Shasha & 38 others v Mwahutu (Enviromental and Land Originating Summons E005 of 2024) [2025] KEELC 4539 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4539 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2024

SM KIBUNJA, J

JUNE 18, 2025

BETWEEN

MBETSA PAYU SHASHA ..... 1ST PLAINTIFF

JOSEPH CHARO KOMBE ..... 2ND PLAINTIFF

PETER C MAE & 36 OTHERS & 36 OTHERS & 36 OTHERS ..... 3RD PLAINTIFF

AND

HAMISI SWALEH MWAHUTU ..... DEFENDANT

RULING

1. The applicants moved the court through the notice of motion dated 3rd December 2024, seeking for orders inter alia that:

    a. The respondent by himself, his servant and or his agent be restrained by a temporary injunction from evicting, demolishing, harassing and or interfering in any manner with the plaintiffs/ applicants occupation of plot No. MN/11/15172, CR. No. 78077 in Utange within the County of Mombasa and OCS, Kiembeni Police Station to enforce these orders pending the hearing and determination of the main suit.

    b. An order be issued directing the Land Registrar, Mombasa County, to prohibit or restrict dealings to all that parcel of land known as plot No. MN/11/15172, CR. No. 78077 in Utange, County of Mombasa, pending the hearing and determination of the main suit.

    c. This honourable be pleased to invoke its inherent powers and issue any further orders that will be just and fair to safe guard the interests of the plaintiffs herein.

    d. The costs be in the cause.

The application is premised on the four grounds on its face and supported by the affidavits of Mbetsa Payu Shasha, 1st applicant, sworn on the 3rd December 2024 and 10th February 2025, inter alia deposing that the plaintiffs have occupied the said land, and have been farming and burying their departed on it for over 40 years; that though the defendant's claim of ownership of the suit land is doubtful, he had tried to bring in a surveyor without their consent; that the defendant had severally colluded with police officers to demolish their houses and is threatening to evict them from the suit land without a lawful court order; that Mombasa CMCELC No. E079 has pending applications and is over a different property from that subject matter of this suit.

2. The application is opposed by the respondent through the replying affidavit of Hamisi Swaleh Mwahutu, sworn on the 22nd January 2025, inter alia deposing that the application is frivolous, vexatious, devoid of merit and an abuse of court's process; that the applicants are malicious people who have invaded the suit property from 2016 as confirmed through the attached satellite images on the surveyor's report dated 6th December 2024, without authority of the registered owner; that the applicants have not provided evidence to show they have been in occupation of the suit land and for how long; that he is the registered owner of the suit land as shown in the title document relied upon by the applicants; that applicants had filed Mombasa CMCELC No. E079 of 2021 where they were directed to vacate from the suit property and in default to be evicted; that this application is brought in bad faith to circumvent that previous order to vacate or be evicted.

3. The court issued directions 14th January 2025, on filing and exchange of replies and submissions. Consequently, the learned counsel for the applicants and respondent filed their submissions dated 10th February 2025 and 18th February 2025 respectively, that the court has considered.

4. The issues for determinations by the court are as follows:

    a. Whether the applicants have met the threshold for the temporary injunctive order to be issued at this interlocutory stage.

    b. What order to issue on costs.

5. The court has carefully considered the grounds on the application, the affidavit evidence, submissions by the learned counsel, superior courts decisions relied on, pleadings and come to the following findings:

    a. In their notice of motion, the applicants have invoked sections 3A & 64 of the *Civil Procedure Act* and Order 40 of the Civil Procedure Rules, and are seeking primarily for temporary injunction against the respondent. The applicants have the responsibility to meet the legal threshold to succeed in their quest. In the case of Giella versus Cassman Brown (1973) EA 358, which has been reiterated in numerous decisions in Kenya such as Nguruman Limited versus Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR the Court of Appeal held that:

        > "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
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        > These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

b. On the first pillar of prima facie case, the Court of Appeal in the case of Mrao Ltd versus First American Bank of Kenya Ltd (2003) eKLR stated that:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

The applicants commenced this proceeding through the originating summons dated 27th November 2024, seeking to be registered with the suit property under adverse possession. They then filed the application dated 3rd December 2024 seeking for the temporary injunction order.

c. That though the applicants have at paragraphs 7 & 8 of the supporting affidavit deposed that the defendant's ownership of the suit property is doubtful, the certificate of title number CR.78077 dated 28th April 2021, and the certificate of postal search of 18th April 2024, shows land parcel subdivision No. 15172/11/MN, suit property, is registered in the name of Hamisi Swaleh Mwahutu, the respondent. Should it be the applicants' intention to challenge the respondent's title to the suit property on the grounds of fraud or illegality, then the best way to move the court is by way of a plaint and not originating summons.

d. The applicants claim that they deserve the temporary injunction order sought to protect them from being evicted from the suit property, which they are entitled to under adverse possession, having lived on it for over 40 years, which means from about 1980. The applicants' claim is opposed by the respondent who at paragraphs 8 & 9 of the replying affidavit deposed that the goggle satellite images attached to the surveyor's report that is annexed shows only one structure was on the land in 2011 and other structures started being erected in 2016. The applicants filed a supplementary affidavit sworn on 10th February 2025, and at paragraphs 10 & 11 thereof deposed they were total strangers to the respondent's deposition at paragraphs 8 & 9 of the replying affidavit. The applicants' failure to avail any evidence to rebut, counter or challenge the surveyor's interpretation of the attached satellite images, leaves their claim that they have been in occupation of suit property for over 40 years, that is from 1980, without supporting evidence. That in view of the foregoing, the applicants have failed to establish the first test of a prima facie case with a probability of success.

e. On the second test of irreparable loss or injury that cannot be adequately compensated in damages, the court has considered the decision in the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR where the court provided an explanation for what is meant by irreparable injury as follows:

