



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 256 OF 2017

ROBERT MUINDE.....1ST PLAINTIFF

MARK MUINDE.....2ND PLAINTIFF

YVONNE MUINDE.....3RD PLAINTIFF

VERSUS

ARTS 680 LIMITED.....1ST DEFENDANT

LAND REGISTRY KWALE.....2ND DEFENDANT

AND

MARTHA WANGUI MURIITHI

ELIJAH WAICHANGURU MURIITHI....INTERESTED PARTIES

RULING

1. By a notice of Motion dated 12th July 2017 and brought under Order 40 Rule 1 and 3 and Orders 51 Rule 1 of Civil Procedure Rules, Sections 1A, 1B and 3B of the Civil Procedure Act and Section 78 of the Land Registration Act, 2012, and all enabling provisions of the law, the Plaintiffs/Applicants seek the following orders:

a. That this application be certified urgent and heard ex-parte at the first instance.

b. This Honourable Court do issue an order of injunction restraining the 1st Defendant herein, its agents, servants, assignees and/or any other party claiming under it from trespassing, wasting, damaging, or alienating, erecting perimeter wall and/or carrying out construction works on the suit properties herein namely: KWALE/GALU KINONDO/1607, KWALE/GALU KINONDO/1608, KWALE/GALU KINONDO/1605 AND KWALE/GALU KINONDO/1606 pending the hearing and determination of this application.

c. This Honourable Court do compel the 1st defendant to restore the beacons and boundary of the suit properties to their original state at the defendant's costs under the supervisions of the Government Surveyor Kwale and in default the plaintiffs be at liberty to restore the boundary and beacons of the suit properties at the defendants' expense.

d. The 1st defendant be compelled to pull down the perimeter wall erected on the plaintiffs suit properties and clear the debris thereof at its expense and in default the plaintiffs be at liberty to pull down the perimeter wall erected on the said properties at the defendant's expense.

e. The Land Registrar Kwale be compelled to appoint a Government surveyor to determine the boundary between the Plaintiffs' parcel of land (the suit properties) and the defendant's land title number KWALE/GALU KINONDO/53 and his report/finding be filed with the court for further direction by this Honourable Court.

f. That the court do hereby orders the 2nd defendant to remove or lift the restrictions registered on 19/08/2009 as per the court order dated 7/08/2009 on the suit properties herein.

g. The Officer Commanding Police Station (OCS) Diani to oversee the implementations of the court orders.

h. Costs of this application be provided for.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit and a further affidavit of Jimmy Ndaka Muinde sworn on 12th July 2017 and on 7th March 2018 respectively. Briefly, it is the applicants' case that the 1st defendant has trespassed and commenced construction of a perimeter wall on the suit properties namely: **KWALE/GALU KINONDO/1605, KWALE/GALU KINONDO/1606, KWALE/GALU KINONDO/1607 AND KWALE/GALU KINONDO/1608** which belong to the applicants who are the registered owners of the subject properties. The applicants aver that without any authority, the 1st Defendant has uprooted/removed beacons placed on the suit properties marking the boundary between its property and that of the 1st defendant. That the interference of the boundaries has been made without any lawful authority as the same ought to have been sanctioned by the Registrar of Titles and done by a Government Surveyor. The applicants contend that the effect of the interference has made the boundaries of their properties indefinite and unascertainable to and has enabled the 1st defendant and the Interested Parties encroach into their properties. The applicants state that the actions of the 1st defendant are illegal and amount to interference of the plaintiffs' rights of use, occupation and ownership of the suit properties, thus infringing on their enjoyment of their rights under Article 40 of the Constitution.

3. In opposing the application, the 1st defendant on 23/10/17 filed a replying affidavit sworn by Himashu Chunilal Shah. In a nutshell, it is deponed that the 1st defendant is the registered proprietor of KWALE/GALU KINONDO/52. It is the 1st defendant's case that its property share a boundary with the property known as KWALE/GALU KINONDO/53 in the name of Mary Wangui Muriithi and another, the Interested Party herein, and not the Plaintiffs. The 1st defendant questions the legitimacy of the plaintiffs titles NOS. KWALE/GALU KINONDO/1605 and 1606 on the strength of a court order alleged issued in Mombasa HCCC No.218 of 2014 which titles, it is alleged reads on the ground as KWALE/GALU KINONDO/52. The 1st defendant avers that the applicants created a subdivision of the property known as KWALE/GALU KINONDO/52 to create KWALE/GALU KINONDO/1607 and KWALE/GALU KINONDO/1608 to confuse and obliterate that owned by the third party and another and also to bring themselves to within sharing a boundary with the 1st defendant. It is the 1st defendant's contention that the acts by the applicants are unlawful. The 1st defendant questions the plaintiffs locus to file this suit and application on allegations that they have no legitimate proprietary rights because of what it calls an unclear or uncertain sub-division of the parent parcel known as KWALE/GALU KINONDO/52. In a nutshell, the 1st defendant questions the legality and lawfulness of the Plaintiffs acquisition of the title Nos. KWALE/GALU KINONDO/1607 and KWALE/GALU KINONDO/1608. It alleges that the plaintiffs' entitlement to the suit properties cannot be protected under Article 40 of the Constitution as they are subject to challenge by the third party. The 1st defendant alleges that the properties claimed by the plaintiffs as belonging to them are not theirs, but are those owned by the Interested Party and another and that actually, the plaintiffs are sitting on the properties owned by the Interested Party and another. It is the 1st defendant's contention that the application by the plaintiffs is misplaced and ought to be dismissed.

