



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC PETITION NO. 57 OF 2019

MARIAM NDIAKU ABDALLA & 550 OTHERS.....PETITIONERS

VERSUS

HAKIKA TRANSPORTES LIMITED & 6 OTHERS.....RESPONDENTS

RULING

(Application for injunction; principles to be applied; preliminary objection that the suit is res judicata; no sufficient material presented that the suit is res judicata; no finding made on the issue of res judicata; Petition seeking various orders including an order that the petitioners are entitled to be issued with title to the suit land; petitioners claiming that 1st respondent was wrongfully issued with title; 1st respondent denying any connection with the suit land; not demonstrated that the owner of the suit land has been sued; difficult to see how the petitioners can succeed without demonstrating that they have sued the persons holding title to the land; report annexed by the petitioners doubting that the petitioners have been on the suit land; no prima facie case established; application dismissed)

1. This suit was commenced through a constitutional petition filed on 10 December 2019. The petition seeks the following orders :-

(a) A declaration that the petitioners have the right to be settled on Original Plot Number 423/I/MN as the residents thereon and in the alternative adequate compensation to be done by the Government accordingly.

(b) A declaration that the harassment intimidation and forceful eviction of the Petitioners from Original Plot Number 423/I/MN is in breach of their constitutional rights and whereof the respondents jointly and severally be ordered to compensate them accordingly.

(c) A declaration that the Petitioners have acquired proprietary interest on Original Plot Number 423/I/MN and all the subsequent subdivisions thereon and title do issue in their favour.

(d) In the alternative the Petitioners be declared to have acquired proprietary interest on the area occupied by the Petitioners and be settled thereon upon survey being done.

(e) An order granted for the Petitioners and their respective families respectively not to be evicted/removed/intimidated unless at their own will and/or unless compensation is carried out accordingly.

(f) An order be and is hereby issued directing the 3rd respondent through the Land Registrar Mombasa to proceed and reconstruct the records if need be and proceed to issue title documents in favour of the Petitioners herein respectively and accordingly without gazettelement.

2. The petition is supported by the affidavit of Mariam Ndiaku Abdalla who is the first petitioner. It is the case of the petitioners that they have been residents of the land described as Original Plot Number 423/I/MN (the suit land) since time immemorial. They aver that they resided on the suit land peacefully until sometimes in the year 2010, when the 1st respondent with the assistance of the 4th respondent, began to forcefully evict them. They attempted to have the matter resolved in vain. The petitioners aver that the 1st respondent has title to the suit land but claim that title was obtained maliciously and in breach of their constitutional rights because it was issued to non-residents thus contravening the principles and spirit of the constitution. They aver that they presented their case to the National Land Commission (NLC) (the 2nd respondent) and a hearing was conducted on 28 and 29 August 2018, and that the NLC made its recommendations on 7 February 2019. It is averred that the claim of the petitioners was dismissed by the NLC but that a recommendation was made that the petitioners seek redress from the Government for consideration for settlement. The petitioners contend that because they have been residing on the suit land they deserve to be settled on it. They claim inter alia a breach of their right to property under Article 40 of the Constitution; a breach of their right to dignity under Article 28 of the Constitution; and a breach of their right to fair administrative action.

