



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 137 OF 2017

ABDULKADIR AHMED RAHIMKHAN.....1ST PLAINTIFF

JABEEN MANAN.....2ND PLAINTIFF

-VERSUS-

COUNTY GOVERNMENT OF KWALE.....1ST DEFENDANT

LAND REGISTRAR, MOMBASA.....2ND DEFENDANT

THE NATIONAL LAND COMMISSION.....3RD DEFENDANT

THE DIRECTOR OF SURVEYS.....4TH DEFENDANT

THE DIRECTOR OF PHYSICAL PLANNING.....5TH DEFENDANT

CEC MEMBER, LANDS NATURAL RESOURCES & URBAN

PLANNING, COUNTY GOVERNMENT OF KWALE.....6TH DEFENDANT

RULING

1. The two plaintiffs have brought their application dated 19th April 2017 seeking orders against the 1st – 6th defendants in the following terms:

1. Spent

2. Spent

3. Spent

4. Spent

5. There be and is hereby issued an order of injunction to restrain the defendants either by themselves, officers, agents, employees, assigns or any person acting for them from undertaking the survey, planning, subdivision and/or development of the property known as Land Reference Number 4659 (Original No. 3855/19) pending hearing and determination of

this suit.

6. There be and is hereby issued an order of injunction to restrain the defendants either by themselves, officers, agents employees, assigns or any person acting for them from harassing threatening, evicting or interfering with the plaintiffs and/or their family members, workers or agents regarding their occupation, possession and use of the property known as Land Reference Number 4659 (Original No. 3855/19) pending hearing and determination of this suit.

7. There be and is hereby issued an order of injunction to restraint the defendants either by themselves, officers, agents, employees, assigns or any person acting for them from inciting the residents of Kwale County, squatters, members of the public, the police and/or any other person to harass, threaten, evict or interfere with the plaintiffs and/or their family members and workers regarding their occupation, possession and use of the property known as Land Reference Number 4659 (Original No. 3855/19) pending hearing and determination of this suit.

8. The Officer Commanding Station (OCS), Kwale Police Station or any other nearest police station to ensure compliance with the Court orders herein as to maintenance of peace, law and order and to ensure that the plaintiffs and/or any of their family members, agents or workers are not evicted, harassed or threatened in a manner that is contrary to the orders issued herein.

9. Costs of this application be provided for.

2. The motion is supported by the facts set out on the grounds on the face of the application and the affidavits sworn by **Rukia Ahmed Khan** on 19.4.2017 and 23rd June 2017.

3. The application is opposed by the 1st & 6th defendants via a replying affidavit sown by **Dr Mohamed Pakia** on 29th May 2017. The 1st & 6th defendant also made an application dated 16th June 2017 under the provisions of order 40 of the Civil Procedure Rules seeking the following orders:

1. Spent

2. That this Honourable Court be pleased to issue an order directing that *status quo* over property known as Land Reference Number 4659 (Original Number 3855/19) be maintained to prevent the Plaintiffs/Respondents, their family members, servants, agents employees, tenants, sub-lessees and/or any other persons permitted by the Plaintiffs from cultivating, subleasing, charging, transferring and/or carrying our any activities that will change the nature, form and appearance of the property pending the hearing and determination of the Application and suit.

3. Spent

4. That this Honourable Court be pleased to make an order of injunction restraining the Plaintiffs/Respondents, their family members, servants, agents employees, tenants, sub-lessees and or any other persons permitted by the Plaintiffs from cultivating, subleasing, charging, transferring and/or carrying out any activities that will change the nature, form and appearance of the property known as Land Reference Number 4659 (Original Number 3855/19) pending the hearing and determination of this Application and Suit.

5. The Officer Commanding Station (OCS) Kwale Police Station or any other nearest police station to ensure compliance with the Court orders herein and to ensure the Plaintiffs/Respondents, their family members, servants, agents employees, tenants, sub-lessees and/or any other persons permitted by the Plaintiffs do not cultivate, sublease, charge, transfer and/or carry out any activities that will change the nature, form and appearance of

the property known as Land Reference Number 4659 (Original Number 3855/19) pending the hearing and determination of this Application and Suit.

6. Coast of this Application be provided for.

4. This application is premised on the grounds listed on the face of it and the affidavit in support sworn by **Dr Mohamed Pakia** on 16th June 2017. The 1st & 6th defendants' application is opposed by the plaintiffs vide a replying affidavit sworn on 20th July 2017 by **Rukia Ahmed Khan**.

5. I have taken time to read through the pleadings and study the documents annexed in support of the application together with the written submissions filed. A brief summary of this dispute is that the plaintiffs are/were registered as leasehold owners of title number 4659 (original No 3855/19) for a period of 99 years w.e.f 1st January 1914 and the lease was set to expire on 1st January 2013. The applicants state that four years to the date of expiry of the lease, they applied for extension of the same seeking relevant consents of the concerned government agencies and Kwale County Council – being the predecessor in title of the 1st & 6th defendants was one of them. The applicants pleaded further that their requests for extension was approved by the County Council vide the letters annexed as **RAK 5** and **7** and the Ministry of lands letters annexed as **RAK 8 (a), 8 (b) & 8 (c)** in the supporting affidavit dated 19.4.2017.

