



REPUBLIC OF KENYA



**Salim & 3 others v Pastad (Environment & Land Case 165 of 2018)
[2024] KEELC 926 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 165 OF 2018
EK MAKORI, J
FEBRUARY 15, 2024**

BETWEEN

RASHID MOHAMED SALIM 1ST PLAINTIFF

AHMED MOHAMED SULEIMAN 2ND PLAINTIFF

**MOHAMED SULEIMAN SHAQSY (SUING AS TRUSTEES OF THE MAZRUI
COMMUNITY DEVELOPMENT AND WELFARE) WAKF LANDS TRUST AND
MEMBERS OF THE MAZRUI COMMUNITY) 3RD PLAINTIFF**

MOMBASA CEMENT LIMITED 4TH PLAINTIFF

AND

ABDULGAFFUR PASTAD DEFENDANT

RULING

1. For the determination of this Court is an application by the defendant/applicant dated 23rd February 2023. The same is supported by the affidavit sworn by Mr. Imran Abulgafur Pasta. The application is opposed by the plaintiffs/respondents. The 1st to 3rd respondents opposed the application through a replying affidavit by one Rashid Mohammed sworn on 4th May 2023 while the 4th respondent opposed the same via a replying affidavit deposited by one Javed Mohamed Sidik dated 17th April 2023. The Court directed the application to be disposed of through written submissions.
2. The short background of the matter is that on 23rd August 2018, the plaintiffs/respondents lodged a suit against the defendant/applicant through a plaint dated 22nd August 2018. Shortly thereafter the defendant/applicant filed their Memorandum of Appearance but failed to file a defence. The plaintiffs/respondents later amended the plaint on the 24th of January 2023 through an amended plaint dated 19th January 2023. The defendant/applicant afterward filed a defence and counterclaim on 2nd March 2023



- dated 23rd February 2023 together with the application on the even date. In response, the 4th plaintiff/respondent did file a statement of defence dated 4th May 2023.
3. Significantly the application sought a temporary injunction order against the plaintiffs/respondents to restrain them from interfering with the use, ownership, access to, and occupation of the property known as Plot No. 722 Takaungu in Kilifi County and also that the plaintiffs'/respondents' suit be struck out because the plaintiffs lacked locus standi and the suit was filed by the firm of Ms. Kanyi J. & Company Advocates who had previously rendered services to the defendant.
 4. The contention by the defendant/applicant is that the suit property remains legally owned by the Mazrui Community but previously registered under Certificate No.409. The Mazrui Trust Board was established through the Mazrui Land Trust Board under the provisions of the Mazrui Lands Trust Act with the mandate to hold the land in trust for the followers of Salim Bim Khamis. Pursuant to the repeal of the Mazrui Lands Trust Act on 25th June 1991 a notice of completion of the Takaungu Adjudication Section took effect. The rights and interests of the persons on the land would be ascertained in accordance with the [Land Adjudication Act](#). Pursuant to the repeal of the Act LR No. 4236 was divided into parcels which were allocated to the residents of the area around Takaungu Adjudication Section. Parcel No. 722 was allocated to one Harrison Mwarumbe Mbui. On 19th July 2012, the High Court in Mombasa declared the repeal of the Mazrui Lands Trust Act (Repealed) unconstitutional. The declaration of the Act as unconstitutional meant that the Adjudication at Takaungu was a nullity and that the Mazrui were then the legal owners of the land that had been adjudicated in favour of the residents. It is the defendant's case that the 1st, 2nd, and 3rd plaintiffs on 30th March 2014 leased out 1000 acres of LR No.4236. The plaintiffs accused the defendants of encroaching on Plot No. 722 which they contended is part of LR No. 4236. The plaintiffs then sought an order to restrain the defendant from continuing to occupy Plot No. 722 as well as vacant possession.
 5. On the other hand, the defendant filed a defence and counterclaim dated 23rd February 2023. The defendant's case is that he is the owner of the property known as Plot No. 722 Takaungu. The plaintiffs have interfered and continue interfering with the defendant's ownership, possession, and use of the suit property and have blocked the defendant from accessing the same. There is a need for the Court to intervene and protect the subject matter by issuing an order of injunction to restrain the plaintiffs and their agents from interfering with the defendant's proprietary rights. A wall that had fenced off the property has long been pulled down and the suit land is at a risk of being wasted further.
 6. The defendant claimed that the plaintiffs are not duly Gazetted members of the Mazrui Land Trust Board and cannot therefore sustain this suit. The other issue is that the firm of Kanyi J. & Co. Advocates previously rendered professional legal services to the defendant by preparing and drafting the Power of Attorney in respect of the property hence the potential for a conflict of interest.
 7. The defendant averred the injunction is intended to preserve the suit property till the suit is heard and determined.
 8. The 1st to 3rd plaintiffs averred that there is no dispute about the land in question vesting in the Mazrui. This is reinforced by the Mombasa Civil Case No. 185 of 1991. The land in question was registered in the Mazrui Community under the Land Titles Act (now repealed) and a Certificate of Ownership No. 409 was issued on 1st April 1914. The issue of ownership is not contested. The contention by the defendant that he owns a portion known as Plot No. 772 which he allegedly purchased from one Harrison Mwarumba and annexed sale agreement did not have a stamp as proof of payment of Stamp Duty. The 1st to 3rd plaintiffs are of the view that the defendant has not established a prima facie case with a probability of success as held in the *Giella v Cassman Brown* [1973] EA 368.



