Mambrui Sea Dunes Limited & 3 others v Yeri & 11 others (Civil Appeal E033 of 2022) [2025] KECA 808 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 808 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E033 OF 2022

SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

MAMBRUI SEA DUNES LIMITED ..... 1ST APPELLANT

ALESSANDRO TRENTAVIZI ..... 2ND APPELLANT

ACRE ONE LIMITED ..... 3RD APPELLANT

MARY JACINTA MUSUNDI ..... 4TH APPELLANT

AND

ALFRED KAHINDI YERI ..... 1ST RESPONDENT

PORTOFINO INVESTMENTS LIMITED ..... 2ND RESPONDENT

KAZUNGU NGUMBAO MUNYAUKI ..... 3RD RESPONDENT

MAIFAMIS HOUSING COOPERATIVE SOCIETY LIMITED 4TH RESPONDENT

GODANA HIRIBAE DULO ..... 5TH RESPONDENT

MOZA MOHAMED ABUD ..... 6TH RESPONDENT

THE SETTLEMENT FUND TRUSTEES ..... 7TH RESPONDENT

THE DIRECTOR OF SURVEY ..... 8TH RESPONDENT

REGISTRAR OF LANDS, KILIFI ..... 9TH RESPONDENT

MINISTRY OF LANDS & PHYSICAL PLANNING ..... 10TH RESPONDENT

NATIONAL LAND COMMISSION ..... 11TH RESPONDENT

HON ATTORNEY GENERAL ..... 12TH RESPONDENT

(Being an appeal against the Ruling of the Environment and Land Court of Kenya at Malindi (J.O. Olola, J.) dated 28th April 2022 in ELC Petition No. 16 of 2020)

JUDGMENT

1. In this appeal, the appellants have challenged the ruling of the Environment and Land Court (ELC) at Malindi (J. O. Olola, J.) delivered on 28th April 2022 dismissing their application dated 16th December 2020. In that application, the appellants sought, among other reliefs, orders that pending the hearing and determination of their petition that the court be pleased to issue: a conservatory order against the Respondents prohibiting the 7th to 10th Respondents from dealing with the register known as Ngomeni Squatter Settlement Scheme or Malindi/Ngomeni Scheme; that the 5th Respondent, it's servants and or agents be directed by an order of Mandatory Injunction to remove the barbed wire fence and any other developments made by them on the appellants' portions of land, failing which the appellants be at liberty to engage the services of a contractor to remove the offending developments; an order of injunction restraining the Respondents, their servants and or agents or any one of them from trespassing upon, selling, mortgaging, transferring, developing, or in any other way dealing with the appellants' pieces of land known as Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambrui Town.

2. That application was based on the grounds that the appellants are the registered proprietors of the properties known as Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambrui Town; that an erroneous survey by the 8th and 9th Respondents resulted in encroachment of their said private properties, leading to illegally surveyed portions and issued titles that were supposed to be cancelled; that the appellants were neither consulted or compensated for the alleged acquisition of their property for the Ngomeni Squatter Settlement Scheme; that, despite the appellants being in possession of the properties, the Respondents unlawfully obtained titles superimposed on their properties; that, in previous proceedings, the 1st appellant obtained judgment for vacant possession in 2004 against other individuals who were evicted and the property fenced off; that the 2nd and 4th Respondents led a group that demolished the appellants' fences and started erecting their own.

3. In opposition to the application, the 1st Respondent claimed to have lived within the Ngomeni Settlement Scheme and applied for land allocation in 1992; that Ngomeni Squatters Settlement Scheme was legally established by the Government to settle squatters, including the Respondents, who have lived in the area for a long time; that the appellants did not make claims during the land adjudication process despite a notice issued in 1995; and that the Respondents were not privy to the previous proceedings alluded to by the appellants.

4. The 4th Respondent, on its part, asserted that it purchased land from the 2nd and 7th Respondents after conducting due diligence and establishing they were registered owners; and that the appellants have never had actual physical possession of the property.

5. The 3rd Respondent claimed the land was their ancestral land and that he was issued a title deed after the land adjudication exercise in 1996, which he later sold to the 4th Respondent. The 4th Respondent stated it purchased the land from the 3rd Respondent after an official search confirmed his ownership and have since taken possession.

6. Dismissing the appellants' application, the ELC found that the 1st to 7th Respondents did not invade the properties but were issued with titles following a Government-established process; that there was no basis to restrain the 8th to 12th Respondents from dealing with the register of the entire scheme, especially since the register has been in place since 1999 and titles have been issued; that a mandatory injunction requires special circumstances and a clear case, which were not established; that in relation

to the prayer for a temporary injunction, the appellants needed to demonstrate an arguable prima facie case with a likelihood of success and the prejudice they would suffer which they did not do.

