



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Civil Case 171 of 2011 & 72 OF 2012**

**FORT PROPERTIES LTD.....PLAINTIFF**

**VERSUS**

**1. STEPHEN K. SARO**

**2. PETER M. KAGO**

**3. BENJAMIN KARISA KITSAO**

**4. RAPHAEL K. MWENI**

**5. LEWIS K. MWAKAMSHA**

**6. MUNGELI MWANZA**

**7. KAPOMBE K. MWATEMO**

**8. BAHATI R. KAMNA**

**9. RIADHA J. ALI**

**10. SAID KIBITHA**

**11. KINGI CHANGAWA**

**12. ALI SHEE .....DEFENDANTS**

**A N D**

**KACHIMBIZI KATANA MWAGANDI & 384 OTHERS .....PLAINTIFF**

**-VERSUS-**

**FORT PROPERTIES LIMITED .....DEFENDANT**

**RULING**

1. On 3rd October, 2012 I made the following directions in HCC 171/2011

***“I have called for and perused for the second time, PMCC No. 225/12. I have also called for HCCC 72/2012 (OS). I have come to the conclusion that the ruling in the instant suit (HCC 171/2011) and that in HCCC 72/2012 due for delivery on 2nd November, 2012 be prepared together so that appropriate directions can be given in both matters. Ruling is therefore reserved for 2nd November, 2012 in this case”.***

2. This composite ruling therefore, is firstly in respect of the application filed on 6th September, 2012 by one Safari Katana seeking two key prayers; namely that he be granted leave to be enjoined in this suit as the 13th defendant, and additionally to be allowed to bury the body of his daughter Zawadi Safari on Plot No. 130 Malindi. The grounds upon which the application is premised are as follows:

***“(a) The applicant has an important interest to protect and he can only do so by becoming a party to the suit, in this case as the 13th defendant.***

***(b) The remains of the applicant's daughter Zawadi Safari who died on 16th June, 2012 need to be buried in the family graveyard according to Giriama Customary Practices.***

***(c) The applicant is a 3rd generation member of his family that has lived on the suit parcel of land to the exclusion of the plaintiff.***

***(d) Burying the deceased on the land will not sway the court in deciding the case over ownership.***

***(e) There is in place an order to maintain the status quo which recognizes that the applicant is in possession.***

***(f) The balance of convenience tilts in favour of the applicant.***

***(g) It is very costly for the family to keep the body of the applicant's child in the mortuary and the experience is not only wreaking financial havoc but also emotionally draining to the family.***

***(h) There are orders of this court made on 29th August, 2012 in HCCC No. 72 of 2012 directing that any burials be authorized by this court.”***

The grounds are further expanded in the affidavit of the applicant, Safari Katana.

3. The ruling is also in respect of two applications in HCCC 72/2012(OS) Kachimbizi Katana Mwangandi & 384 others vs Fort Properties. They are the Notice of Motion filed by the applicants on 16th May, 2012 and that filed by the respondent on 30th May, 2012. The two were heard together by consent of the parties. The substance of the two said applications is as summarised below.

4. The Notice of Motion filed on 16th May, 2012 primarily sought an injunction to restrain the respondent, its directors, agents and servants etc, from

***“entering into and carrying out any activities including but not limited to the following: surveying, cultivating, grazing, clearing, construction, threatening the applicants ....with eviction, or in any manner interfering with the applicant's peaceful occupation of the suit property on plot No. 130 Malindi or in any manner dealing in the property including alienating it.***

The grounds thereof are set out on the face of the application and amplified in the supporting affidavit of Guni Bati Guni on behalf of the applicants.

5. Although the court declined with regard to the application of 16th May, 2012 to issue ex parte orders on 17th May, 2012, it was persuaded on 23rd May, 2012 to order that the status quo be maintained as the respondent was not ready to proceed with the hearing of the application. On the face of it, the

respondent's application filed on 30th May, 2012 resulted from the aftermath of the said order. In the said application the respondents complain that the plaintiffs herein misconstrued the status quo order of 23rd May, 2012 and commenced unilateral survey, new constructions and excavation on the suit property while preventing access thereto to the respondent's employees. That is the substance of the affidavit of Akil Fazulhussein Ebrahimjee in support of the respondent's application of 30th May, 2012.

6. The respondents therefore prayed therein that:

***“pending interpartes hearing of this application, the applicants be granted a temporary injunction to restraining the respondents, agents servants....from trespassing, encroaching, alienating, selling and carrying out any activities including but not limited to the following; surveying, cultivating, grazing, clearing, construction, taunting or threatening the defendant's servants and their families with death and in any manner interfering with the applicants' peaceful occupation of plot 130 Malindi or in any manner dealing with it to the detriment of the applicant”***

A further prayer sought in similar terms orders to restrain the plaintiffs pending the hearing and determination of the suit.