4. The application is also opposed by the Interested Party through a replying affidavit sworn by Martha Wangui Muriithi on 13th November, 2017. The interested party avers that together with her late brother Elijah Waichanguru Muriithi they are the registered proprietors of all that parcel of land known as KWALE/GALU KINONDO/52. She avers that she obtained orders in Mombasa High Court Misc. NO.887 of 2009 revoking an award by the Msambweni Land Disputes Tribunal which had awarded the land to the applicants, and the court directed the 2nd defendant herein to cancel entries that had been entered in the register and restore title in the name of the Interested Party and her late brother. The Interested Party also states that upon the reinstatement of the original title by a court of competent jurisdiction, other irregular sub-divisions therefrom are inconsequential. That title numbers KWALE/GALU KINONDO/1607 and 1608 were cancelled by the High Court and the same reconfirmed when title to KWALE/GALU KINONDO/52 was re-opened after it had been irregularly closed. The Interested Party avers that the application is marred with irregularities and non-disclosure of material facts since the court could not have issued an interlocutory injunctive order on a non-existent title.

5. On its part, the 2nd defendant opposed the application through grounds of opposition dated 4th November, 2017. It is the 2nd Defendant's contention that the application is misconceived, frivolous, vexatious and an abuse of the process of court, and that the orders sought cannot be granted at this interim stage but only after the main suit has been heard and determined on merit.

6. The application was canvassed by way of written submissions. On the basis of the supporting affidavit and the further affidavit, learned counsel, Mr. Adhoch for the applicants submitted that the suit properties were lawfully and procedurally registered in favour of the applicants and the 1st defendant and the Interested Party's question of the legality and process of registration of the Plaintiffs from the original PLOT NO. KWALE/GALU KINONDO/52 TO KWALE/GALU KINONDO/1607 and KWALE/GALU KINONDO/1608 is without substance and without any merit. Relying on Section 80 (2) of the Land Registration Act, counsel submitted that the Registrar was right in refusing to make alterations affecting the title.

7. Counsel submitted that the 1st defendant and Interested Party should have taken steps to seek rectification of the register if they were aggrieved, adding that the order issued in **Misc. Casue No.887 of 2009** directing the registration of the Interested Party and her late brother could not come to the aid of the 1st defendant as the parcel NO.KWALE/GALU KINONDO/52 was non-existent, and the order obtained on 18/5/2009 and amended on 22/5/2009 was incapable of performance for the aforesaid reasons. Mr. Adhoch relied on the court of Appeal decision in the case of **Macharia Mwangi Maina & 87 Others –v- Davidson Mwangi Kagiri (2014)eKLR**.

8. Counsel further submitted that the Interest Party has no locus to utter any interest or file suit in respect of the property known as KWALE/GALU KINONDO/52 in the absence of letters of administration in respect of the estate of her deceased brother. He relied on the case of **Moses Bii – v – Kericho District Land Registrar & Another (2015)eKLR**. Regarding the order issued by Serگون, J in **HCC Misc Application No. 887 of 2009** on 18/3/2009 and amended on 22/5/2009, counsel submitted that the same was incapable of enforcement, arguing that the Registrar of Titles could not effect what did not exist and relied on the case of **Beta Healthcare International Ltd –v- Stephen Mukita t/a Musteky Enterprises (2015) eKLR**.

9. Mr. Adhoch submitted that from the evidence available, the applicants have established a prima facie case within the requirements of the often cited case of **Giella –v- Cassman Brown** and that the applicants would otherwise suffer irreparable loss were an injunction not issued and that damages would not be an adequate remedy to the applicants, adding that the balance of convenience tilts in favour of the applicants.