9. The 4th plaintiff stated that it is common ground that Plot No, 722 is part and parcel of the Mazrui Land and no title could arise out of Plot No 722. In addition, the defendant has no proprietorship rights on the said land the defendant/applicant is claiming to be the owner of the suit parcel Plot No. 722, which was created through an adjudication process in 1990. It is asserted that an allotment of a plot does not give any rights to title to land. An adjudication officer can only adjudicate unalienated public land and assign plot numbers. The Mazrui Land, however, is private land that is not subject to adjudication. The adjudication process was a result of the Mazrui Lands Trust (Repeal) Act No. 11 of 1989 repealing the Mazrui Lands Trust Act Cap 289 of 1982 that rendered the Mazrui Community Land as Trust land and the rights and interests of persons on the land to be ascertained and registered in accordance with the provisions of the *Land Adjudication Act*. The adjudication process began in 1990 and was concluded on 20th May 1993 however the Land Adjudication and Settlement Officer could not register and issue titles because the Mazrui Community claimed ownership over the land
10. The 4th plaintiff submitted that It is not in dispute that the original allotted owner is Harrison Mwarumba Mbui who subsequently sold the land to the defendant/applicant before the adjudication process was complete. It is trite law that for ownership of the property to be upheld, the process of acquiring the property must conform to proper alienation procedures.
11. The plaintiffs/applicants have filed evidence to demonstrate that this property was part of the Takaungu Adjudication Section, conducted in the year 1990. That adjudication process partitioned the land constituted in the original title Certificate of Ownership No. 409 and allocated a portion to Harrison Mwarumba Mbui through Plot No. 722, yet the defendant/applicant denied that the Plot No. 722 was allocated from the Takaungu Adjudication Section.
12. According to the 4th plaintiff, this property is part of the Takaungu Adjudication Section as demonstrated by the Judgment of this Court in ELC Case No. 12 of 2012 Abdulgaffur Abdulgani Pasta v Harrison Mwarumba Mbui as supported by the Kilifi Land Adjudication and Settlement Officer which the defendant has filed (the supporting affidavit dated 23rd February 2023). In paragraph 4 of the judgment dated 6th April 2018, this Court (Angote J.) found that the original allocated owner Harrison Mwarumba Mbui expressly stated that the Land Registrar could not issue the defendant/applicant with a title as the land was part of ongoing proceedings in court. The Kilifi Land Adjudication and Settlement Officer in paragraph 10 made the same comment that the titles concerning the adjudication of Takaungu Adjudication Section were not issued and will never be issued because of the Mazrui Community claim in Mombasa HCCC No. 185 of 1991 and HCCC No. 134 of 1991. in Mombasa High Court Case No.185 of 1991: Ahmed Abdalla Mohamed & 3 others v the Hon. Attorney General, the Court found that the Mazrui Community are the lawful owners of the land to the exclusion of all other persons and that the Minister concerned or his servants or agents had no powers to determine the question of the ownership of such land.
13. 4th plaintiff further stated that the defendant/applicant was well aware of the existence of the Mombasa HCCC No. 185 of 1991 and the Mazrui Community's claim to the land. However, he did not appeal the judgment whose effect cancelled the allocation of the suit property and subsequently determined the property to be private land belonging to the Mazrui Community.
14. The 4th defendant has cited the cases in *Funzi Development Ltd & Others v County Council of Kwale*, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR and *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), affirming that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot base on the indefeasibility of a title sanctioning illegality or give its seal of approval to an illegal or irregularly obtained title. It is



