



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**Elc 64 of 2014**

**YAHYA SWABIRI BWANAMAHADHI.....1ST PLAINTIFF/APPLICANT**

**MAHADHI SWABIRI MAHADHI..... 2ND PLAINTIFF/APPLICANT**

**=VERSUS=**

**MOHAMED ALWI.....1ST DEFENDANT/RESPONDENT**

**INSPECTOR GENERAL.....2ND DEFENDANT/RESPONDENT**

**THE OFFICER COMMANDING**

**KIPINI POLICE STATION (OCS).....3RD DEFENDANT**

**R U L I N G**

**Introduction:**

1. What is before me is the Application by the Plaintiffs' dated 7<sup>th</sup> April 2014. In the Application, the Applicants' are seeking for the following orders:

(a) A Mandatory injunction do issue requiring the 1<sup>st</sup> Defendant either by himself or through his agents, employees, servants, assignees and or any other person to immediately quit and or vacate the an unalienated public land known as Kiziwiliani farm at Kipini Village within Tana River County measuring approximately 10 acres (hereinafter referred to as “the suit property”) and hand over possession thereof to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants pending the hearing and determination of the suit herein.

(b) An injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants either by themselves or through their agents, employees, servants, assignees and or any other person from interfering in any manner with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs quiet enjoyment of the unalienated public land known as Kiziwiliani farm at Kipini Village within Tana River County measuring approximately 10 acres (hereinafter referred to as “the suit property”) and hand over possession thereof to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicant pending the hearing and determination of the suit herein.

2. The Application is premised on the grounds that the Applicants are the bona fide owners of the

suit properties and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have no legitimate interest in the suit property.

**The Plaintiffs'/Applicants' case:**

3. According to the Affidavit in support of the Application, the 1st and 2nd Plaintiffs are the owners of an unalienated public land known as Kiziwiliani farm at Kipini village within Tana River County measuring approximately 10 acres.
4. It is the deposition of the 1<sup>st</sup> Plaintiff that him, together with the 2<sup>nd</sup> Plaintiff, are the grandchildren of Bwanahamadhi Swabir who had acquired the suit property by prescription and or through the Government consent.
5. The Plaintiffs' case is that the Chief and the District Officer have on different occasion decreed that the suit property belongs to them and that the 1<sup>st</sup> Defendant was directed to stop any activities on the suit land.
6. According to the 1<sup>st</sup> Plaintiff's deposition, on 18<sup>th</sup> March 2014, the 1<sup>st</sup> Defendant, while accompanied by a gang of 15 people forcefully entered the suit property, evicted the 2<sup>nd</sup> Plaintiff and took over possession of the suit property and threatened the Plaintiffs with death if they ever stepped on the land.

**The Defendants'/Respondents' case:**

7. The 1<sup>st</sup> Defendant deponed that he has been on the suit property for more than 10 years; that he has planted casuarina trees, erected several houses and kraals for his animals and that he has two wells on the land.
8. The 1<sup>st</sup> Defendant deponed that the 1<sup>st</sup> Plaintiff is a former councilor who has always been aware that the land in question is trust land and that the dispute between him and the Plaintiffs has never been resolved and that he has always been in possession of the suit land.
9. The 1<sup>st</sup> Defendant has opposed the grant of the prayers in the Application because, according to him, he is lawfully in possession of the land and an order of mandatory injunction will determine the case before the hearing of evidence in his possession.
10. The 1<sup>st</sup> Defendant finally deponed that the Plaintiffs have failed to prove that they have a cause of action and that they will suffer irreparable loss unless the orders they are seeking are granted.