7. Upon hearing Mr. Anyoka, counsel for the respondents, the court stated as follows:

***“Having considered the matters raised in the application filed on 30th May, 2012 I am satisfied that I should certify it urgent lest the object thereof and of the application filed by the plaintiffs on 14th May, 2012 (16th May, 2012) be defeated. It is apparent that certain adverse activities are currently being undertaken on the ground and may cause damage to the suit property, or worse lead to a violent breakdown of law and order. Hence I find it necessary to amplify my order of 23rd May, 2012 to maintain the status quo in the following terms:***

***The status quo to be maintained means that the parties do not commit any acts adverse to the title of the property or which cause damage thereto. In particular no new construction, cultivation or surveys or development may be undertaken by any of the parties.”***

8. At this point, it is useful to note that HCCC 171/2011 had been filed by Fort Properties on 7th November, 2011 seeking vacant possession of plot 130 Malindi, permanent mandatory and injunctive orders against the 12 defendants therein who are alleged to have trespassed onto the suit property. After interpartes hearing of the plaintiff's application filed simultaneously with the plaint, the court gave a ruling on 15th June, 2012. The court granted the application in the following terms:

***“1. THAT pending the hearing and determination of this suit (HCCC 171/11), the court grants an injunction to stop the defendants by themselves, their agents and or any persons acting under their instructions from:***

***a. alienating***

***b. selling or offering for sale***

***c. subdividing***

***d. putting up constructions or further developments or committing any waste in respect of the land parcel LR No. 130 MALINDI CR 19971.”***

These orders are still in place against the 12 defendants in HCCC 171/11.

9. In many ways, HCCC 72/2012(OS) filed on 14th May, 2012 by Kachimbizi and 384 others, including plaintiff No. 78 (the alleged family representative of Safari Katana's family) against Fort Properties appears to respond to HCCC 171 of 2011 on the one hand, and also to the alleged actions of surveying and threats issued against the plaintiffs therein by Fort Properties. There is yet another development that

is relevant to this background. On 21st June, 2012 Fort Properties filed a suit in the Lower Court being PMCC No. 225/2012 Fort Properties -vs- Safari Katana seeking to restrain the present applicant in HCCC 171/2011 Safari Katana from interring the body of Zawadi Katana Safari on LR NO. 130 MALINDI.

10. This suit PMCC 225/12 has now been heard in full. Judgment was delivered on 6th August, 2012. The learned Resident Magistrate correctly took cognisance of the two “ownership” suits pending in the High Court, namely HCC 171 of 2011 and HCC 72 of 2012(OS) (even though the defendant in the Lower Court case was not patently a party to any of those suits). He granted an order barring the said Safari Katana from burying Zawadi Katana Safari on parcel LR No. 130 Malindi. “*pending the determination of the rights of the parties to the suit land by the High Court...*”

11. Exactly one month later, on 6th September, 2012 Safari Katana brought the present joinder application in HCCC 171 of 2011. In view of the determination in PMCC 225/12, I consider the latter application by Safari Katana to constitute an abuse of the court process in as much as it seeks that he be allowed to bury Zawadi Katana on the suit property. In my opinion, if Safari Katana is aggrieved by the decision of the learned Resident Magistrate, he should have lodged an appeal. Secondly, in HCC 171/2011, there are clear interim orders which inter alia restrain the defendants therein from inter alia committing any waste in respect of the suit property. I do not accept the argument by the applicant herein or in HCCC 72/2012 that such interment is a “normal activity of life” which does not cause prejudice to the proprietary interest of the respondents, or even that exhumation in the event the respondents are successful, will be good enough.

12. An examination of the affidavits sworn by Safari Katana and Guni Bati Guni and other pleadings in HCCC 171/2011 and HCC 72/2012 suggests strongly that the interment of the dead in the suit land is itself one of the evidences relied on by the defendants and applicants respectively to stake their claim to the suit land. Hence, should the court allow this to continue, the adverse party will be handed a *fait accompli*. The burial can be done in public cemeteries hence the applicant is not helpless. He swears that the body of his daughter Zawadi has been lying in the mortuary since June, 2012 and that he is incurring expenses. I think it would be morally reprehensible if it turns out eventually that the applicant is using the body of late Zawadi as a pawn in what is basically a property dispute.

13. With regard to the plea by Safari Katana to be enjoined as a party to the suit HCCC 171/2012, I do not think it is necessary as he admits that his and his family interests are well represented by plaintiff 77 (erroneously stated as no. 78) in HCC 72/2012 (OS). Secondly, in view of the orders I will make at the end of this ruling, I do not consider Safari Karisa a necessary party in the terms contemplated in Order 1 rule 3 and 10(2) of the Civil Procedure Rules. It does appear to me that apart from the interment, the real purpose of Karisa's application is to pursue the very interests he says plaintiff No. 77 in HCCC 72/2012 is pursuing on his behalf. The application filed on 6th September, 2012 by Safari Katana cannot succeed and is accordingly dismissed. Costs will be in the cause.

