



REPUBLIC OF KENYA



Athman & 3 others v Art 680 Limited & 2 others (Environment and Land Case Civil Suit E021 of 2023) [2024] KEELC 217 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 217 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE CIVIL SUIT E021 OF 2023**

**AE DENA, J
JANUARY 30, 2024**

BETWEEN

**ALI HAMISI ATHMAN 1ST PLAINTIFF
ESTATE OF MOHAMED HAMISI MWASENGEZA 2ND PLAINTIFF
SAID HAMISI MWASENGEZA 3RD PLAINTIFF
YUSUF MOHAMED MWARANDANI 4TH PLAINTIFF**

AND

**ART 680 LIMITED 1ST DEFENDANT
EAST & CENTRAL AFRICA HIDES AND SKINS LIMITED ... 2ND DEFENDANT
THE LAND REGISTRAR KWALE COUNTY 3RD DEFENDANT**

RULING

1. This ruling is the subject of the Plaintiffs application dated 10th March 2023 and the Defendants Notice of Preliminary Objection dated 17th April 2023.
2. The Plaintiffs commenced this suit by way of a Complaint dated 15th March 2023 where they allege to have acquired parcel No. Kwale/Galu/Kinondo/53 (the suit property) upon the demise of their father through succession cause no. 101 of 2015. It is averred that the deceased pursuant to land adjudication was allocated the suit property in 1974. The Plaintiff allege that by an agreement allegedly entered between the 1st and 2nd defendant sometime in the year 1991, the 2nd defendant transferred the suit property to the 1st Defendant. That deceased never sold the suit property during his life time. The Plaintiff allege they have been in occupation of the suit property throughout the years together with other members of the extended family but the 1st Defendant has through its agents invaded the suit property and started erecting a wall around it. The plaintiffs claim that the Defendants actions amount to trespass on the Plaintiffs land and crave an order directing the restoration of the ownership of



- the suit property to them. Further they seek *inter alia* orders of permanent injunction restraining the Defendants and or their agents from interfering with the Plaintiffs quiet possession and use of the suit property.
3. In the application dated 10th March 2023 filed alongside the Plaint under certificate of urgency the Plaintiffs seek the following orders; -
 1. Spent
 2. That pending the inter-parties hearing and determination of the application, this honourable court do issue an order restraining by temporary injunction the Defendants and or their servants, agents, representatives or assignees from trespassing, entering, occupying and constructing on land parcel number Kwale/Galu/Kinondo/53.
 3. That pending the hearing and determination of the suit herein, this honourable court do issue an order restraining by temporary injunction the Defendants and or their servants, agents, representatives or assignees from trespassing, entering, occupying and constructing on land parcel number Kwale/Galu/Kinondo/53.
 4. That costs of this application be provided.
 4. The application is supported by the affidavit of Mohamed Hamisi Mwasengeza who depones that vide Succession Cause No. 101 of 2015 filed in the Kadhis Court an order dated 30/3/2015 was issued that they were the rightful registered owners of the suit property. That in the year 2006 the plaintiffs filed Land Dispute Tribunal Case No. 33 of 2005 at the Mambweni Land Dispute Tribunal against the 1st Defendant and one Dr. Julius Muturi Nganga who held titles to the suit property and who upon the tribunal finding that the suit property belonged to the deceased surrendered their titles to the 3rd Defendant for cancellation. It is further stated that that the tribunal decision was subsequently adopted as a judgement of the court in Magistrates Court Case Number 35 of 2009 and thereafter a title was issued in the name of the Plaintiffs as beneficiaries following confirmation of grant.
 5. The deponent avers that following an order of the court in Judicial Review Misc. Application No. 493 of 2009 quashing the Land Disputes Tribunal decision, they were requested by the 3rd Defendant to return their title. That though they retrieved the said order served upon the 3rd Defendant they have never traced the court file in respect of the Judicial review proceedings which they were never served with and did not participate thereof. That they reported the matter to the DCI and the same was still under investigations. The deponent reiterates the rest of the averments in the Plaint and state that the suit property belongs to them and their land has been grabbed due to their vulnerability as the underprivileged in society. That they only have the suit property to fall to and unless the Defendants construction of the wall is stopped the Plaintiffs will suffer irreparable harm. That they have established a prima facie case with high chance of success and the balance of convenience favours the granting of the orders sought.
 6. In response to the above application the 1st Defendant entered appearance on 13/04/23 and filed a Notice of Preliminary Objection on 17/04/23 and replying affidavit by Himashu Chunilal Shah its Director. It is averred that the application and suit herein are res judicata by dint of the decision in Judicial Review Misc. Application No. 493 of 2009 which resolved the dispute in favor of the Defendants. That the court order in the said proceedings prohibited the District Land Registrar from cancelling and or nullifying the 1st Defendants title including registering transfer in favor of the Plaintiffs pursuant to the Land Dispute Tribunal decision. That consequently this court lacks jurisdiction to entertain the application. That no appeal was lodged against the said decision in which the Defendants participated in the proceedings. That court cannot seat on appeal of the judgement