- argued that indeed, the title or lease is an end product of a process. If the process that was followed before the issuance of the title did not comply with the law, then such a title cannot be held as indefeasible.
15. It is argued that since the defendant/applicant will never hold title to the suit property, he has nothing to maintain. The defendant cannot lawfully base his interest in the suit property over an adjudication process that was nullified, according to the Kilifi Land Adjudication and Settlement Officer, who also stated that the land is now owned by the Mazrui Community. 4th plaintiff is of the view that for the defendant/applicant to sustain this application and defend this suit he must prima facie show title, a burden he has failed to establish in the instant suit.
 16. The 4th plaintiff avowed that the defendant/applicant is praying for an order of injunction against it from interfering with its use, ownership, access, and occupation of the property known as Plot No. 722 Takaungu in Kilifi County. That the law regarding the grant of injunctive relief is now well settled. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [20031 eKLR, the court of appeal sitting in Mombasa applied the principles originally enunciated in the now-famous case of *Giella v Cassman Brown & Co. Ltd* (supra). In addition to holding that the power of a court in granting an interlocutory injunction is discretionary, it reiterated the principles for granting an interlocutory injunction:
 - a. the applicant must show a prima facie case with a probability of success;
 - b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages;
 - c. If the court is in doubt, it will decide the case on the balance of convenience.
 17. The 4th plaintiff stated that the Court further interpreted prima facie in a civil application to include but is not confined to a "genuine and arguable case". It 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 been infringed by the other party as 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. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is a standard which is higher than an arguable case.
 18. On dismissal of the suit for want of locus standi and representation, the 4th plaintiff submitted that a party has a right to choose counsel and, in this case, it has not been shown the potential conflict alluded to debar the firm of Ms. Kanyi J. & Company Advocates acting for the plaintiffs, in any event, there has already been change of advocates. On the former the 4th plaintiff argued that It is clear that the Mazrui Lands Trust (Repeal) Act No. 11 of 1989 repealed the Mazrui Lands Trust Act Cap 289 of 1982 in its entirety, therefore the latter ceased to have any legal effect. Therefore, it can only be revived by an express provision of the law. However, the ownership of the land by the Mazrui Community is not disputed. The Wakf predated the repealed Mazrui Lands Trust Act Cap 289 of 1982, as it was created on 2nd July 1913 and registered on 6th April 1914 in the original certificate of ownership number 409 as an overriding interest in the land under the Land Titles Ordinance of 1908 to benefit the Mazrui, their heirs, and successors forever. Pursuant to Islamic law, the beneficiaries of the Wakf created the Trust herein represented by the 1st, 2nd, and 3rd plaintiffs/respondents on 7th February 2006 and after the successful determination by the Court in the Mombasa High Court Case No.185 of 1991: *Ahmed Abdalla Mohmed & 3 others vs the Hon. Attorney General* on 19th July 2012, where the Court declared that the Mazrui as the lawful owners of the Land to the exclusion of all other persons, the trustees were duly registered as the legal proprietors of the Land in trust for the Mazrui Community on the 30th July 2012. Similarly, in Civil Case 230 of 1981 *Ahmed Abdalla Mazrui and 5*