He relied on the case of **Mrao Ltd –v- First American Bank Kenya Ltd & 2 Others (2003) eKLR**. Relying on the case of **Amir Suleiman –v- Amboseli Resort Limited (2004) eKLR**, counsel submitted that the court would be better placed to grant an injunction and prevent any further development rather than allow development and at the determination of the matter find that the plaintiffs own the property. The Applicants counsel further submitted that in view of the disputes in relation to the respective boundaries, it would be apt to grant prayer (e) of the motion and relied on the provisions of Section 18 of the Land Registration Act. Counsel further submitted that the prayer requiring the 1st defendant to pull down the erected wall would also, in the circumstances of the case be merited.

10. Learned counsel Mr. Kurgat, for the 1st Defendant fully relied on the replying affidavit filed on 23rd October, 2017. In her submissions filed on 20th June, 2017, Ms. Mango learned counsel for the Interested Party submitted that TITLE NOS. KWALE/GALU KINONDO/1605 and 1606 are subject of an ongoing case HCCC No.218 of 2004 and therefore this suit in respect of the said properties is sub judice. Counsel submitted that properties KWALE/GALU KINONDO/1608 and 1607 have ceased to exist by virtue of the court order made in **HCCC No.887 of 2007** served and effected by the Registrar. That no appeal has been made from the said order. It was submitted that the properties were not lawfully and procedurally registered in favour of the plaintiffs as no consent from the land control board was obtained. That the letter of consent from the Land Control Board annexed as “JNM B” was in respect to KWALE/GALU KINONDO/51.

11. Counsel submitted that the property known as KWALE/GALU KINONDO/52 was available at the time of filing suit. On the issue that the Interested Party has no locus to articulate and assert her interest in the absence of the letters of administration of the estate of the deceased, Elijah Waichainuru Muriithi, Counsel submitted that letters of Administration were issued, and that the deceased was husband to the Interested Party pointing out that the reference of the deceased as brother of the Interested Party was a typographical error. Counsel further submitted that the orders issued in Misc. HCC No.887 of 2005 had effect noting that the plaintiffs have in fact prayed to have the said orders lifted or removed. It is the interested Party’s submission that the applicants have not made out a prima facie case. That from the onset, the applicants have come to court with unclean hand by failing to disclose to this Honourable Court the existence of an ongoing case HCCC No.218 of 2004 in respect of Plot Nos. 1605 and 1606 and with existing orders in place. It was further submitted that the court cannot issue orders in vain as PLOTS KWALE/GALU KINONDO/1607 and 1608 have ceased to exist in light of the order in case No. 887 of 2005. That the applicants have not demonstrated what irreparable damage they are bound to suffer that is incapable of compensation by damages. That the applicants have never been in possession of the suit properties and the balance of convenience does not tilt in their favour. Learned counsel urged the court to dismiss the application with costs.

12. Mrs. Waswa, learned counsel for the 2nd defendant relied on the grounds of opposition filed.

13. I have considered the application, the affidavits in support and against, the grounds of opposition and the rival submissions as well as the authorities cited. The essence of the plaintiffs’ case is, firstly that at all material times they were and still are the registered owners of the land parcels numbers KWALE/GALU KINONDO/1605, KWALE/GALU KINONDO/1606, KWALE/GALU KINONDO/1607 and KWALE/GALU KINONDO/1608; secondly that the 1st defendant has trespassed on the suit properties and commenced construction of a perimeter wall, and removed beacons on the properties; thirdly, that the 1st defendant’s actions are illegal. These objects emerge from the specific prayers in the suit by plaintiff dated 12th June, 2017. A close consideration of the prayers sought in the plaint and the prayers sought in the Notice of Motion dated 12th July, 2017 will reveal a remarkable similarity. In the notice of motion the plaintiffs seek to restrain the 1st defendant from trespassing, wasting, damaging or alienating, erecting perimeter wall and/or carrying out and construction works on the suit properties and to compel the 1st defendant to restore the beacons and boundary of the suit properties to their original state. The plaintiffs also seek an order compelling the 1st defendant to pull down the perimeter wall erected on the suit properties and to clear the debris thereof. They also seek orders compelling the 2nd defendant to appoint a Government Surveyor to determine the boundary between their parcels of land and the 1st defendant’s title NO. KWALE/GALU KINONDO/53, and to remove or lift the restrictions registered on 19/8/2009 as per the court order dated 7/8/2009.