**Submissions:**

11. The Plaintiffs' counsel submitted that the suit property is yet to be allocated to his clients in view of the provisions of Section 5(1)(c) or (d) of the Land Act as read together with Section 7 of the same Act; that the elders have in various forums stated that the suit property belongs to the Plaintiffs and that the Plaintiffs are unemployed and depend on the suit property for food and if denied to access the suit property, then they shall suffer irreparable loss and damage that cannot be compensated by damages.
12. The 1<sup>st</sup> Defendant's counsel submitted that this case does not satisfy the standards that are necessary for the grant of either of the injunction sought because of the highly disputed facts such as whether possession was taken away from the Plaintiffs by force and whether the 1<sup>st</sup> Defendant has all along been in possession of the land for over 10 years.
13. Counsel submitted that if the suit property is public land as alleged by the Plaintiffs, then it is only the National Land Commission which has the mandate to manage it and not the Plaintiffs; that time cannot accrue against government land and that the Applicants have not made up a prima facie case with chances of success.
14. Both the Plaintiffs and the 1<sup>st</sup> Defendants filed authorities which I have considered.

**Analysis and findings:**

15. The Plaintiffs are seeking for both mandatory and prohibitory injunctions on the ground that they are the legitimate owners of what they refer to as "unalienated public land".

16. The Plaintiffs have admitted in their pleadings that it is the 1<sup>st</sup> Defendant who is in possession of the suit property although the suit property was taken from them forcefully. The Plaintiffs are therefore seeking for a mandatory injunction at the interlocutory stage.
17. The Court of Appeal has set down the applicable law relating to an order of a mandatory injunction at an interlocutory stage. In the case of **Locabail International Finance Limited Vs Agro export & Others (1986)**, ALL ER, it was held as follows:

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then in clear case either where the court thought the matter ought to be decided at once or where the injunction was directed at a simple and summary act which would be easily remedied or where the defendant had attempted to seal a match on the Plaintiff. Moreover before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.....”**

18. In the case of **Mohamed Abdalla A Shikely & 8 others Vs Mohamed Abdalla Salim (2014) Eklr** this court held as follows:

**“There guidelines have been followed consistently by the courts. In the case of Mucuha Vs Ripples Limited (1990-1994) EA 388, the Court of Appeal quoted with approval the case of Canadian Pacific Railway Vs Guad (1949) 2 KB 239 in which it was held as follows-the principles of granting a mandatory injunction are that they will only be granted exceptionally and in the clearest cases.**

19. Trespass is an authorized or unlawful entry upon land. However, where a land owner gives a person permission, either by consent or by a licence, such an entry cannot amount to trespass.
20. It is trite law that unalienated public land can only be owned by either the County Government or the National Government pursuant to the provisions of Article 62 of the Constitution.
21. Although public land may vest in and be held by the County Government “in trust for the people residing in the county” and although such land may be allocated to individuals residing in the area by the National Land Commission, it is only the National land Commission, by virtue of the provisions of Section 12 of the Land Act, which can allocate such land. This court cannot, at this stage, state with certainty that it is the Plaintiffs who are entitled to the suit property in the absence of supporting documents.
22. Indeed, neither the Chief nor the District Commissioner, can, under the new constitutional dispensation, allocate or purport to allocate public land to people in their area of jurisdiction.
23. In view of the fact that there is no evidence before the court at this stage to show the legitimate owners of the suit property, and considering that the Plaintiffs have described the suit property to be “unalienated” public land, I find and hold that the Plaintiffs have not convinced me to issue a mandatory injunction at this stage considering that it is the 1<sup>st</sup> Defendant who is in possession.
24. The standards for a party to be granted a mandatory injunction have not been met by the Plaintiffs, which standards are higher than those required for one to be granted a prohibitory injunction. The prayer for a prohibitory injunction will still amount to an eviction order in view of the admission that it is the 1<sup>st</sup> Defendant who is in possession of the suit property.
25. For those reasons, I dismiss the Plaintiffs' Application dated 7<sup>th</sup> April, 2014 with costs.

Dated and amended in Malindi this **20<sup>th</sup>** day of **March**, 2015.

**O. A. Angote**

**Judge**