others v Mazrui Lands Board of Trustee and another the Court held that the Mazrui Land including the Wakf is divested from the whole world any interest that anyone may have had or may have thought to have. The judgments were never appealed or overturned; therefore, the judgments stand as law. The declarations not only give the Mazrui Community ownership of the land to the exclusion of others but also embolden their power to alienate the land in extension. The change of trustees in the Wakf in the names of the 1st, 2nd, and 3rd plaintiffs/respondents and other trustees was a lawful process, that was done in accordance with the trust deed and by extension, the Lease to the 4th plaintiff/respondent is valid.

19. The 4th plaintiff further emphasized it was not enough for the defendant /applicant to allege fraud; evidence had to be tendered to prove the particulars of fraud beyond reasonable doubt. The case submitted by the applicant/defendant - ELC Case No. 12 of 2012 Abdulgaffur Abdulgani Pasta v Harrison Mwarumba Mbui, the Kilifi Land Adjudication, and Settlement Officer, the defendant witness testified in court that the suit land was adjudicated in 1990 and the exercise was completed on 20th May 1993. He also stated that the titles were not issued because the Mazrui family had filed a claim over the land in the Mombasa High Court Case No.185 of 1991: Ahmed Abdalla Mohmed & 3 others v the Hon. Attorney General. The reason the applicant/defendant is referring to the suit property as a Plot Number, as opposed to a Title, is because the judgment in Mombasa High Court Case No -185 of 1991: Ahmed Abdalla Mohmed & 3 others v the Hon. Attorney General led to the cancellation of the allocation which was being undertaken within Takaungu Adjudication Section. Hence the applicant/defendant could not be granted title as the property is now under the ownership of the Mazrui family. When the Court in Mombasa High Court Case No.185 of 1991: Ahmed Abdalla Mohmed & 3 others vs the Hon. Attorney General declared the Mazrui Lands Trust (Repeal) Act No. 11 of 1989 unconstitutional it also declared the Mazrui as the lawful owners of the land to the exclusion of all other persons, the Adjudication process which granted the applicant title to the suit property was nullified. In the case before the Court, nothing can challenge the fact that indeed the Mazrui Community is the legal, beneficial, and equitable proprietor of the land held in trust by the 1st, 2nd, and 3rd plaintiffs/respondents who have lawfully leased the property to the 4th plaintiff/respondent.
20. This Court is called upon to decide whether to have the entire suit dismissed for want of locus standi and conflict of interest given representation by a lawyer who has acted for both parties in the past. The Court is also asked to grant temporary injunctive orders pending the hearing and determination of the current suit. The Court is also called upon to declare who should bear the costs of the current application.
21. On dismissal of the current suit, it is trite law that Courts are called upon to sustain a suit as much as possible to avoid creating hardships on litigants seeking justice of whatever shed. In *Simon Kirima Muraguri & Another v Equity Bank (Kenya) Limited & another* [2021] eKLR, Mwita J. held as follows:

“The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya v I.T Inamdar & 2 Others* [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.

22. In *Olympic Escort International Co. Ltd. & 2 Others v. Parminder Singh Sandhu & Another* [2009] eKLR, the court opined that a triable issue is not necessarily one that the defendant would ultimately succeed on but it need only be bona fide.



23. In the Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.

24. In Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000) the same court expressed itself thus:

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.

