



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 105 OF 2016 (OS)

IN THE MATTER OF LAND PARCEL NOS. 284/III/MN (CR. 7172)

**3725/III/MN, 7936/III/MN, 7937/III/MN, 7938/III/MN, 7939/III/MN, 7940/III/MN, 7941/III/MN,
7942/III/MN, 7943/III/MN, 7944/III/MN (ANY OTHER SUBDIVISIONS CREATED FROM
284/III/MN, THE MOTHER TITLE)**

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS
HAVE OBTAINED OWNERSHIP OF 1590 ACRES OF THE ABOVE PARCELS OF LAND BY
WAY OF ADVERSE POSSESSSION**

BETWEEN

AL MHALA SWALEH.....1ST PLAINTIFF

MACHEMBA MWAMBURA KADZINGA.....2ND PLAINTIFF

GILBERT KATANA MKARE.....3RD PLAINTIFF

MATANO MWAMODZU.....4TH PLAINTIFF

CHARLES KAINGU CHIGULU

(all suing on behalf of themselves and other members of Tuamkeni Self Help Group)

..... 5TH PLAINTIFF

VERSUS

MOHMAMED M. SHEIKH ALI.....1ST DEFENDANT

THE PUBLIC TRUSTEE IN TRUST FOR

MOHAMED M. MOHAMED KHATOR.....2ND DEFENDANT

KHATOR MOHAMED KHATOR.....3RD DEFENDANT

ZAINAB MOHAMED KHATOR.....4TH DEFENDANT

HAFSA MOHAMED KHATOR.....	5 TH DEFENDANT
MARIAM MOHAMED KHATOR.....	6 TH DEFENDANT
AMINA MOHAMED KHATOR.....	7 TH DEFENDANT
BAZEE BIN HERO MARO.....	8 TH DEFENDANT
MBWANA BIN HERO MARO.....	9 TH DEFENDANT
KIBWANA ABDALA.....	10 TH DEFENDANT
THE COUNTY COMMISSIONER,	
KILIFI COUNTRY.....	11 TH DEFENDANT
THE CHAIRMAN, LAND COMMISSION OF KENYA.....	12 TH DEFENDANT
THE ATTORNEY GENERAL.....	13 TH DEFENDANT

RULING

1. I have before me two applications that were heard simultaneously. The 1st Application is a Notice of Motion filed by the Plaintiffs dated 3rd May 2016. The 2nd Application is a Notice of motion dated 3rd April 2017 filed by the 1st, 4th, 5th, 6th and 7th Defendants.

2. In the Application dated 3rd May 2016, the Plaintiffs are seeking an order as follows:-

(a) That a mandatory injunction do issue restraining the Defendants by themselves, servants, workmen and or agents, or otherwise however(sic) from removing/destroying houses/structures, erecting fences, threatening the Plaintiffs with harm and eviction, trespassing into and/or in any other way dealing with the Plaintiff's property known as Plot/Land Parcel Nos.

284/III/MN (CR. 7172), 3725/III/MN, 7936/III/MN, 7937/III/MN, 7938/III/MN, 7939/III/MN, 7940/III/MN, 7941/III/MN, 7942/III/MN, 7943/III/MN, 7944/III/MN (any other subdivisions created from 284/III/MN, the Mother title) situated at Barani Kikambala within Kilifi District and to stop interfering in any other way with the Plaintiff's occupation and peaceful enjoyment of the Suit property pending the hearing and determination of this matter.

(b) That the Costs of this application be borne by the Defendants.

3. The application is supported by the annexed affidavit of the 2nd Plaintiff herein Mchemba Mwambura Kadzinga sworn on 3rd May 2016 and is premised on the grounds that:-

a. The Plaintiffs use the property to live and cultivate crops.

b. The Plaintiffs have been residing in the suit property with their families since birth.

c. The defendants are using the County Commissioner Kilifi and Policemen from Mtwapa and Kijipwa Police Stations to harass and intimidate the Plaintiffs.

d. The defendants have hired goons used in the demolition/destruction of structures in the company of Police without a Court Order while harassing the Plaintiffs and members of Barani Village.

e. That it would only be fair if the Police and the County Commissioner Kilifi are restrained from being used for hire to cause chaos instead of maintaining law and order among the residents.

f. That the Chairman, National Land Commission has an interest on this matter as his utterances on this matter during the funeral of Mohamed Khator Mohamed in January 2016(sic) and within a month, the police and hired goons descended on the suit property, destroying and burning houses while evicting residents without any Court Order.

g. That the Chairman of the National Land Commission authorized the demolition without looking the history of the place and when the titles were obtained by the Defendants, which is questionable, when he did a letter dated 11th February 2016, and copied (it) to some of the residents who received their copies on 16th February 2016 long after the demolition from the area Assistant chief.

h. The Defendants/Respondents will not suffer prejudice in any way if the application is allowed.