> "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

The applicants herein have not specifically shown the court through affidavit evidence what loss or injury of a irreparable nature that they are likely to suffer if the injunction order is not granted. This is especially so when the court considers the unrebutted deposition by the respondent that the applicants had previously filed another adverse possession claim over plot No. 303/11/MN before the lower court, being Mombasa CMELC NO. E79 OF 2021. From

the availed court order dated 16th June 2021, it shows the suit was settled through a consent dated 11th June 2021 that was adopted on 15th June 2021, to the effect inter alia that they vacate from the said land or its subdivisions or be evicted. Due to the existence of that order, the respondent has submitted that this suit is res judicata. The applicants' at paragraph 16 of the supplementary affidavit have confirmed the existence of the lower court suit, adding that it has a pending application and was over a different parcel of land from the one subject matter in this instant case. I have noted that the surveyor at page 3 of his report has inter alia referred to that parcel where he indicated that the consolidation and subdivision of plots MN/11/270 and MN/11/303 was carried out in 2016. In view of the contentious positions taken by both sides, it is not apparent whether there exist any relationship between parcels MN/11/303 that was subject matter in the lower court matter, and MN/11/15172, subject matter in this suit. The deposition by the applicants that there is a pending application in the lower court matter did not give details on the nature of the pending application. Whatever the status of the lower court case may be, it is incapable of making this instant suit res judicata in view of the Court of Appeal decisions that the Magistrates courts do not have jurisdiction in adverse claim disputes. The court finds the applicants have failed on the second test of establishing irreparable harm/ injury incapable of being remedied through an award of damages.

f. In the case of LSK versus Malindi Law Society & 6 Others (2017) eKLR the Court of Appeal held as follows:

> " 62. Article 169 of the *Constitution* has already been reproduced elsewhere in this judgment. It identifies four types or classes of subordinate courts, namely, magistrates' courts, Kadhis courts, court martials, and any other court or local tribunal "as may be established by an Act of Parliament". In our view, it is in respect of the fourth category of subordinate courts that a restriction is placed so that Parliament is not at liberty to establish, under that category, courts established under Article 162(2). That is to say, while Parliament is empowered under Article 169(1)(d) to establish "any other court or local tribunal", that power of establishing courts and tribunals does not extend to the power to establish the specialized courts required under Article162 (2).
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> 63. We are unable to construe that Article as limiting the power of Parliament to confer jurisdiction, on the courts already established by the *Constitution* under Article 169(1)(a), (b) and (c). Article 169(2) provides that Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause 169(1). A distinction should thus be drawn between the power given to Parliament under the *Constitution* to establish courts, which in this case is restricted, and the power to confer jurisdiction on courts. It is acknowledged in the preamble to the Magistrates Courts Act, that it is an Act of Parliament to give effect to Article 169(1)(a) of the *Constitution* "to confer jurisdiction, functions and powers on the magistrates' courts". We do not consider that in doing so, Parliament in any way exceeded its mandate or acted ultra vires."

It can thus be said that the magistrates' courts have the same jurisdiction as the Environment and Land Court if they have been gazetted and it is subject to pecuniary jurisdiction. And in the case of Sugawara versus Kiruti (Sued in her capacity as the administratrix of the Estate of

Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others [2024] KECA 1417 (KLR), the Court of Appeal held that that:

> "48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates' Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court.
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> 49. We come to this conclusion also bearing in mind that the jurisdiction of Magistrates' Courts is largely determined by the pecuniary interest designated for determination by each level of the Magistracy specified in the hierarchy of courts, in terms of section 7 of the Magistrates Courts Act. In claims for adverse possession where the value of the land in question may be unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far in excess of the particular Magistrates' Court's pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.
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> 50. In the circumstances, in view of the express provisions of section 38 of the *Limitation of Actions Act*, as did the Environment and Land Court, we find that Magistrates' Courts do not have jurisdiction to determine the claims of adverse possession. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it. In the result, this ground is without merit and is accordingly dismissed."

Therefore, any orders/decrees purporting to arise out of claims of adverse possession in magistrates' courts are null and void ab initio. Therefore, in view of section 6 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the lower court order dated 16th June 2021 relied upon by the respondent does not make this suit res judicata, as the court that issued it was without jurisdiction.

g. On the third principle of balance of convenience, the court in the case of Pius Kipchirchir Kogo case [supra] held that:

> "The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
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> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

Similarly, in the case of Paul Gitonga Wanjau versus Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court in dealing with the issue of balance of convenience expressed itself and stated that:

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

Further, in the case of Amir Suleiman versus Amboseli Resort Limited [2004] eKLR the court offered elaboration on what is meant by "balance of convenience" and stated:

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

As from the evidence availed so far the applicants have failed to establish a prima facie case with a probability of success, the lower risk of injustice or inconvenience in the instant situation would be not to grant the injunction order sought by the applicants.

h. On the prayer for inhibition order, there is no evidence tendered to show that the respondent has threatened to deal with the suit land in a way that is likely to affect the current legal status of the title. Considering therefore, that the applicants have failed on the temporary injunction prayer, I do not find any reasonable basis upon which to consider granting the inhibition order.

i. The provision of law under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya is that costs always follow the event unless where there is good reason to order otherwise. The court definitely has the discretion on the matter of costs, and in this case, I am of the view the respondent is entitled to costs.

6. Flowing from the foregoing determinations, on the notice of motion dated the 3rd December 2024, the court finds and orders as follows:

   a. That the application is without merit, and is hereby dismissed.

   b. The applicants to pay the respondent's costs.

   It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 18TH DAY OF JUNE 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Applicants : M/s Barayan

Respondent : Mr Ondiek

Shitemi-Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.