



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT MALINDI

LAND CASE NO. 64 OF 2017

1. SAMSON KOMBO
2. KONDE MATHOLE
3. JORUM MAITHA
4. SCOLA KAMBUA
5. MOSES NGOLO
6. ESTHER KADZO
7. JOHN KAJORO
8. MIGHULO DENZIA
9. MICHAEL MRAMBA(The Board of Management,  
Kambi Ya Waya Primary School).....PLAINTIFF/APPLICANT

VERSUS

1. JULIUS DARAKA MBUZI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT
2. THOMAS MARTIN ANGORE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

**RULING**

1. By a Plaint dated and filed in Court on 24<sup>th</sup> March 2017, the Plaintiffs/Applicants who are Members of the Board of Management, Kambi Ya Waya Primary School, brought this suit against the two Defendants/Respondents seeking:-

***(i) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit premises.***

***(ii) An Order restraining the 1<sup>st</sup> Defendant by himself, his agents, servants, legal representatives or any other person claiming interest through him from burying the remains of (one) Kangombe Gunga(deceased) in the suit premises known as Malindi/Marereni-Msumarini Scheme/462***

***(iii) Vacant possession of the suit property***

***(iv) A permanent injunction restraining the Defendants jointly or severally by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from trespassing, entering, remaining, alienating and/or dealing with the suit property in any manner whatsoever.***

***(v) General damages to trespass***

**(vi) Costs of this Suit and interest at Court rates.**

2. Contemporaneous with the Plaintiff, a Notice of Motion dated the same day was lodged under Certificate of Urgency seeking orders that:-

*1. Service of the application be dispensed with in the first instance*

*2. Pending the hearing and determination of the application, this Honourable Court be pleased to grant an order restraining the 1<sup>st</sup> Defendant/Respondent by himself, his agents, servants, legal representatives or any other person claiming interest through him from burying the remains of Kang'ombe Gunga(Deceased) in the suit premises known as Malindi/Marerereni-Msumarini Scheme/ 462*

*3. Pending the hearing and determination of this application this Honourable Court be pleased to issue an injunction against the Defendants/Respondents by themselves, their agents, servants, legal representatives or any other person claiming interest through them from interfering with or in any way dealing with the suit premises known as Malindi/Marerereni-Msumarini Scheme/462.*

*4. The costs of this Application be awarded to the Plaintiff/Applicant*

3. The Application is supported by the annexed affidavit of Samson Kombe, the 1<sup>st</sup> Plaintiff and Chairman of the Board of Management of the School sworn on 24<sup>th</sup> March 2017. The Application is grounded on the facts set out on the face of the Motion as follows:-

*(a) That the Plaintiff is the bona fide registered owner of the disputed parcel of land and has a title issued in its name;*

*(b) That the defendants wrongfully entered and took possession of a portion of the suit property, and have thereafter remained in possession;*

*(c) That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are quarrelling over the area they are occupying within the suit premises, leading to a threat to peace and needless confrontations;*

*(d) That the 1<sup>st</sup> Defendant intends to bury a dead person on the land in contravention of the Plaintiff's property rights; and*

*(e) That the Defendants have not shown any signs that they will leave the land any time soon and have ignored pleas to stop trespassing upon the suitland.*

4. By Grounds of Opposition dated 29<sup>th</sup> March 2017 and a Replying Affidavit sworn on 13<sup>th</sup> April 2017, the 1<sup>st</sup> Defendant/Respondent Julius Davaka Mbuzi is opposed to the grant of the Orders sought by the Plaintiff. It is the 1<sup>st</sup> Defendant's case that:-

*(a) The suit and the application for interim relief herein are an abuse of the Court Process having been filed prematurely in that:-*

*(i) The School was only registered in 2011 or 2014 but the title exhibited was issued in 2006;*

*(ii) The defendants are admittedly settled on the suitland;*

*(iii) The allegations of trespass are not backed by any evidence that the boundaries of the school land have been fixed and a note thereof made on the register.*

*(b) Title to the suitland was issued before registration of the school as stated under the Education Act.*

*(c) The 1<sup>st</sup> Defendant's land also has a boundary which is not fixed.*

*(d) All the residents of Kambi Ya Waya village have not been joined in this case, yet they all settled within the land now claimed by the Plaintiff*

*(e) The deceased named on the Plaintiff was long buried elsewhere and this action is nothing but a boundary dispute.*

*(f) The 2<sup>nd</sup> Defendant is a mere licensee on the 1<sup>st</sup> Defendant's land which measures 1.75 acres and his being sued alongside the 1<sup>st</sup> Defendant is mischievous and intended to give him standing in this suit.*

5. I have considered the Application and the response thereto. I have equally considered the Written Submissions and authorities placed before me by the Learned Counsels acting for the Parties herein.

