



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 201 OF 2018

JOHN MUSAU KILONZO & 135 OTHERS.....PLAINTIFFS

VERSUS

KENYA ELECTRICITY GENERATING

COMPANY LTD.....DEFENDANT

RULING

1. In the Notice of Motion dated 17th October, 2018, the 136 Plaintiffs are seeking for the following reliefs:

a. This Honourable Court be pleased to grant an order of temporary injunction to maintain the status quo by restraining the Respondent whether by themselves, their agents and/or servants from wasting, constructing on, developing, alienating or otherwise interfering or dealing with property known as Machakos/Yatta/1 until the hearing and final determination of the main suit.

b. The Officer Commanding Station Police Division (OCPD) and Officer Commanding Kivaa Police Station (OCS) do enforce compliance of the above order.

c. The costs of this Application be provided for.

2. In his Affidavit, the 52nd Plaintiff deponed that the Applicants are the owners of land situate in Kivaa composed of Nunguni, Twamyao and Kithuia villages in Masinga Constituency, Machakos County (*the suit properties*).

3. The 52nd Plaintiff deponed that the Kivaa area was declared an adjudication section in 1996; that the demarcation of the land in the area was conducted in 1996 and the allotment numbers were issued to the residents of the area and that in 1999, the Plaintiffs realized that the Defendant had encroached on their land.

4. It is the Plaintiffs' case that when the Land Adjudication Officer heard the dispute between them and the Defendant, he observed that the Defendant acquired a Title Deed in the year 2005 irregularly; that the Defendant's land overlaps the adjudicated areas and that the Defendant admitted in writing of having not complied with the adjudication process when it was issued with its Title Deed.

5. The Plaintiffs, through the 52nd Plaintiff, finally deponed that they have settled on the suit property for over 40 years; that the Defendant has never compensated them for their land and that they have been deprived the use and enjoyment of their land. It is the Plaintiffs' case that unless the Defendant is restrained by this court from using the suit land, they are bound to suffer irreparable damage.

6. In response to the Application, the Defendant filed Grounds of Opposition and a Replying Affidavit. In the Grounds of Opposition, the Defendant averred that the Plaintiffs are not the registered proprietors of land known as Machakos/Yatta/1; that the proceedings against the Defendant offend the provisions of Section 3, Public Authorities Limitation Act and that the Plaintiffs have not complied with Order 1 Rule 13 and 14 of the Civil Procedure Rules.

7. The Defendant finally averred that the orders being sought by the Plaintiffs will validate an illegality or an intended act of trespass on the part of the Plaintiffs and that the principles set out in *Giella vs. Cassman Brown* have not been met to warrant the issuance of the order.

8. In her Replying Affidavit, the Defendant's property Manager (*the Manager*) deponed that the Defendant is a limited liability company in which the Government has the majority shareholding; that the Defendant took over the business of Tana River Development Company Limited which was incorporated on 10th July, 1964 and that the Transfer of Business to the Defendant from Tana River Development Company Limited included generating electric power at Embu/Mavuna/1 (*Gitaru and Kiambura*) and Machakos/Yatta/1 (*Kindaruma*).

9. According to the Defendant's Manager, the Defendant was issued with a Title Deed on 8th July, 1998; that there were developments on the suit land as at the time the Defendant took over the business of Tana River Development Company Limited and that the suit property was set aside for the development of the three hydro-power stations, otherwise known as Kindaruma; Kamburu and Gitaru.

10. The Defendant's Project Manager finally deponed that the acquisition of the suit land was effected lawfully after the public was notified through various Gazette Notices; that the three dams are clearly demarcated by a fixed boundary and that the Defendant is the registered proprietor of the suit land.

11. In his Supplementary Affidavit, the 52nd Plaintiff deponed that the entry onto the suit property by the Defendant without the Plaintiffs' authority amounts to a forceful taking of their property without due process and that the Defendant's Title Deed was issued in the year 2005 and not in 1998 as alleged.

12. The Plaintiffs' advocate submitted that by virtue of the Defendant's trespass and wrongful occupation of the Plaintiffs' land, the Defendant has misused, damaged, wasted, destroyed, polluted and degraded the suit property; that the Defendant has prevented the Plaintiffs from utilizing the suit land and that the process for acquiring land compulsorily was not followed.

13. The Plaintiffs' counsel submitted that at no point in time has the Defendant ever proven that it compensated the Plaintiffs and that the Plaintiffs are the registered owners of the land in Kivaa area following a successful adjudication process since 1996. Counsel submitted that the manner in which the Defendant purported to acquire land over the suit properties falls far way below the constitutional threshold.