4. The Defendants are opposed to the Application dated 3rd May 2016. By an Affidavit in Reply sworn on 22nd June 2016 by the Defendant Hafsa Mohammed Khator, the Defendants aver that they had previously filed Mombasa ELC Case No. 211 of 2014 against the 1st Plaintiff and Others and it is an abuse of the Court process for the 1st plaintiff and others to now institute a claim for adverse possession in respect of the same land before a different Court of concurrent jurisdiction.

5. The Defendants further aver that Tuamkeni Self Help Group through which the Plaintiffs herein are suing was formed on 30th June 2014 as a self-help group under the Ministry of Labour and Social Security Services. It is their case that the group is not an incorporated legal entity and this suit is thus improperly brought as a representative suit. The Defendants further contend that even through this suit is expressed as a representative suit, brought by Ali Mhala Swaleh(the 1st Plaintiff) and 4 other members of Tuamkeni Self Help Group, this court has not issued an order granting leave to file the representative suit.

6. The 5th Defendant further avers that she was allocated her portion of land by the Public Trustee during the distribution of her late Mother's landed assets and that she has since had the same surveyed after which she built thereon. It is her case that none of the Plaintiffs, or their relations are squatting on her portion and they cannot therefore raise the claim against her by way of adverse possession.

7. The Defendants aver that for the Plaintiffs to successfully maintain an action in adverse possession, they must establish an act of dispossession of the title owner; or discontinuance of possession and an act of entry to replace the title owner; and further, demonstrate continued unbroken and uninterrupted possession of a specific parcel of land for a period of 12 years. It is their case that in the present case, the plaintiffs are not specific on the particulars of the portions they are occupying; that they have joined their claims in a group and it is unclear what part of the various plots each one of them claims to occupy.

8. The County Commissioner Kilifi, sued as the 11th Defendant herein is equally opposed to the application. In a Replying Affidavit sworn by Inspector of National Police Service Mary Mbai on 14th September 2016, the County Commissioner states that in January 2015, the Police received a report of invasion of family property from one Mohamed Khator and Farma Mohamed Khator through Kijipwa Police Station OB No. 18/13/01/2015. The said report was in respect of Land parcel No 284/III/MN located in Majengo-Barani area in Kikambala Division, Kilifi County and it indicated that some squatters who had formed a group known as Tuamkeni Self Help Group had invaded the land.

9. The 11th Defendant avers that acting on the report, the Police visited the site they found the squatters armed with machetes and batons among other "Crude" weapons. Investigations carried out revealed that some fraudsters were obtaining money from members of the public after which they proceeded to illegally and forcefully subdivide private land without the knowledge and or consent of the owner. Subsequently all those found culpable were apprehended and charged in Court for various offences. It is

the 11th Defendants case that at all material times, the police acted in accordance with the law and discharged their mandate independently, diligently and fairly.

10. At the same time, the 11th and 13th Defendants also filed Grounds of Opposition to the said application on 14th July 2016 stating as follows:

- 1. That the Applicants have not met the threshold for granting of an injunction*
- 2. That (the) orders sought are final in nature which cannot be granted at(an) interlocutory stage unless there is demonstrated great hardship on the part of the applicant which is not the case herein.*
- 3. That public interest militates against private interests hence injunction should not issue.*
- 4. That the application is otherwise an abuse of the process of this Honorable Court.*

11. In addition to the Replying Affidavit, the Defendants have also filed the Second Application. In the Application dated 3rd April 2017, the Defendants are seeking for Orders that:-

- i. The Court strikes out the suit for want of leave to institute representative action, or in the alternative, it orders the Plaintiffs to expeditiously seek leave; file, publicize and serve necessary notices and papers with a view to ready this case for trial, on strict timelines;*
- ii. Should the prayer to strike out this action for want of leave be refused, consolidation or concurrent trial back to back, of this case with Mombasa HCC No. 211 of 2014-Amina Mohamed Khator & 6 Others –vs- Muhala & 3 Others, is ordered;*
- iii. The names of and causes of action against Basee Bin Hero Maro and Bwana Hero Maro are struck down in any event, as they were deceased before commencement of suit, under the Principe in Dawson (Bradford) Ltd & Others –vs- Dove & Another(1971)1 QBD 330 of 334 from letter ‘G’;*
- iv. In the interim, any new act of trespass upon the suit land by the Plaintiffs or any persons claiming through or under them is stopped, and any contravention of this Court’s Order is punished , by a dismissal of action order; and*
- v. Any other necessary directions are given to expedite the trial in these cases.*

12. The Defendants application is supported by two affidavits, one sworn by the 1st Defendant-Mohamed Mohamed Sheik Ali on 4th April 2017 and another sworn jointly by the 4th and 6th Defendant-Zainab Mohamed Khator and Maraim Mohamed Khator respectively on the same 4th day of April 2017. The Defendants application is premised on a number of grounds stated therein as follows:-

- i. That the Plaintiffs have expressly and under oath acknowledged and admitted that they instituted their action against deceased defendants 3, 8 and 9; this renders the actions) against the deceased defendants a nullity.*
- ii. That the Plaintiffs have not complied with order 1 Rule 8 and Order 11 with a view to notify all and sundry and thereby ready the case for hearing.*
- iii. The delay in hearing of these cases works in favour of the persons, who have taken and retained the disputed land by force; and it is only fair that the case is heard at the earliest opportunity.*
- iv. The Plaintiffs in ELC 108 of 2016(O.S) are retaining a position of advantage by wrongfully retaining possession of the land they have trespassed upon; against old and weak Muslim Women who should be afforded protection under Article 57 of the Constitution of Kenya 2010.*

v. *New trespassers are contemptuously being invited to invade the land, to the detriment of the defendants; and with a view to further compound an already convoluted dispute; it is only fair that the Court by Order stems new acts of trespass upon the suit land as the litigation will otherwise never come to an end. An Order to dismiss the representative suit in the event of new entry would stem the trespass.*

vi. *That some of the Defendants are very old, and some fear that they might die before they vindicate their title in the land dispute;*

vii. *The 1st defendant, and his co-administrator have a duty to complete the administration of estate of their late mother, which they cannot do when the land is invaded by squatters.*

13. The Defendants application is also opposed by the Plaintiffs. In a Replying Affidavit sworn by the 1st Plaintiff Ali Mhala Swaleh, on 19th April 2017, the Plaintiffs admit that the 8th and 9th Defendants are deceased but they aver that they were not aware of that fact as they merely relied on documents which were in their possession at the time of filing the suit. They however object to the striking out of the suit as against the estates of the 8th and 9th Defendants as they have a claim on their property. It is the Plaintiff's case that striking out the suit would be inviting chaos in the entire area.

14. I have considered the two applications and the respective responses thereto. I have also considered the written and oral submissions as well as the authorities filed herein by the Learned Counsels for the Parties herein.

15. The Plaintiff's application dated 3rd May 2016 is seeking injunctive orders to restrain the Defendants from wasting, alienating, selling, disposing, removing/destroying the boundary fence, trespassing or in any other way dealing with suit properties. From the material placed before me, the Defendants (save for the 2nd, 11th, 12th and 13th) are the registered and or beneficial owners of the suit properties. The Plaintiffs however contend that the registration and/or conferment of ownership was obtained without the Applicants' and other residents' knowledge.

16. It is the applicants case that they have lived on the suit property uninterrupted and without being threatened with evictions for a period of over 12 years and that they do not know any other residence other than the suit property. It is the Applicant's case that they did not seek any one's permissions and/or authority when they entered and occupied the suit premises. They aver that they have built structures and planted trees on the suit land only for the Respondents to start threatening them with arrest and causing some of them to be summoned by the 11th Defendant.

17. On their part, the 1st, 4th, 5th and 7th Respondents maintain that they are the lawful owners of the suit land by virtue of being the legal representatives of the Estate of Mwanahawa Mohamed Khator. The said Mwanahawa Mohamed Khator was herself a beneficiary of the Estate of one Halima Mbwana Hero whose estate was being administered by the Public Trustee Mombasa sued herein as the 2nd Defendant. It is the Defendant's case that upon the death of the said Halima Mbwana Hero, the 1st Defendant together with his sister applied for letters of administration which they then presented to the 2nd Defendant. The 2nd Defendant then assisted them to be registered as the owners of sub division No 7940(Original No. 284/203) Section III MN, measuring approximately 0.8610 hectares.

18. As it were, it is apparent from the record that in May 2016 when the Plaintiffs filed this suit, the Defendants had already sued them in ***Mombasa ELC No. 211 of 2014; Amina Mohamed Khator and 6 Others –vs- Ali Mohala and Others***. Subsequently, on 14th August 2014, the Honourable Lady Justice Mary Kasango granted orders in favour of the Defendants herein as follows:-

“1. That the Defendants, their agents, servants or family members are restrained for 14 days from today's date from alienating to 3rd Parties and/or trespassing upon Plot No. MN/III/7936-MN/III/7944

2. *That this Order to be served upon OCS Kijipwa Police Station for him/her to ensure to maintain law and order. 3.....”*

19. The said Orders were extended from time to time although the Court record is not clear as to what transpired after 30th September 2014 when they were again extended for 14 days. Whatever the case, I am inclined to agree with the Defendants that when the Plaintiffs filed this case, they were aware of the existence of Mombasa ELC 211/2014 having filed their Defence thereon in August 2014.