6. The 1st & 6th Respondents on their part contends that the process of application for extension was flawed since not all the registered owners of the lease signed the application or gave their consent. Secondly that the application format adopted by the applicants did not comply with the requirements of section 42, the Third Schedule (Section C) and Fourth Schedule of the Physical Planning Act No 16 of 1996. The 1st & 6th Respondents have added that the applicants have not presented evidence that they adhered to the procedure for extension of lease as provided under the Government Land Act and the Land Registration Act. That the letters referred to by the applicants as approvals by the County Council of Kwale are merely recommendations and as such cannot be treated as approvals. Finally that the lease having expired, the suit property automatically reverted to the Government of Kenya and vested in the 6th Defendant to be held in trust for the Residents of Kwale. Because of the reversion, the plaintiff cannot suffer loss. The 1st & 6th defendants thus urged the Court to dismiss the plaintiffs' application.

7. The 5th Respondent via a replying affidavit deposed to by **Timothy Waiya Mwangi** also opposed the plaintiffs' application. The 5th Respondent deposed that it neither renews nor approves leases but only makes comments on development applications referred to him by a local authority as mandated by Section 32 (1) of Cap 286. He urged the Court to dismiss the application by the plaintiffs.

8. All the issues raised in the replying affidavit of the 1st & 6th defendants were countered by the further affidavit of the applicants dated 23.6.2017. The applicants contend that their application complied with the requirements of the law and even if it did not, the then County Council in its wisdom deemed it fit to approve the same. Therefore it is not open for the 1st & 6th defendants to question the application at this stage. Secondly that the registered owners of the certificate of lease are family members, they were all aware of the application for extension and consented to it. That there is no requirement that such consent must be made in writing. Further that there are no rental units on the suit premises and the 1st & 6th defendants have not annexed the conditions of the lease which have been breached. The applicants in paragraph 14 – 16 aver that the 1st & 6th defendants have not denied holding public foras that may result into breaches of their property rights. They have denied being in arrears of rents. That the 1st Defendant is legally bound to grant the final approval and not to purport to take over the suit property.

9. The orders sought herein are in the nature of temporary injunctions. The principles to be considered are well established both in statute and case law. From the pleadings, it is not in dispute that: -

i) The applicants are in possession of the suit land.

ii) The lease for the suit property expired on 1.1.2013.

iii) That the applicants submitted an application for extension of the lease before its expiry.

10. What is in dispute is: -

a. Whether the said application as presented was done in accordance with the law.

b. Whether there were valid approvals given or what was given were mere recommendations.

c. The lease having expired, what is the status of the suit land depending on the answer to (b) above i.e. is the ownership still in the hands of the applicants or it reverted to the Government of Kenya.

11. Both parties have filed correspondences and documents to justify their positions taken as I have summarized in the preceding paragraphs which they believe is correct and within the law. In the supplementary submissions of the 1st & 6th defendants, they have raised the issues in controversy in this suit. They made reference to the decision of **Bazola Mkalindi vs Michael Seth Kaseme & 3 Others (2016) eKLR** where the trial Court held that the Government Lands Act made further and better provisions for regulating the leasing & other dispositions of government land. That unlike trust land, the county councils had no role to play at all in the allocation of un-alienated government land. I wish to point out that this decision is final judgement of the Court. Secondly that the land in dispute has not been determined as unalienated government land as it were.

12. Besides the matter on who approves the application for extension of the lease the 1st & 6th defendants have also raised the issues inter alia that the application for extension was defective in both substance and form. This is a matter that may not be summarily determined at an interlocutory stage. The case of **Ahmed Obo vs Kenya Airports Authority (2013) eKLR** referred to is distinguishable from the present application as it dealt with an application for striking out of the suit and which applies different set of principles from an application for temporary orders of injunction.

13. For an Order of Injunction to be granted, an applicant is required to satisfy the Court that it has a prima facie case with a probability of succeeding. On this principle, I note that the applicants have shown that they presented an application for extension of the lease before the lease expired to the County Council of Kwale. There were positive responses made to that application giving their approvals. The 1st & 6th defendants contend that the application did not meet the legal requirements. As already stated the Court may not at the interlocutory stage be able to conclusively determine this issue. It is a matter for determination in a full trial. Secondly whether the **“approvals”** given by the Council amounted to recommendations or otherwise would require hearing the matter substantially on their role in application for extension of leases. The 1st & 6th defendants did not move the Court for striking out of the suit and these are issues which touch on merits of a suit and not applicable for consideration in injunction application.

14. I will skip the principle of irreparable loss and deal with the balance of convenience. The applicants are on the suit land. Assuming the lease expired and was not renewed (a fact which is contested), then the question arises on whether they are entitled to a notice to vacate the land or if where there is no requirement for such notice to who does the land vest in? Is it the 1st defendant or the 3rd defendant under the applicable land regimes? However is still maintained that the balance of convenience tilts in favour of the applicant to remain in possession until the status of their lease is determined. On this account also, I find merit in the orders they are seeking in their application

15. In conclusion, I find the application of 19.4.17 has merit and do allow it in terms of prayers 4 – 8 with costs to abide the outcome of the suit. The effect of my orders is that the orders sought in the application by the 1st and 6th defendants is not granted as prayed as allowing the same will be in conflict to the orders granted in the plaintiff’s application. I note however that part of the orders they (1st & 6th

defendants) are seeking for are an order stopping the plaintiffs from subleasing, charging and or transferring the suit property pending determination of the suit. Since the leasehold interest is questioned by the 1st & 6th defendants, it is in the interest of justice that possession of the suit property be preserved as is. Consequently I do make an order directed to the plaintiffs not to sublease, charge, transfer or part with possession of the suit property until the case herein is heard and determined. The plaintiffs are allowed to cultivate but no put up new buildings on the suit property until the suit is heard and determined. Costs of this application to also abide the outcome of this suit.

16. The two applications are thus determined as set out above.

Dated, signed & delivered at Mombasa this 21st February 2018.

A. OMOLLO

JUDGE