14. Turning now to the two applications in HCCC 72 of 2012, I have perused the affidavits filed as well as written submissions by the parties. In my considered view the status and position of the 385 applicants therein and that of the defendants in HCCC 171 of 2011 vis a viz their mutual adversary, Fort Properties Ltd. is the same. Fort Properties is the registered owner of the suit property LR 130 Malindi, the common subject matter of HCCC 171 of 2011 and HCCC 72/2012 (OS). In HCCC 171 of 2011 Fort Properties Ltd. seeks vacant possession against the defendants whom it accuses of trespass. They in turn claim to have purchased the property from its “previous owners” and/or to have acquired title by adverse possession.

15. In HCCC 72 of 2012(OS) the 385 applicants seek to assert their alleged entitlement to the suit property via adverse possession, a claim that is strongly opposed by Fort Properties Ltd. For these reasons I cannot in good conscience grant an order that on the face it conflicts with my earlier orders of 15th June, 2012 in HCCC 171 of 2012. Besides, and it appears that although the application of the applicants of 16th May, 2012 is seeking to restrain the respondents as per prayer 3 therein, their affidavits appear to suggest that they are content that the “status quo” be maintained and in particular to stop the survey and subdivision of the property. (See ground 4 and paragraph 16 of the supporting affidavit to application of

16th May, 2012 and paragraph 16 of their affidavit in reply to the application by respondents of 30th May, 2012). Equally, if the respondent's prayers in the application dated 30th May, 2012 were to be granted as drafted it would result in massive evictions of families represented in HCCC 72/2012 (OS). Such an extreme situation does not appear attractive or even just at this stage of the proceedings.

16. It does seem to me that HCC 72/2012(OS) represents an even more fierce legal contest between the applicants and the registered owner of the suit property. The applicants assert a claim through adverse possession while the respondents are the registered owners since 1990, under Registration of Titles Act and they strongly contest the applicant's claim. However, the applicants like the defendant in HCC 171/2011 appear to be in physical possession of the suit property. Be that as it may, the final determination of the question whether such possession is adequate to constitute an entitlement by way of adverse possession must await the full trial. I would therefore adopt my ruling of 15th June, 2012 in HCC 171/2011 in this matter.

17. The Respondents however have admitted that they had commenced the survey of the land which they put on hold in compliance with the court's order of 16th May, 2012. Their complaint is that the applicants have on their part commenced survey work, excavations, construction of new houses and are barring access to the respondent's employees. The applicants admit they are carrying on what they term as "activities pertinent to normal life, namely cultivation, burying their dead, keeping animals repairing and completing houses under construction" etc. But they deny that they have been surveying the property, digging trenches thereon and the like.

18. In light of all the foregoing I am minded to make an order restraining the 385 applicants in HCCC 72 of 2012 in terms of my order in the ruling of 15th June, 2012 in HCCC 171/2011. In addition, I would include another category of activities under (c) therein to include surveying of the suit property. For the avoidance of doubt, waste as contemplated in category (d) therein includes the interment of the dead, for reasons earlier stated, any clearing of bushes for the purpose of creation of fresh shambas for cultivation, but does not include the cultivation and grazing on any existing shamba presently occupied by the respective applicant. The respondents and their workers will have free access to the portion admitted to be currently in their possession and use, unmolested. The applicants are thus restrained. On the part of the respondents, they are restrained from proceeding with the proposed survey or alienating the suit property, or interfering with the lawful, peaceful and quiet possession thereof by the applicants.

19. These orders will remain in force for a period of 12 months pending the hearing and determination of this suit. I do further direct that HCCC 171/2011 and HCCC 72/2012 (OS) be consolidated for purposes of hearing and determination. Costs will abide the outcome of the main suit. A copy of this ruling to be filed in HCCC 171/2011 and HCCC 72/2012.

Delivered and signed at Malindi this **2nd** day of **November, 2012** in the presence of: Mr. Otara holding brief for Angima for the plaintiff in HCCC 72/2012(OS) and defendant in HCCC 171/2011. Mr. Obaga holding brief for Mr. Anyoka for the plaintiff in HCCC 171/2012 and respondent in HCCC 72/2012(OS).

Court clerk – Evans.

**C. W. Meoli**  
**JUDGE**

**MR. OTARA**

We seek leave to appeal on question of burials and also certified copies of proceedings and ruling.

**C. W. Meoli**  
**JUDGE**

**COURT**  
Granted.

**C. W. Meoli**  
**JUDGE**