14. On his part, the Defendant's advocate submitted that an injunction cannot issue to protect a party who has not shown that he owns the property in issue or identified the property and demonstrated that the Defendant has violated his proprietary rights.

15. The Defendant's counsel submitted that the Defendant has shown that it is the owner of land known as Machakos/Yatta/1; that the issues before the court were also issues before the adjudication process and that this court does not have jurisdiction over such issues.

16. The Defendant's counsel submitted that in 1962, the Government set aside trust land including the suit land that was transferred to the Defendant's predecessor and that this suit was filed fourteen (14) years after the act complained off. Counsel submitted that the proceedings herein are statute barred.

Analysis and findings:

17. The Plaintiffs in this matter are seeking for an order of injunction restraining the Defendant from interfering or dealing with property known as Machakos/Yatta/1 until the hearing and final determination of the suit. In the case of *Kenya Commercial Finance Co. Limited vs. Afraha Education Society (2001) 1 E.A 86*, the Court of Appeal held as follows:

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the Application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

18. In the *Nguruman Ltd vs. Jan Bonde Nielsen (2014) eKLR* case, the Court of Appeal held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. In *Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125*, the Court of Appeal defined a prima facie case as follows:

“a prima facie case in a Civil Application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter.”

19. The Plaintiffs' case is that in 1964, they settled in area known as Kivaa which is within Masinga Constituency, Machakos County; that in 1996, the Kivaa area was declared an adjudication section whose boundaries were defined by the then Adjudication Officer of Machakos and that they have since been issued with either Title Deeds or allotment cards. The Plaintiffs annexed the 39 Title Deeds that have since been issued for Masinga/Kivaa Registration Section. According to the annexed copies of the Title Deeds, the Kivaa Register was opened on 24th August, 2015.

20. The Plaintiffs have stated that in 1999, they noticed that the Defendant had encroached on their land and that a resolution was passed for the marking of boundaries. The Kivaa Land Disputes Committee was to oversee the process of marking the boundaries. The Plaintiffs produced in evidence the Minutes of 14th December, 2000 which established the Committee. In the meeting, the representatives of the Defendant were present.

21. The dispute in respect to the land in the Kivaa adjudication area was escalated to the Land Adjudication Officer. In the proceedings before the Land Adjudication Officer, the Plaintiffs complained that the Defendant had taken their land in different villages. Just like now, the Defendant informed the Land Adjudication Officer that the disputed land belonged to the Defendant which it acquired by way of compulsory acquisition in 1976; that the land was duly surveyed and that the titles for Machakos/Yatta/1 and 2 were being processed.

22. After hearing all the parties to the dispute, the Land Adjudication Officer found as follows:

“(VIII) The findings of the District Surveyor dated 10th February, 2009 indicated that there is an overlap of 463.19 Ha and the Memorandum presented by the community to the District Commissioner will be a key reference together with Ruling to future undertaking of any nature and be guided by the Laws of Kenya...”

23. In his penultimate decision, the Land Adjudication Officer of Yatta District found as follows:

“Objection is partially allowed for the survey of Kenya to harmonize and regularize the sectional boundary and KenGen boundary without any overlap. Thereafter subject the boundary to the Commissioner of Lands before Title Deeds issuance to Kivaa Adjudication Sections.”

24. My reading of the decision of the Land Adjudication Officer shows that by the time the Kivaa Adjudication Section was declared an adjudication area, the Defendant was already lying a claim over a portion of the said land by over 463.19 Ha (*approximately 1, 158 acres*).

25. The Defendant’s case is that by way of Gazette Notices number 3216 of 1966, 4155 of 1967, 1526 and 1527 of 1972 and 2194 and 2195 of 1975, the government set apart the disputed land and had the land surveyed vide survey plan number 117/8. According to the Defendant, the suit property was set apart for three (3) hydro-power stations which are known as Kindaruma, Kiambura and Gitaru.

26. The Defendant has exhibited the copies of the Gazette Notices that were published before the land it is claiming was set apart. According to the Defendant, its predecessor was eventually issued with a Title Deed for the land that was set apart in the year 2005. The total acreage of the land that was registered in favour of the Defendant is 6,794 Ha (*approximately 17,233.129 acres*).

