



**Mwaponda & another (Chairman and Vice Chairman suing in their own behalf and on behalf of Maweni “A” CBO) v Alamin & 3 others (Environment & Land Case E005 of 2023) [2024] KEELC 983 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 983 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E005 OF 2023  
FM NJOROGE, J  
FEBRUARY 27, 2024**

**BETWEEN**

**ALLAN JANDO MWAPONDA ..... 1<sup>ST</sup> PLAINTIFF  
KHUHU CHIVATSI ..... 2<sup>ND</sup> PLAINTIFF  
CHAIRMAN AND VICE CHAIRMAN SUING IN THEIR OWN BEHALF AND  
ON BEHALF OF MAWENI “A” CBO**

**AND**

**ABDULRAHMAN M ALAMIN ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, MOMBASA ..... 3<sup>RD</sup> DEFENDANT  
COUNTY COMMISSIONER, KILIFI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By the Plaintiff’s notice of motion application dated 12<sup>th</sup> September 2023 brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Order 40 Rules 1,2, and 3 of the Civil Procedure Rules he seeks the following orders: -
  - a. Spent.
  - b. That pending inter-partes hearing and determination of this application and plaintiff’s suit herein the honourable court be pleased issue an injunction restraining Abdulrahman M. Alamin, the 1<sup>st</sup> Defendant, whether by himself, his servants or agents from trespassing into, invading, entering or remaining upon all that area demarcated in the Local Physical Land Use Development Plan No. 139/KLF/2019/1, and from purporting to unlawfully hinder the



implementation of the Local Physical Land Use Development Plan No. 139/KLF/2019/1, or from howsoever dealing with any part of the suit property.

- c. That pending inter-partes hearing and determination of this application and plaintiff's suit herein the honourable court be pleased issue an injunction restraining the National Land Commission, the 2<sup>nd</sup> Defendant herein, whether by its officers, employees, servants, agents and or persons acting with its authority from carrying out a survey exercise and or conducting any activity in favour of the 1<sup>st</sup> Defendant on the suit property number MN/III/284/R further as delineated in the Local Physical Land Use Development Plan No. 139/KLF/2019/1.
  - d. That pending inter-partes hearing and determination of this application and the Plaintiff's suit herein the honourable court be pleased to direct the District Land Registrar, the 3<sup>rd</sup> Defendant herein, to furnish the Plaintiffs and the court with a report on the status of Plot No. MN/III/284/R (CR. 7172) and MN/III/553 (Orig. 284/5) CR. 15344 within 15 days of the order being made.
  - e. That pending inter-partes hearing and determination of this application and the Plaintiffs' suit herein the honourable court be pleased to direct the County Commissioner Kilifi County, the 4<sup>th</sup> Defendant herein, to mobilize security officers and flush out all invaders unlawfully present on the suit land number MN/III/284/R further as delineated in the Local Physical Land Use Development Plan No. 139/KLF/2019/1 and furnish the court with a report within 30 days.
  - f. Any other order or relief the court deems just and fair as to ensure maintenance of status quo pending the hearing and determination of the Plaintiffs' suit.
  - g. Costs of the application be provided for.
2. In support of the application are the grounds enumerated on the face of the motion and the affidavit jointly sworn by the Plaintiffs on 11<sup>th</sup> September 2023. According to the Plaintiffs, the Kilifi County Government together with the 1<sup>st</sup> Defendants conducted a research on the history of the contested piece of land they referred to as "Maweni "A" Squatter Upgrading Scheme," (the suit property) and were satisfied that the same was available for regularization. Subsequently, the Kilifi County Government prepared and approved a Local Physical Land Use Development Plan No. 139/KLF/2019/1 on 11<sup>th</sup> May 2022 which was duly published in two local dailies on 6<sup>th</sup> January 2023.
  3. The Plaintiffs added that upon issuance of notice dated 27<sup>th</sup> March 2023 by the relevant County Executive Committee requesting security at the survey exercise to implement the said Development Plan, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants scuttled the process. The 2<sup>nd</sup> Defendant issued a statement of intention to conduct a survey in favour of the 1<sup>st</sup> Defendant only; while the 1<sup>st</sup> Defendant wrote to the County Executive Committee letter dated 11<sup>th</sup> April 2023, objecting to actualization of the said Development Plan claiming beneficial interests in Plot CR 15344, MN/III/553 (Orig. No. 284/5).
  4. The Plaintiffs stated that failure to implement the development plan and neglect of duty by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants, has resulted in deterioration of security in the area, one instance being an attack on the Plaintiffs on 25<sup>th</sup> April 2023 at 19:22 hours. The Plaintiffs were apprehensive that if the orders sought are not granted, the Defendants will unlawfully carry out a survey to the exclusion of the former.
  5. The 1<sup>st</sup> Defendant opposed the application. He filed a Replying Affidavit on 11<sup>th</sup> October 2023 which he swore on 27<sup>th</sup> September 2023. He stated that he is the administrator of the estate of one Teba Binti Mohamed who is the registered owner of Plot No. 553/III/MN Kilifi. According to the 1<sup>st</sup> Defendant he was not aware of the development plan until sometime in April when he was called by officers of Kijipwa Police Station to attend a survey on the suit property. He immediately wrote to the relevant