6. The principles for the grant of an interlocutory injunction have been long settled in the often-cited case of **Giella –vs- Cassman Brown Company Ltd(1973) EA 358**; where Spry V.P stated that:-

*“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”*

7. As was stated in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (Civil Appeal No. 39 of 2002), (2003)eKLR**;

*“...a prima facie case 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 latter.”*

8. In the instant case, it is common ground that Kambi Ya Waya Primary School is the registered owner of all that parcel of land known as Malindi/Marereni-Msumarini Scheme/462 measuring approximately 5.79 Ha. From the annexed Title Deed to the Plaintiff's application, the said title was issued on 1<sup>st</sup> September 2006, upon completion of the Malindi/Marereni-Msumarini land adjudication scheme conducted in the year 2006. It is the Plaintiff's case that the Defendants have since wrongfully entered and taken possession of portions of the suit property and have thereafter, wrongfully remained in possession thereof which act constitutes trespass upon the Plaintiff's land. I note however that the Plaintiffs do not give the exact time or period when the Defendants wrongfully entered the land.

9. On the other hand, it is the 1<sup>st</sup> Defendant's case that he bought his portion of land in 1979 from one Karisa Nzovu Tuva, who he states is the son of one Nzovu Tuva who donated the land on which Kambi Ya Waya Primary School stands today. Indeed it is the 1<sup>st</sup> Defendant's case that he has lived in the parcel of land since 1965 and further, that he is the one who requested the said Nzovu Tuva (now deceased) to provide land in which he founded the present day Kambi Ya Wapi Primary School. A copy of the Sale Agreement between the 1<sup>st</sup> Defendant and the said Karisa Nzovu Tuva dated 3<sup>rd</sup> February 1979 is annexed to his Replying Affidavit.

10. The 1<sup>st</sup> Defendant further avers that he established his homestead on the land he purchased which is separate from but borders the land on which the school stands. It was further his case that the 2<sup>nd</sup> Defendant is a mere licensee on his land, a fact which may explain why the 2<sup>nd</sup> Defendant did not bother to file any papers in opposition to the application herein.

11. Be that as it may, it is apparent that the 1<sup>st</sup> Defendant has built his homestead on the portion of land being claimed. If the annexed Sale Agreement is to be believed, he has occupied the land at least since 1979. The Plaintiffs did not controvert this assertion by the 1<sup>st</sup> Defendant. It was not clear from the material placed before me why the plaintiff did not move earlier to evict the 1<sup>st</sup> Defendant from the suitland having obtained its title deed way back in 2006. According to the 1<sup>st</sup> Defendant, however, a dispute arose during land adjudication for the area and the Adjudication register was apparently closed and the Plaintiff Primary School was therefore issued with a title occupied by other members of the community.

12. From a reading of the Plaintiff's minutes annexed to the Supporting Affidavit, I am inclined to believe the 1<sup>st</sup> Defendant's assertion that there are many other members of the community resident in the suitland following the manner in which the adjudication was done without a proper demarcation of boundaries. The said minutes dated 21<sup>st</sup> March 2017 clearly show that the Plaintiff school has no fence and that a resolution was passed to fence it and to evict the other members of the community residing within the land registered in the school's name.

13. Arising from the foregoing, it would be greatly unfair and unjust to grant the Order sought herein evicting the Defendants before the Court can fully hear the circumstances under which the school which only came to be registered as a legal entity in 2011 came to own the suitland in 2006. Granting the orders sought would mean barring the defendant for instance from entering or remaining in a place he has called home since 1979 at an interlocutory stage.

*14. As it were, no evidence has been availed by the Plaintiffs tending to show that the portion of land occupied by the 1<sup>st</sup> Defendant is in danger of being wasted, damaged or wrongfully alienated to Third Parties to put it out of reach by the Plaintiffs at the conclusion of the main suit.*

15. Accordingly, I do not find merit in the application dated 24<sup>th</sup> March 2017. The same is dismissed with no Order as to costs.

**Dated, signed and delivered at Malindi this 15th day of November, 2017.**

**J. O. OLOLA**

**JUDGE**