7. The Judge ruled further that the appellants became aware of the alleged infringements in 1999 but filed the petition much later, suggesting 'no urgent necessity for immediate action'; that land adjudication is a lawful inter-agency process with dispute resolution mechanisms, and the appellants had not provided sufficient evidence that the process by which the Respondents acquired their titles was unlawful.

8. As already indicated, the appellants are aggrieved, and hence this appeal. We heard the appeal on 5th December 2024. Learned counsel Mr. Ole Kina appeared for the appellants; learned counsel Mr. Atiang held brief for Mr. Akanga for the 1st Respondent and appeared for the 2nd Respondent; learned counsel Mr. Stephen Kibunja appeared for the 3rd and 4th Respondents and learned counsel Mr. Ojwang held brief for Mr. Munga for the 7th to 10th Respondents and the 12th Respondent. There was no appearance for the other Respondents who were duly served with hearing notice on 29th November 2024. Counsel relied on their respective written submissions which they orally highlighted.

9. Counsel for the appellants submitted that the appellants are undoubtedly the registered proprietors of the properties known as Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambrui Town; that an erroneous survey was carried out by the 8th to 9th Respondents that led to an encroachment on the appellants properties; that approximately 600 portions of land were illegally surveyed and titles issued, which were subsequently recalled despite which, the Respondents have continued to transact with those illegal titles and used them to take possession of the appellants' properties, causing them loss and damage; and that the Ngomeni Squatter Settlement Scheme or Malindi/Ngomeni Scheme is unlawful as it covers the same area as their properties.

10. Counsel submitted that contrary to the finding by the learned Judge, the appellants did demonstrate a prima facie case with a likelihood of success and that they would suffer prejudice if the orders they sought were not granted; that the appellants established, prima facie, that an erroneous survey and unlawful titles led to the invasion of their properties by Respondents relying on impugned titles; that the Respondents were transacting with the disputed titles, subdividing and selling the land, which would cause irreparable damage not only to the appellants but also to the public; and that the Judge failed to heed previous court decisions affecting the same subdivision scheme.

11. It was submitted that to the extent that the ELC declined to grant the reliefs sought, it did not properly exercise its discretion, and this Court should therefore interfere, set aside the decision of the learned Judge and grant the reliefs the appellants sought.

12. In opposing the appeal, counsel for the 1st Respondent submitted that Ngomeni Squatters Scheme was formed by the 8th to 11th Respondents in 1999 in order to issue title to 10,000 squatter families in the area and despite a notice having been issued to the general public who may have had adverse claims to do so, the appellants did not do so; that they were squatters on the land since the 1950s; and that over 10,000 families are residing in the area as they have done for many years.

13. It was submitted that the appellants claim to have purchased the properties from one Mansour Naji Said who illegally acquired the properties through the office of an non-existent Recorder of Titles, a position that ceased to exist in the 1980s; that the Certificate of Title that was held by the said Mansour Naji Said is fake; and that the appellants only have themselves to blame for having purchased the properties from the said Mansour Naji Said whose title is highly questionable and in an area full of squatters and permanent developments.

14. It was urged that the Court should not place the commercial interests of the appellants over those of thousands of persons settled on the properties; and that the appeal is devoid of merit and should be dismissed.

15. Counsel for the 3rd Respondent, submitted that the learned Judge did not err in dismissing the appellants' application; that the application did not meet the threshold for grant of conservatory orders as set out in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, SC Application No. 5 of 2014 [2014] eKLR; that neither did the appellants establish a prima facie case with a probability of success in accordance with the principles in Giella vs Cassman Brown & Co Limited [1973] EA 358. It was submitted further that, to the extent that the appellants sought a mandatory injunction, the same was premature and no special circumstances were established to justify the grant of the same at an interlocutory stage. The case of Kenya Breweries Limited and Another vs. Washington Okeyo [2002] 1 EA 109 was cited.

16. Counsel for the 3rd and 4th Respondents respectively, submitted that the 3rd Respondent was allocated the land by the Government in 1996 and obtained title in July 2008 after following due process; that the appellants are Italian citizens who cannot own freehold land and the titles they hold are void for contravening *the Constitution*; and that the 4th Respondent is an innocent purchaser for value.

17. For the Settlement Fund Trustee, The Director of Survey, The Registrar of Land - Kilifi, The Ministry of Lands & Physical Planning, the 7th to 10th Respondents and for the Attorney General, the 12th Respondents, it was submitted that this Court is called upon to determine whether the learned Judge properly exercised his discretion or misdirected himself or arrived at a wrong decision in declining to grant the conservatory order and the mandatory injunction that was sought. In that regard, counsel referred to the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] KECA 606 (KLR). It was submitted that the appellants did not establish a prima facie case to warrant the grant of those reliefs; moreover, the establishment of the settlement scheme followed the procedure set by law and a conservatory order was not merited.