3. Together with the petition, the petitioners filed an application seeking orders of injunction to have the respondents restrained from harassing, intimidating, arresting, or evicting them from the suit land, or from dealing, transferring, subdividing and/or developing the suit land pending hearing of the suit. They also want orders that it be declared that the petitioners have acquired proprietary interest on the suit land and all its subsequent subdivisions. They further wish to have registered a caution/caveat over the suit land. It is that application which is the subject of this ruling.
4. The 1st respondent entered appearance under protest and filed a replying affidavit sworn by Abdulkahim Abeid Khamis its managing director. He has deposed that the application is mischievous as the suit land is not registered in the name of the 1st respondent and neither is the 1st respondent a beneficial owner of the same. He has averred that the 1st respondent does not carry out any business in the suit property or any subdivisions thereunder and has no interest in the suit property.
5. In reply to this, the petitioners filed a further affidavit where they annexed a building approval for a wall in the name of Abdulkahim Abeid Khamis and Others. I have seen that the same is for a proposed perimeter wall on Plot No. 6806/I/MN and Plot No. 6806 Section I/Zone Mombasa Main Land North.
6. The 3rd, 4th, 5th and 6th respondents (the Chief Land Registrar, The Ministry of Interior, The Cabinet Secretary for Land & Physical Planning and the Attorney General respectively) filed a reply to the petition on the grounds inter alia that this suit is res judicata; that the petitioners are guilty of mischief for failing to enjoin the owners of the suit land yet they have filed previous suits against the owners; that the suit herein raises no constitutional issues and that the same is an abuse of the court process. To press the claim that this suit is res judicata, the following suits have been mentioned, *Mombasa HCCC No. 164 of 2010, Kalume Machaku Mavuo & Others vs Gladys Njenga Kagiri & 42 Others; Civil Appeal No. 126 of 2012, Kalume Machaku Mavuo & Others vs Gladys Njenga Kagiri & 42 Others; Mombasa HCCC No. 44 of 2017, Aboubakar Katana Pekeshe & Others v Gladys Njenga Kagiri & Others; Mombasa HCCC No. 46 of 2014 (OS) Kalume Machaku Mavuo & Others vs Gladys Njenga Kagiri & Others.*
7. The 7th respondent filed a Notice of Preliminary Objection basically pleading that the suit is res judicata. The following suits have been mentioned, being :- *ELC No. 164 of 2010 (OS) Kalume Machaku Mavuo, Mariamu Thiakuu Abdalla & 524 Others vs Gladys Njeri Njenga Kagiri & 45 Others* said to have been dismissed by Ojwang J, on 8 April 2011; *Appeal No. 126 of 2012* said to have been an appeal against the ruling of Ojwang J, and said to have been dismissed on 17 October 2013; *ELC No. 46 of 2014 (OS), Kalume Machaku Mavuo, Mariamu Thiakuu Abdalla & 524 Others* dismissed for want of prosecution. They are more or less the same suits mentioned by the 3rd, 4th, 5th and 6th respondents.
8. I made directions that the preliminary objection be argued alongside the application for injunction. In his submissions, Mr. Shimaka, learned counsel for the petitioners, argued that since the 1st respondent has denied having any interest in the property then the application should be allowed. He stated that in so far as the other respondents are concerned, only the issue of res judicata has been raised. He submitted that this is an issue of law and therefore the issues of fact have not been denied. He submitted that this case is not res judicata and should be heard on merits. He referred me to the decision of the NLC which directed the petitioners to seek redress from court for settlement.
9. Mr. Makuto, learned counsel, made submissions on behalf of Mr. Malombo for the 1st respondent, and also submitted that an injunction cannot issue if the owner of the land is not a party. He supported the preliminary objection. He referred me to the report of the NLC which the petitioners themselves had annexed to their affidavit, and pointed out that the NLC had mentioned that the petitioners could not link themselves to the land. He also directed me to a report by the Deputy Registrar, filed in the suit High Court at Mombasa, Petition No. 69 of 2012. That report states that the land in issue in that suit is vacant. Ms. Omboga, learned counsel for the 7th respondent, submitted on the preliminary objection and argued that the suit is res judicata.
10. I have considered the issue. I have before me a preliminary objection to the suit and an application for injunction and other orders. I will start with the preliminary objection.
11. I am afraid that at this juncture, I cannot with certainty come to the conclusion that this suit is res judicata, based only on the preliminary objection. True, some cases have been mentioned, and some documents related to some of the cases mentioned filed. However what has been filed is so sketchy. I do not have the full pleadings of the suits mentioned nor the full decisions of the High Court and the Court of Appeal. It is difficult, with such limited material, to make a conclusive decision that this suit is res judicata. My direction on this plea is that if the respondents are of the view that this suit is res judicata, they make an appropriate application to strike out this suit, supported by all relevant material and I will consider that on merits. For the avoidance of doubt, I have not made any decision on whether this suit is res judicata or not, for as I have mentioned, I cannot do so with the material before me.
12. I will thus straight away move to the application by the petitioners. I note that the application, apart from the prayer for injunction, also seeks various other orders, including the order for a declaration that the petitioners have acquired proprietary rights on the suit land and its subsequent subdivisions. I am afraid that such orders, being final orders, can only be considered after the suit has been fully heard on its merits. Those are not the sort of orders that a court would ordinarily make at this stage of the proceedings. I will thus disregard all other prayers save for the prayer for an injunction pending hearing of the suit.
13. It is now well settled that for an applicant to obtain an order of injunction, such applicant needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable loss if the injunction is not allowed; and where the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358* and on my part, I see no need to reinvent the wheel; I stand guided by these principles.
14. So, have the petitioners demonstrated a prima facie case with a probability of success? My simple answer is NO. The petitioners of course claim that they are entitled to the suit land. They can only claim the suit land from the person who currently owns it. Thus, they must sue the registered proprietor of the suit land if they stand any chance at succeeding in their quest. This is really a very basic principle. The petitioners have not annexed any copy of title of the land that they claim. Their suit mentions the land parcel Original 423/I/MN. Who is the

owner of this land, if at all it exists as described? The petitioners in the petition, specifically paragraph 4, state that title was issued to the 1st respondent. The 1st respondent has filed an affidavit stating that it does not have title to the suit land and has no interest in the land. Faced with that denial, it behoved the petitioners to demonstrate that title is actually with the 1st respondent but they have not done so. What they annexed in response were building plans in the name of Abdulhakim Abeid Khamis and Others. Abdulhakim Abeid Khamis is not a party to this suit. I have also looked at the building plans and they do not mention the property LR No. 423/I/MN, but different plots. I have not been shown by the petitioners that these other plots have any relationship with the suit property. There is a big lacuna in the case of the petitioners, and in fact, I do not see how they can succeed in their suit without the registered proprietor of the original parcel of land and the subdivisions, if at all there are any, are respondents in this suit. How can the petitioners succeed and get title to land when the owner of the title is not a party? I do not see how.

15. I am thus not persuaded that the petitioners have a prima facie case and on that ground alone this application must fail.

16. Apart from failure to enjoin the registered proprietors, I have looked at the documents produced by the petitioners and one of them is a report of the NLC. I have carefully gone through the said report. I have deduced from the report that the NLC had doubts on whether the petitioners actually occupy the land. Indeed, in their final findings, they held that the petitioners could not link themselves to the land. There is therefore some doubt, raised by the petitioners' own documents, on whether the petitioners can really be linked with the land.

17. Given the above, I do not see how it can be argued that the petitioners have demonstrated a prima facie case that is capable of succeeding.

18. I therefore have little option but to dismiss this application with costs. The result is that the petitioners will have to argue their case without any benefit of an order of injunction.

19. It is so ordered.

DATED and delivered this 15th day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.

NOTE: This ruling has been delivered through email for reasons that a court sitting is not possible given the on-going COVID-19 pandemic. Parties were duly notified that delivery will be through this means.