27. In addition to the Gazette Notices that facilitated the setting apart of the Trust for the Defendant’s predecessor in title, the Defendant produced in evidence the Gazette Notice No. 2195 dated 20th July, 1996. The said Gazette Notice consolidated all the previous parcels of land that had been set apart which were delineated in boundary Plan No. 179/102 measuring 17.15 square kilometres. It is on the basis of the said Gazette Notice and boundary plan number 179/102 that the Defendant’s predecessor in title was issued with a Title Deed in the year 2005.

28. The land that the Defendant is claiming, or a portion thereof, was set apart under the repealed Constitution between 1976 and 1996.

29. Section 118 (1) of the repealed Constitution provides as follows:

“Where the President is satisfied that the use and occupation of an area of Trust land is required for any of the purposes specified in subsection (2), he may, after consultation with the County Council in which the land is vested, give written notice to that County Council that the land is required to be set apart for use and occupation for those purposes; and the land shall then be set apart accordingly and there shall be vested in the Government of Kenya or in such other person or authority referred to in subsection (2) as may be specified in the written notice, such estates, interests or rights in or over that land or any part of it as may be specified in the written notice.”

30. The procedure for setting apart Trust Land is provided under Section 13(2) of the Trust Land Act as follows:

“(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—

(a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;

(b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;

(c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

(d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council;

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.”

31. In the case of *Bahola Mkalindi Rhigo & 9 others vs. Michael Seth Kaseme & 2 others (2016) eKLR*, this court analyzed the law relating to Trust Land as follows:

“85. Under the repealed Constitution and the Trust Land Act, Trust Land was neither owned by the Government nor by the County Council within which the land fall. The County Council simply

held such land on behalf of the local inhabitants of the area.

86. For as long as Trust Land remained unadjudicated and

unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust Land was transformed into private land.

89. Adjudication and registration of Trust Land removed the particular land from the purview of community ownership and placed it under individual ownership while setting apart removed the Trust Land from the dominion of community ownership and placed it under the dominion of public ownership.”

32. Indeed, setting apart of Trust Land pursuant to the provisions of Section 118 of the repealed Constitution and Section 13 of the Trust Land Act could not be complete until prompt payment of full compensation is done if the setting apart extinguished any estate, interest or right in or over the land that would have been vested in any person or authority (*See Section 117 (4) of the repealed Constitution*).

33. The question as to whether the Defendant’s predecessor paid compensation to the people “*ordinarily resident*” in the land that was set aside part can only be determined at trial. Indeed, the issue as to whether such a claim can arise after such a long period of time can only be determined by the court after receiving evidence.

34. However, considering that the Plaintiffs and the other residents of the area which was purportedly affected by the setting apart of the land that was eventually registered in favour of the Defendant’s predecessor did not raise the issue of compensation within a reasonable period, their claim could be time barred.

35. I say so because under Section 7 of the Limitation of Actions Act, an action to recover land cannot be filed by any person after the end of twelve (12) years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

36. Considering that the Defendant’s land was surveyed and depicted in boundary plan number 179/102 in 1996, and a Title Deed issued in the year 2005, this suit should have been filed before the lapse of twelve (12) years from the year 2005. The suit having been filed in the year 2018, the Plaintiffs are likely to be caught up with the doctrine of laches.

37. The issue that this court will have to determine with finality at trial will therefore include whether the Plaintiffs’ suit is time barred; whether the land that was set apart through Gazette Notices was included in the area that was declared an adjudication area and whether the people whose land was set apart were compensated.

38. However, considering that the Defendant is in possession of the Title Deed in respect of the suit land, which Title Deed was issued in the year 2005, and in view of the various Gazette Notices setting apart the suit land, I find that the Plaintiffs have not established a prima facie case with chances of success.

39. In any event, both the repealed and the current Constitution mandates the Government to acquire land compulsorily for public purposes upon prompt payment in full, of just compensation to the owners of land. It is not in dispute that the suit land, or a portion thereof, is being used for the purpose of generating electric power for the entire country. That being the case, the Plaintiffs’ claim can only be in respect to damages, which damages are guaranteed by the Constitution and the Land Act or the Trust Land Act (*repealed*) and that Land Acquisition Act (*repealed*). That being the case, the Plaintiffs will not suffer irreparable injury that cannot be compensated by an award of damages if they are to succeed at trial. All that the Plaintiffs need to do is to value the land that was allegedly acquired by the Defendant or its predecessor. If they are compensated for the land, they need not have the Defendant’s title invalidated.

40. For those reasons, I dismiss the Plaintiffs’ Application dated 17th October, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14TH DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE