



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 328 OF 2010**

IDDI IBRAHIM

YUSUF NEVI (Suing on behalf of all the 127 members  
of Mabirikani Village Land committee).....PLAINTIFFS/APPLICANTS

-VERSUS-

AINSLEY LEVERATATT DOPWELL.....1<sup>ST</sup> DEFENDANT/RESEPDNENT

MUNICIPAL COUNCIL OF MOMBASA.....2<sup>ND</sup> DEFENDANT/RESPONDENT

AND

PENGUIN HOLDINGS LIMITED.....INTERESTED PARTY

**RULING**

1. The matter before me is the application dated 7<sup>th</sup> October 2015 brought under provisions of section 1A, 1B, 3 and 63 (e) of the Civil Procedure Act and Order 22 rule 29 of the Rules. The plaintiffs who are the applicants seek for ORDERS:

**1. Spent**

**2. That this Honourable Court makes a finding that Plot No 2427 “hived off” from Plot No 885 which was already wholly registered privately as a Freehold Title be cancelled forthwith.**

**3. The Decree/Holder Applicants be placed in possession of all that piece of land referred to as Plot No 2427/V/MN measuring 11.2ha.**

**4. That the costs of this application be awarded to the Decree Holder Applicants.**

2. The application is premised on the grounds set on the face of the application which are ;

**1. The Honourable Lady Justice Maureen Odero had already made a finding that a Freehold Title could not become available for leasing to the Intended Interested Party PENGUIN HOLDINGS LTD by the Government hence the said Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**2. The Certificate of Title Deed Plot No 2427 is NOT conclusive evidence of proprietorship having been acquired illegally, unprocedurally and/or through corrupt scheme and offence Section 26 of the LAND REGISTRATION ACT 2012.**

**3. The Decree-Holder Applicants should take possession of that parcel of land known as Plot No 2427 having obtained a Judgement on the subject suit and the Judgement is still unchallenged to date.**

3. The application is further supported by the affidavit of Yusuf Nevi. Mr Nevi deposed that the intended interested party unsuccessfully attempted to join this suit vide an application dated 10<sup>th</sup> September 2010. The applicants annexed a copy of the ruling dismissing that application and quoted the Judge where she said that the duty to determine the legality of title for plot No 2427 hived from the plot No 885 lies with this Court (ELC). Mr Nevi deposed that the applicants have extracted a decree declaring them the registered owners hence they want full possession of plot no 2427 which was unprocedurally hived from plot No 885.

4. The application is opposed by the intended interested party's replying affidavit. The intended interested party deposed that it is not a party to these proceedings. Secondly the application is a non-starter and abuse of the Court process. It also states that the Court is *functus-officio*. The party continued that they are registered owner of plot No 2427 as per copy of title deed they have annexed.

5. It is her case that she has filed a suit vide ELC 284 of 2015 seeking to quash title issued to the applicants. Lastly the part deposed that quote of the Judge referred to by the applicant is an "orbiter" as this was never an issue before her for determination.

6. The parties filed rival submissions which have summarised the facts set out in their respective affidavits. I have read and considered those submissions. The plaintiffs have moved this Court seeking cancellation of title for plot No 2427 on the basis that it was hived off from plot No 885. It appears the applicants believe this plot was hived off their plot No 885 on the basis of the comments made by the Judge in a ruling delivered on 20<sup>th</sup> November 2014.

7. The plaintiffs vide a decree in this suit was awarded plot No 885/VI/MN. The intended interested party who is registered as owner of plot No 2427 applied to be joined in the suit after judgement and also sought for orders to set aside that judgement. That application was dismissed. The trial Judge at page 10 stated that before the interested party can be enjoined "*the question of validity of its title must first be determined*". The Judge did not determine the validity or otherwise of this title as it was not a matter before her. At page 8, she also stated that it was not the province of her Court to make a finding on the legality of the interested party's claim to plot No 2427 which clearly shows the Judge did not make a finding on the validity or otherwise of title No 2427 owned by Respondents.

8. Since the Judge did not make a finding on the legality of the interested party's claim or the validity of its title, is it open for the applicants to rely on the ruling rendered by the learned Judge to seek cancellation of this title by an interlocutory application. In my view the proper forum for the applicants to question that title is by way of coming to Court in a suit where they can lead evidence to convince the Court that the title was irregularly acquired. The method they have chosen is not provided for in law and this Court cannot exercise its discretion to issue orders that amounts to condemning a party unheard contrary to the rules of natural justice.

9. Further the applicant is seeking orders to apply to a party who has not been joined in these proceedings. This party attempted to join but was closed out. It is gross abuse of the Court process that the applicants would oppose the intended interested party from joining this suit and then turn around and file an application against them. The orders cannot issue even if it was merited against a person who is not a party to the proceedings.

10. In the circumstances I find the application as lacking in merit for seeking substantive orders which can only be granted through a substantive suit. The application is thus dismissed with costs.

Signed and delivered at Mombasa this 25<sup>th</sup> October 2016

A. OMOLLO

JUDGE