25. Similarly, in D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another [1980] eKLR, Madan JA, stated:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

22. In this suit the issues raised as to why the striking out of the plaintiffs' suit by the defendant is that there was a distrusted potential conflict of interest by the firm of Kanyi J. & Co. Advocates representing the plaintiffs. It was alleged the said firm also drew a Power of Attorney for the defendants. There has long been a change of advocates and that issue now stands moot.

23. On locus standi, parties extensively submitted on the effect of the repeal of the Mazrui Lands Trust Act Cap 289 of 1982, which was later to be declared unconstitutional by the High Court in Mombasa High Court Case No.185 of 1991: Ahmed Abdalla Mohamed & 3 others vs the Hon. Attorney General declared the Mazrui Lands Trust (Repeal) Act No. 11 of 1989, it also declared the Mazrui as the lawful owners of the land to the exclusion of all other persons, the Adjudication process which granted the applicant title to the suit property was nullified. Whether the plaintiffs are the rightful trustees of the



Mazrui Community will have to be a trial issue. It will require a hearing rather than ordering a dismissal. It is not a fringe issue for the summary procedure. Dismissal will be a drastic measure that the law does not support in this case and from the materials placed before me.

22. Whether to grant an injunction or not, is an issue that has been argued by the parties extensively. As correctly stated, for an injunction to be issued as held in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] E.A. 360, the following threshold has to be overcome:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”

22. Firstly, this Court has to check whether the applicant had established a prima facie case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125:

“A prima facie case in a civil application 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 been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

22. And, that the principles stated in the *Giella* case (supra) are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraha Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”.

22. In this case we have two warring factions the Mazrui Community, on one hand, alleging ownership of the suit property by dint of the repealed Mazrui Lands Trust Act Cap 289 of 1982, stating ownership of this property was created on 2nd July 1913 and registered on 6th April 1914 in the original certificate of ownership number 409 as an overriding interest in the land under the Land Titles Ordinance of 1908 to benefit the Mazrui, their heirs, and successors forever. There are also alleged pronouncements from the Courts recognizing the said rights for example in ELC Case No. 12 of 2012 *Abdulgaffur Abdulgani Pasta v Harrison Mwarumba Mbui*, the Kilifi Land Adjudication, and Settlement Officer, the defendant witness testified in court that the suit land was adjudicated in 1990 and the exercise was completed on 20th May 1993. He also stated that the titles were not issued because the Mazrui family had filed a claim over the land in the Mombasa High Court Case No.185 of 1991: *Ahmed Abdalla Mohmed & 3 others v the Hon. Attorney General*. High Court in Mombasa High Court Case No.185 of 1991: *Ahmed Abdalla Mohmed & 3 others v the Hon. Attorney General* which declared the Mazrui Lands Trust (Repeal) Act No. 11 of 1989 unconstitutional it also declared the Mazrui as the lawful owners of the land to the exclusion of all other persons, the Adjudication process which granted the applicant title to the suit property was also allegedly nullified. On the other hand, the defendants claim that he acquired the land from one Harrison Mwarumba Mbui who had gotten it through an adjudication process at the Takaungu Adjudication Section. At the centre of the main trial will be the two processes to discover which of them passed the ‘real’ title of the subject matter here. At the trial too will be whether the initial title was never affected by the repeal of the Mazrui Act.

23. An injunction then will not be germane to issue at this stage but rather status quo orders to preserve the substratum of the suit. At this point then the application dated 23rd February 2023 is hereby dismissed



with costs, but the Court directs that land Plot No. 722 Takaungu in Kilifi County remain registered in the names of the person(s) as appearing in the register and not be transferred or charged to any 3rd party until the current suit is heard and determined.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 15TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Mwiti for the 4th Plaintiffs

Ms. Agejoh for the defendants.

Court Assistant: Happy

In the absence of:

Mr. Hamza for the 1st 2nd and 3rd Plaintiffs