of Tuiyot J and reinstate the title. The 1st Defendants claim that they have owned the suit property since 1997 after purchasing the same from the 2nd Defendant. That the proceedings in the Kadhis court that purported to transfer the suit property were of no legal effect as they were based on the tribunals decision which had long been quashed by Tuiyot J.

7. With regard to the restraining orders sought on the suit property the 1st Defendant submits that the Plaintiffs have failed to demonstrate an iota of ownership except the orders of the Msambweni District Land Tribunal but which were quashed. The court is invited to strike out the application and the suit for being an abuse of the court process.
8. The Plaintiff's through the affidavit sworn by Mohamed Hamisi Mwasengeza response is that judicial review proceedings deal with the lawfulness of decisions made by public officers and to ensure they act within the limits of their powers. That the said proceedings could not deal with the core issue exhaustively. That it is in the interest of justice that the suit be heard on merit to establish the lawful owners of the suit property.
9. The Attorney General representing the 3rd Defendant did not participate in the application. The 2nd Defendant has not entered appearance in the suit. The court directed that both the application and the preliminary objection be heard at the same time by way of written submissions. The parties complied.

Determination

10. Having considered the pleadings, the application, responses and the submissions of the parties the issues that arise for determination are whether the suit is res judicata and if not whether the application is merited.
11. The preliminary objection largely rests on the doctrine of res judicata which is provided for under Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya which provides that: -

‘No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.’

12. The Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR comprehensively set the test to be applied in determining if a suit is res judicata thus; -

(86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.



13. This court was also referred to the definition of res judicata from the [*Blacks Law Dictionary 10th Edition*](#) as; -

An issue that has been definitely settled by judicial decision.. the three essentials are (i) an earlier decision on the issue, (2) a final judgement on the merits and (3) the involvement of the same parties or party's in privity with the original parties'

14. Applying the provisions of Section 7 of the [*Civil Procedure Act*](#) and the principles set out in the caselaw I will proceed to discuss on whether this suit and the application are res judicata.

15. I have keenly considered the submission that the instant suit and the application are res judicata on the basis of the judgement in Judicial Review Misc. Application No. 493 of 2009 and which was annexed to the 1st Defendants reply. Let me first state that I'm surprised that the Plaintiffs can allude to a missing file and proceedings without annexing any correspondence from the registry in this regard and expect the court to believe it. I have no material before me to convince me to doubt the authenticity of the court orders herein.

16. I have seen the prayers sought in the Judicial review application as contained in the said judgement. The gist of the said proceedings was to remove into the High Court the decision of the Msambweni Land Dispute Tribunal pertaining the suit property for quashing as well as the Magistrate decision in Kwale adopting the said order as the judgement of the said court. Orders prohibiting the Land Registrar from effecting the decision was sought.

17. The High Court allowed orders 1, 2, 3 and 4 as follows; -

1. That an order certiorari be issued to remove into the High Court and quash the proceedings and award of Msambweni Land Dispute Tribunal pertaining to LR.No. Kwale/Galu/Kinondo/53.
2. That an order of certiorari be issued to remove into the High Court and quash the proceedings and decision of the Principal Magistrate Kwale in Land Case No. 35 of 2009 touching on LR.No. Kwale/Galu/Kinondo/53.
3. That an order of prohibition do issue to prohibit the District Land Registrar Kwale from cancelling and or nullifying the title deed in respect of LR.No. Kwale/Galu/Kinondo/53 registered in favour of ARTS 680 Limited and further prohibiting the said District Land Registrar Kwale from registering documents of transfer in respect of LR.No. Kwale/Galu/Kinondo/53 pursuant to the Msambweni Land Dispute Tribunal award and the subsequent decision of the Principal Magistrate Kwale in Land Case No. 35 of 2009.
4.

18. I note that the above orders were granted based on the finding that the Land Disputes Tribunal did not have jurisdiction to hear disputes on title to land and no more. The High Court did not pronounce itself on the ownership of the suit property in favour of the Defendants. The issue of ownership of the suit property as between the deceased, the 2nd defendants and subsequently the Plaintiffs and the 1st defendants still remains unresolved. It was not an issue before the said High Court proceedings. Additionally, it is now settled that judicial review is not concerned with the merits of the decision being challenged but rather with the decision-making process see the Court of Appeal dictum in [*Municipal Council of Mombasa v Republic & Umoja Consultants Ltd \(Interested Party\)*](#) Civil Appeal 185 of 2001[2002] eKLR. This court respectfully disagrees with the Defendants deposition that the High Court resolved the dispute in favor of the Defendant.



19. Based on the foregoing it is this court finding that the present suit is not res-judicata.
20. Having satisfied myself that the suit herein is not res judicata I will now proceed to render myself on the application for temporary orders of injunction. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."
21. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance. There must be a serious/fair issue to be tried, damages are not an adequate remedy and the balance of convenience lies in favour of granting or refusing the application. These echo the principles in the case of *Giella Versus Cassman Brown & Co Ltd* 1793 EA 358.
22. As to prima facie case the court in Civil Appeal No. 77 of 2012, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR had this to say; -

We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

23. The Plaintiff submit that their demonstration of the history of the suit property including the decision of the Msambweni Land Disputes Tribunal in their favor culminating into the title which they returned suffices to demonstrate a prima facie case. Additionally, the Plaintiff has not placed any material before this court to cement their averments that they have been and are in occupation of the suit property. I have also not seen any proof of the construction of the wall. The 1st Defendant on the other hand produced a copy of an agreement that led to their ownership of the Land but did not produce any document showing transfer of the property into their name.



24. But having stated the above I think the best approach for this court to take is the protection of the suit property by ensuring that the status of the suit property remains the same pending determination on ownership. Considering the facts leading to the filing of these proceedings ownership of the suit property can only be fully determined upon the matter being set down for hearing but which in the meantime needs to be protected. The court has jurisdiction under the provisions of Order 40 enumerated herein to make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

25. In *Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another* [2020] eKLR, the court elucidated the purpose of a status quo order thus; -

..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

26. The Court is also persuaded by the holding in Murithi J in *Boabab Beach Resort as quoted by F. Tuiyot I Saifudeen Abdullahi & 4 Others* in Mombasa High Court Misc. Civil Cause No. 11 of 2012, on the nature of a status quo order as follows:

In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

27. The upshot of the foregoing is that the following orders shall issue; -

- i. That the Preliminary objection dated 17th April 2023 is hereby dismissed.
- ii. That the status quo on the suit property LR No. Kwale/Galu/Kinondo/53 shall be maintained.
- iii. That pending the hearing and determination of this suit, there is hereby issued an order of inhibition, barring the Land Registrar Kwale from registration of any disposition in the register of the land parcel numbers of LR.No. Kwale/Galu/Kinondo/53.
- iv. That the 1st Defendant shall file Defence within 14 days of the date of this ruling.
- v. Each party shall bear their costs.

It is so ordered

Ruling Dated Signed And Delivered This 30th Day Of January 2024

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A.E DENA



JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Ms. Salim holding brief for Mr. Kimathi for the Plaintiffs

Ms. Kipchumba holding brief for Mr. Kurgat for the 1st Defendant

Ms. Kagoi for the 3rd Defendant

Mr. Hannington Kessy – Court Assistant