- County Executive Committee objecting to the survey and sub-division. He also filed ELC Case No. 031 of 2023 against the County Government of Kilifi where orders of status quo were issued pending determination of the suit, and that he equally filed an application to join the squatters as interested parties to the said suit.
6. He further stated that when he learnt about the development plan, he engaged the county government, the county commissioner, and DCI Kilifi who requested that a survey be conducted to establish the boundaries of the land entailed in the development plan and Plot No. 553/III/MN. Consequently, the government surveyor invited him for a survey which he paid for but has since been frustrated by the Plaintiffs. According to him, the Plot No. 553/III/MN did not form part of the land on the development plan. The 1<sup>st</sup> Defendant deposed that the land entailed on the development plan herein lies on Plot No. MN/III/4364, 4745 and 4583 under Survey Plan No. FR 466/138 and FR 355/38.
  7. The 1<sup>st</sup> Defendant contested that this suit is sub-judice ELC Case No. 031 of 2023 and Mombasa ELC Petition No. 10 of 2018 filed by members of the Plaintiffs over the suit property herein. He urged the court to dismiss the application.
  8. When this matter came up for mention on 25<sup>th</sup> January 2024, Mr. Kiilu, counsel appearing for the 2<sup>nd</sup> Defendant, told the court that he does not oppose the motion, while Mr. Ojwang, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants informed the court that they will only take part in the main suit. Notably also, this court directed the Plaintiffs to file and serve written submissions within 14 days from 9<sup>th</sup> November 2023 and Defendants within 14 days upon service. Regrettably, the Plaintiffs filed the same on 23<sup>rd</sup> January 2024.

### **The Plaintiffs' submissions**

9. The Plaintiffs identified two issues for determination namely: a) whether injunctive reliefs can be granted, and b) whether this suit is sub-judice.
10. In relation to the first issue, counsel submitted that the Plaintiffs have established a prima facie case by showing the existence of the development plan and their claim over the suit property. Counsel contested that the Plot MN/III/553 lies on a different area not covered by the development plan, contrary to what the 1<sup>st</sup> Defendant alleges. He added that the Plaintiffs have equally satisfied the conditions set out in *Giella v Cassman Brown Co. Ltd* [1973] EA 358 for granting the injunction orders sought. Counsel submitted that the Plaintiffs do not entirely oppose the survey but the same should be done jointly. Counsel relied on the cases of *Christopher Chepkuyeng v Vincent Lelei & 3 others* [2021] eKLR and *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR.
11. Regarding the second issue, counsel cited the characterization of sub-judice as discussed in the case of *Richard Kiplangat Sigei v Grace Sang* [2020] eKLR. He stated that the issues in the subsequent suit should be directly and or substantially similar to those in the former suit; and the remedies sought should equally be broadly similar. Counsel submitted that the Plaintiffs are not parties in ELC No. E033 of 2023 and Petition No. 10 of 2018 hence not aware of the issues therein. As such, he submitted, the doctrine of sub-judice not applicable in this case.

### **1<sup>st</sup> Defendant's submissions**

12. Counsel for the 1<sup>st</sup> Defendant highlighted that the conditions to be satisfied were set out in the case of *Giella v Cassman Brown* [1973] EA as prima facie case, irreparable harm and balance of convenience. To counsel, the Plaintiff has failed to establish a prima facie case as was defined in *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR. To him, the Plaintiffs' claim was that they are



intended beneficiaries yet the 1<sup>st</sup> Defendant produced ownership documents and evidence that he is actual occupation of the suit property.

13. In relation to irreparable harm, counsel relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tena [2018] eKLR. He submitted that the intended activity is only for purposes of establishing the boundaries between the said plots hence it will be more beneficial to both sides. Similarly, so he argued, that the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant considering he is enjoying the orders issued in ELC Case No. E033 of 2023.

### **Analysis And Determination**

14. I have read the application, affidavit in support of the application, replying affidavit and their accompanying annexures. I have also considered the submissions filed and the judicial decisions cited. The issues for determination are whether this suit is sub judice and whether the application is merited.
15. The concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction. This principle finds its footing in section 6 of the *Civil Procedure Act* which reads: -

“Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

16. In this case, the 1<sup>st</sup> Defendant avers that he filed a suit before the Mombasa ELC E033 of 2023 raising similar issues as those in the present suit over the same suit property. He annexed a copy of two sets of orders in that case issued by Naikuni J on 6<sup>th</sup> July 2023 and 27<sup>th</sup> September 2023. He also states that he has filed an application therein to join the Plaintiffs herein and others as interested parties. I have carefully perused the exhibited orders; the Defendants therein are the 2<sup>nd</sup> Defendant herein, the County Government of Kilifi and the Officer, Kilifi Land Adjudication and Settlement Scheme. The latter two are not parties in this suit. However, I cannot ascertain the nature of issues in that suit and whether the Plaintiff has indeed filed the said application for joinder.
17. Be that as it may, the Plaintiffs herein do not entirely dispute the existence of the other suits filed in Mombasa. In the given circumstances, and in the interest of justice I hereby issue the following orders: -
  - a. The status quo of the parcels in dispute, Plot No. MN/III/284/R (CR. 7172) and MN/III/553 (Orig. 284/5) CR. 15344, be maintained by all parties herein pending further orders herein;
  - b. The 3rd Defendant herein do furnish to the Plaintiffs and this court a report on the status of Plot No. MN/III/284/R (CR. 7172) and MN/III/553 (Orig. 284/5) CR. 15344 within 15 days from the date herein;
  - c. Costs of the application shall be in the cause.
  - d. The matter shall be mentioned on 23/5/2024 for directions.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 27<sup>TH</sup> DAY OF FEBRUARY 2024.**



**MWANGI NJOROGE**  
**JUDGE, ELC, MALINDI**