18. We have considered the appeal and the submissions. This being an interlocutory appeal and considering that the petition before the ELC is yet to be heard, we must be guarded in our pronouncements to avoid embarrassing the trial court that will eventually determine the petition. With that in mind, the issue for determination in this appeal is whether the learned Judge of the ELC properly exercised the court's discretion in rejecting the appellants' application for a conservatory order, for a mandatory injunction and for a temporary injunction. As this Court stated in Nguruman Limited vs Jan Bonde Nielsen & 2 Others (above):

> " Before this Court can interfere with the exercise of a discretion of a judge, it must be shown that the judge has either erred in principle in his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong, or that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially could have reached it. These are the words of Sir Charles Newbold, P. expressed in this often-cited Mbogo & Another V. Shah [1968] EA 98 decision as follows:
>
> ".....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

19. The Court in the same decision amplified that:

> "...as an appellate court this Court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the exercise of discretion by the Judge in the court below and must not interfere with it merely upon the ground that the members of this Court would have exercised the discretion differently. See Export Processing Zones Authority V. Kapa Oil Limited & 6 Others, Civil Appeal No. 190 of 2011."

20. With that caution in mind, we examine whether the learned Judge erred in declining the appellants' prayers for the grant of either conservatory orders, or mandatory injunction or temporary injunction pending the hearing and determination of the appellants' petition. In as far as the appellants' prayers for a mandatory injunction and for a conservatory order are concerned, we have carefully reviewed the ruling of the learned Judge and see no basis at all for faulting the way the court exercised the courts discretion.

21. In the case of Kenya Breweries Limited and Another vs. Washington Okeyo (above) this Court expressed that while an a mandatory injunction can be granted on an interlocutory application, it should not normally be granted in the absence of special circumstances; that if for instance the case is clear or if the act done is a simple and summary one which can easily be remedied, then a mandatory injunction may be granted at an interlocutory stage. The Court underlined that before granting a mandatory interlocutory injunction, the court should feel a high degree of assurance that at the trial, it would appear that the injunction had rightly been granted.

22. Against that standard and given the complexities in the matters raised in the petition, and where, as here, it was asserted, that thousands of families are resident on the properties, and the contestation involves questions of validity of the Settlement Scheme. The learned Judge was alive to the principles in the case of Kenya Breweries Limited & Another vs. Washington Okeyo before concluding that the appellants had not demonstrated "special and or clear" circumstances to warrant a mandatory order of injunction. We think the learned Judge was right in declining to grant a mandatory injunction at an interlocutory stage.

23. In relation to the prayer for conservatory order, the Judge considered the same against the principles laid down in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others before concluding that, considering that the Settlement Scheme "has been in place since 1999 and various individuals have since been issued with the title deeds", issuing the conservatory order at this stage would not facilitate the ordered functioning within public agencies. We are again unable to fault the Judge in that regard.

24. In relation to the appellants' prayer for a temporary injunction, however, the learned Judge expressed that the appellants are required to satisfy the court that they have "an arguable prima facie case with a likelihood of success", and to demonstrate the prejudice they stand to suffer if the orders of injunction were not granted. In that regard, beyond stating that the appellants learned of the infringements they complained of in 1999, no further consideration appears to have made regarding whether the application met the threshold in Giella vs Cassman Brown &Company Limited. In the regard the question is whether, on the material presented before the ELC, the appellants demonstrated that they have a right which has apparently been infringed to call for an explanation or rebuttal by the Respondents. See the decision of this Court in Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 125.

25. The appellants presented material showing that they are the registered proprietors of the portions of land known as Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambrui Town;

and that they acquired the same through purchase. They contended that Ngomeni Squatter Settlement Scheme, or part of it was superimposed on their properties and that the same was invaded by parties claiming to hold letters of offer or titles following adjudication process undertaken by the 8th to 11th Respondents. The appellants contend that such letters of offer and titles are illegal. They maintain that their rights under Article 40 of *the Constitution* have been violated.

26. As the Court explained in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (above):

> "...in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

27. In our view, had the learned Judge considered the matter of the prayer for a temporary injunction against the parameters in Giella vs. Cassman Brown & Company Limited (above) as he should have, we are persuaded that he would have reached the decision that the appellants had indeed established a prima facie case within the meaning in Mrao Limited vs. First American Bank of Kenya Limited & 2 Others where Bosire, JA. in answering the question, what is a prima facie case stated:

> "I would say that in civil cases 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

28. We are in the circumstances entitled to interfere with the learned Judge's exercise of discretion in that regard. In doing so, we bear in mind the contention by the Respondents that there are over 10,000 families residing in the area and who are said to have done so over many years and that they have structures, and developments thereon. The order that commends itself to us in the circumstances, which we hereby grant is that the status quo obtaining as at the date of delivery of this ruling with respect to the properties known Portions No. 658 to 707 (Original No. 652/2-51) situated North of Mambrui Town, shall be maintained by all the parties pending the hearing and determination of the appellants' petition before the ELC.

29. To that extent only, the appeal succeeds. Each party shall bear its own costs of the appeal.

conclusions

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIArb

.....**.....**

JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR