limited or unlimited. Jurisdiction of a court may be conferred by the Constitution, statute, or both. Whatever the case, the court as a creature of the constitution and the law, must only exercise the jurisdiction conferred on it.

11. Under **Section 13 of the Environment and Land Court Act**, this court has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article **162(2)(b) of the Constitution** and with the provisions of the Environment and Land Court Act or any other law applicable in Kenya relating to environment and land.

12. In the matter before me, it is apparent that there is another dispute concerning the subject matter herein. The Plaintiffs assert that they learnt of the said case being Kilifi SPM's ELC case No. 37 of 2020 when the Police served them with an order emanating therefrom seeking

their eviction from the suit property. They challenge the said order on the basis that they were not a party to the case and that they have been condemned unheard.

13. In this respect, I am in agreement with the submissions of the 1st Defendant that the issue as to whether the Plaintiffs are bound by the order issued in the subordinate court at Kilifi can only first be determined in the said case. What the Plaintiffs ought to have done is to apply to be made a party to the Kilifi case and thereafter apply for the orders to be set aside and/or varied.

14. The Plaintiffs were certainly cognizant of that fact hence their averment that the Kilifi file has been missing. As it were, no evidence whatsoever has been annexed to their application to demonstrate that they made any efforts to look for the alleged missing file and/or for the reconstruction of the same. That should have been the starting point as that would entitle them to approach this court by way of appeal.

15. What the Plaintiffs have done here is to challenge the orders issued in the subordinate court through the backdoor. By their application herein, they are asking the court to stay or set aside the orders given in the Kilifi suit without first applying to the trial court. That approach is unprocedural and unacceptable.

16. In the Premises, I am persuaded that the 1st Defendant's preliminary objection is well-founded in law. Accordingly I hereby strike out both the suit herein and the Motion dated 18th February, 2021.

17. I make no orders as to costs.

Ruling dated, signed and delivered virtually at Nyeri this 2nd day of December, 2021 via Microsoft Teams.

In the presence of:

Mrs. Nyange holding brief for Nyange for the Applicants

No appearance for the Respondents

Court assistant - Wario

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J. O. OLOLA

JUDGE