14. In the plaint the plaintiffs seek:

a) An injunction restraining the 1st defendant, its agents and/or servants or any party claiming under it from trespassing, wasting, damaging or alienating, erecting perimeter wall and/or carrying out any construction works on the suit properties herein or interfering in any manner on the suit premises herein namely: Kwale/Galu Kinondo/1605, Kwale/Galu Kinondo/1606, Kwale/ Galu Kinondo/1607 and Kwale/Galu Kinondo/1608.

b) An order compelling the 2nd defendant to restore the beacons and boundary of the suit properties to their original state at the 1st defendant’s costs and under the supervisions of the Government Surveyor, Kwale and in default the plaintiffs’ to be at liberty to restore the boundary and beacons of the suit properties at the 1st defendant’s expense.

c) An order compelling the 1st defendant to pull down the perimeter fence erected on the plaintiffs’ debris thereof at its expense and in default the plaintiffs be at liberty to pull down the perimeter wall erected on the said properties and the 1st defendant’s expense.

d) An order compelling the 2nd defendant to appoint a government surveyor to determine the boundary between the plaintiffs parcels of land(suit properties herein) and 1st defendant’s land title number KWALE/GALU KIMONDO/53 and his report be filed in court.

e) An order directed to the 2nd defendant to remove or lift the restrictions registered on the suit properties on 19/08/2009 as per the court order dated 7/8/2009.

f) General damages

g) Costs of this suit.

h) Any other relief that may be necessary in the circumstances.

15. It is therefore clear that the plaintiffs, by their Notice of Motion dated 12th July 2017, they sought for final orders as sought in the plaint, except the prayers for general damages. The court of Appeal in the case of **Olive Mwhaki Mugenda & Another –v- Okiya Omtata Okoiti & 4 Others (2016)eKLR** considered a persuasive decision of India in issuance of final orders at interlocutory stage and stated:

“2. Ashok Kumar Bajpai –v- Dr.(smt) Ranjama Bajpai, AIR 2004, ALL 107, 2004 (1)AWC 88 at paragraph 17 of the decision the Indian Court expressed as follows:

i.....it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the Petitioner is bound to succeed and fact-Situation warrants granting such a relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party.”

16. In the case of **Olive Mwhaki Mugenda (supra)** the Court of Appeal held:

“a. Applying the decisions of this court in *Vivo Energy Kenya Limited –v- Maloba Petrol Station Limited and 3 Others (2015)eKLR* and *Stephen Kipkebut t/a Riverside Lodge and Rooms –v- Naftali Ogola (2009)eKLR* it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December, 2015 with the prayers in the petition dated 21st October 2015. The ruling of 18th December, 2015 effectively granted final prayers in paragraph 62 (c), (d), (f), (g), (h) and (j) of the petition.”

17. The plaintiffs acknowledge that there appears to be a dispute over ownership as well as the boundaries of the suit properties. This include existence of previous and pending litigation. What is it that would justify the issuance of final orders at interlocutory stage in view of the claim of ownership both by the plaintiffs on one hand and the 1st defendant and the interested party on the other hand? The plaintiffs filed a suit seeking orders as outlined in the plaint and cannot be entitled to seek the very same orders at interlocutory stage unless the plaintiffs invoke the rules of procedure which entitle a party to enter judgment.

18. The principles to be applied when considering an application for temporary injunction are well settled. In the famous case of **Giella –v- Cassman Brown (1973)EA 358**, the conditions were laid and that is:

“First, the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. And thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

19. In this case, it is apparent that the plaintiffs, the 1st defendant as well as the Interested Party claim ownership of the suit properties. The plaintiffs and the 1st defendant and the Interested Party question the legitimacy of the other’s titles. Whereas the plaintiffs allege that the Interested Party’s title does not exist, the interested party maintains otherwise. At this interlocutory stage it is not possible to resolve the issues of ownership. In my view, the issue as to who amongst the parties is holding a genuine title and is entitled to the suit properties is a matter for determination at full hearing.

20. From the evidence on record, I find that the applicant have not established a prima facie case with a probability of success against the defendants. Secondly, the applicants have not shown that they stand to suffer irreparable harm not compensable in damages. Moreover, the survey can still be undertaken and the boundary determined and demolition issued if necessary, after full hearing. The balance of convenience, if I had doubt, rests with the 1st defendant and the Interested Party who, it is not denied, are in possession and occupation. Further, and as earlier stated, the application also fails because the applicants by the application, seek final orders at interlocutory stage.

21. The orders of the court therefore are as follows:

a) The notice of motion dated 12th July, 2017 is dismissed with costs to the defendants and the interested party.

b) By the determination of the Notice of Motion dated 12th July 2017, it follows that the application by Notice of motion dated 6th February, 2018 is spent.

DATED, SIGNED and DELIVERED at MOMBASA this 15th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Adhoc for plaintiffs

Karega holding brief for Ms. Mango for interested party

No appearance for the 1st defendant

Mwandeje for Mrs. Waswa for 2nd defendant

Yumna Court Assistant

C.K. YANO

JUDGE