20. I have looked at the pleadings in the two cases and it is evident that even though the Plaintiffs are seeking to be declared the owners of the suit properties by way of adverse possession, the two cases refer to the very same parcels of land. It is thus evident that this Suit and the application before me were meant to pre-empt the Plaintiffs case in Mombasa ELC No. 211 of 2014 aforesaid. To issue any orders herein would therefore go a long way in helping the Plaintiffs herein to succeed in abusing this Court’s process.

21. In any event, the prayers sought by the Plaintiffs herein are all in the nature of an injunction. In ***Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR***, the Court of Appeal restated the threshold in ***Giela –vs- Cassman Brown & Co Ltd(1973) EA 358*** and held that:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a. Establish his case only at a prima facie level

b. Demonstrate irreparable injury if a temporary injunction is not granted and

c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

21. What constitutes a prima facie case was again defined by the Court of Appeal in ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*** as follows:-

“In Civil Cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show the infringement of a right, and the probability of success of the applicant’s case upon trial. This is clearly a standard, which is higher than an arguable case.”

22. As it were, nothing was placed before this Court to demonstrate that any of the Plaintiffs have been living on any of the parcels of land comprised in the suit land herein for the periods stated in their application. Indeed in the absence of any material to support allegations of harassment or implicating the police in wrong doing, the applicant’s case falls short of the required standard. A perusal of the Replying Affidavit filed on behalf of the 11th and 13th Defendants shows that the Police moved to the suit land in the discharge of their mandate to maintain law and order. I did not find any evidence that the Police were being used for hire to cause chaos instead of maintaining law and order as is required of them.

23. In regard to the Defendants’ application dated 3rd April 2017, it is not denied that the suit herein is expressed to be brought by the Plaintiffs on their behalf and on behalf of members of Tuamkeni Self Help Group. Order 1 Rule 8 of the Civil Procedure Rules provides:-

“8. (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise Orders, continued by or against any one or more of them as representing all or as representing all except one or more of them.

(2). The parties shall in such case give notice of the suit to all such persons either by

personal service, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3). any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

24. From the Applicant's Supporting Affidavit, it is evident that the members of the said Tuamkeni Self Help Group are in the region of 100. Counsel for the defendants contended that this being a representative suit, it was imperative that leave be sought prior to the filing thereof and that in the absence of such leave, the proceedings amount to nothing but a nullity.

25. I think however that a reading of Order 1 Rule 8 above indicates that a party may file such proceedings but may not proceed therewith without the leave of the Court. It is however imperative as stated by Counsel that notice of the said proceedings be given to all other parties. Such notice is meant to ensure all parties are notified of the institution of the suit and to avoid the situation of repeated litigation by other parties.

26. The suit is brought on behalf of Tuamkeni Self Help Group. This is not a body with legal capacity to sue and/or to be sued and it is important that all those interested in this suit be individually known and that they apply to be made party as per the provisions of Order 1 Rule 8(3) aforesaid.

27. Again, it is not contested that the suit was filed against defendants Nos. 8 and 9 who were then long dead. The Plaintiffs contend that they were not aware of their deaths at the time of filing this suit. They however object to them being struck out of the suit on the basis that they have a claim against their estates and that to strike out the suit would be inviting chaos in the entire area.

28. It would appear to me that the proceedings brought against the deceased persons were a nullity in law. In ***Dawson(Bradford) Ltd and Others –vs. Dove and Another(1071) 1 QB 330***, it was held that:-

“.....Where a suit had been served on a deceased defendant at a time when the Plaintiff bona fide believed him to be alive. ...(the rules) did not empower the Court to substitute the executors as defendants as it would not be said that the plaintiffs' mistake was merely one of misnomer...”

29. That being the case, it would not help the plaintiffs case to leave the deceased. Defendants names in this suit merely on the notion that do so would be to invite chaos to the entire area. Courts of law cannot be intimidated to refrain from giving orders on the purport that a party before it would unleash chaos if certain orders were issued.

30. Arising from the foregoing, I make the following orders:-

a. The plaintiffs application dated 3rd May 2016 is dismissed.

b. The Plaintiffs are hereby granted 30 days from the date hereof within which to comply with the requirements of Order 1 Rule 8 of the Civil Procedure Rules.

c. This Suit be and is hereby consolidated with Mombasa ELC No. 211 of 2014; Amina Mohamed Khator & 6 Others –vs- Ali Muhala & 3 Others

d. The names of and causes of action against the 8th and 9th Defendants are hereby struck out as they were deceased prior to the commencement of this Suit.

e. Parties herein to appear before the Deputy Registrar of the High Court within 45 days of the date hereof for purposes of compliance with pre-trial directions.

f. The costs of the two applications shall be borne by the Plaintiffs herein.

Dated, signed and delivered at Malindi this 19th day of September , 2017.

J.O. OLOLA

JUDGE