



Nyaga v Omollo & another (Environment & Land Case E012 of 2023) [2024] KEELC 3789 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E012 OF 2023**

AE DENA, J

APRIL 12, 2024

BETWEEN

KEFA MICHENI NYAGA PLAINTIFF

AND

ERICK OMOLLO 1ST DEFENDANT

MUHSIN BUGU 2ND DEFENDANT

RULING

1. The subject of this ruling is the Notice of Motion dated 5th September 2023 and the Chamber Summons dated 24th October 2023. The application dated 24th October 2024 is for joinder.
2. The application dated 5th September 2023 is brought by the Plaintiff seeking the following orders;-
 1. Spent
 2. That the Defendants be restrained either by themselves or otherwise from entering upon and carrying out construction of any nature on the suit premises namely title numbers Kwale/Diani Beach Block/1171, Kwale/Diani Beach Block/1172 and Kwale/Diani Beach Block/1173 (herein collectively called the suit premises) or dealing with the suit premises in any manner whatsoever pending the hearing and determination of the suit.
 3. Spent
 4. Costs of the application be provided for.
3. The application is supported by the affidavit of Kefa Micheni Nyaga the Plaintiff and the further affidavit of Vincent Omollo. The Plaintiff avers that he is registered proprietor of Kwale/Diani Beach Block/1171, Kwale/Diani Beach Block/1172 and Kwale/Diani Beach Block/1173. That the Defendant have trespassed into the suit properties and delivered building material in preparation to



- commence construction. In addition, they have placed guards therein denying the Plaintiff access. It is deponed that this is an infringement of the applicant's proprietary rights as enshrined under article 40 of *the Constitution*.
4. The application is opposed by the replying affidavit of Erick Omollo and Muhsin Bugu the Defendants sworn on 15/09/23. The deponents admit to placing materials in the suit property but deponed that as far as they are concerned the property is Kwale/Diani Beach Block/993. That the same belongs to Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu and who had contracted them. That they are merely workers engaged by the proprietors. The deponents further state that the said property was subject of proceedings in Kwale ELC No. 247 of 2021 Halima Mohamed Mambo & 3 Others Vs. Orbit Developers Limited & 4 others. That the court had issued status quo orders and that the proprietors have never sold the property or undertaken any subdivision thereof.
 5. In response to the above averments the Plaintiff vide an affidavit sworn by their counsel Vincent Omollo deponed that the property Kwale/Diani Beach Block/993 was registered in the name of Sterling Investments Ltd as lease from the Government of Kenya. That Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu filed OS 197 of 2006 in the High Court at Mombasa claiming various plots by way of adverse possession which excluded Kwale/Diani Beach Block/993 which they later included by way of amendment but they did not join Sterling Investments to the OS. That Judgement was delivered on 28/09/2009 declaring Kwale/Diani Beach Block/993 to be the property of the Juma Kimbirwa the 2nd Plaintiff. Counsel deponed that he was later instructed by Sterling Investments to apply for stay of execution and set aside the Judgement and which he successfully did. The order dated 5/10/2010 setting aside the Judgement was duly registered against the title. That the Plaintiffs appealed the ruling setting aside the Judgement and the appeal was dismissed in May 2013. Thereafter Sterling Investments proceeded to subdivide Kwale/Diani Beach Block/993 into 8 portions Kwale/Diani Beach Block/1771-1779 and the mother title was closed upon subdivision. That Plaintiff in the present proceedings purchased the three suit properties from the said Sterling Investments.
 6. It is further deponed that the original suit being HCCC No. 197 of 2006 (OS) was transferred to ELC Mombasa as ELC No. 197 of 2006. That the suit was mentioned before Yano J on 28/01/21 where the Plaintiffs therein informed the court they no longer had an interest in Kwale/Diani Beach Block/993 and the orders were duly recorded. That it would appear in the green card annexed by the Defendants the Land Registrar Kwale illegally registered the decree dated 28/9/2009 despite the said Judgement having been set aside and further ignored the white card where both orders had been registered. The registrar opened another green card to effect the illegal registration. It is further deponed that the title Kwale/Diani Beach Block/993 no-longer exists.
 7. The Applicant in Chamber Summons dated 25/10/23 seek for orders that;
 1. This honourable court be pleased to allow Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu to be enjoined as Co-Defendants.
 2. That each party to bear its costs.
 8. The application is supported by the affidavit of Mwinyi Juma Bugu. It is deponed that the plot Kwale/Diani Beach Block/993 is registered under the said Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu. That the said land is subject of litigation in Kwale ELC No. 247 of 2021 Halima Mohamed Mambo & 3 Others Vs Orbit Developers



Limited & 4 others where a ruling has been reserved for 6/02/24. That the Plaintiff herein ought to have applied to be enjoined in the said ELC No. 247 of 2021 instead of filing the new proceedings herein.

9. It is deponed that the above three undertook a ground assessment of plot 993 which showed subdivision undertaken in the year 2011 by Sterling Investment. That no such company has ever owned the said plot and that neither the deponent nor his family had ever signed off the said subdivision or sale thereof. The applicant states that if they are not allowed to participate in these proceedings no justice shall be found as the Defendants are merely contractors and are not associated or affiliated with the suit property. Attached to the affidavit is title for Kwale/Diani Beach Block/993.
10. This application is opposed through the Replying affidavit of Vincent Omollo whose content has already been highlighted elsewhere in this ruling.

Analysis and Determination

11. This court notes that the application for joinder was filed after the application seeking for orders of injunction. But due to the nature of the orders sought it is prudent that the same is dealt with first for good order. The Plaintiff complied with the orders of the court and filed submission on 21/11/23 which covered the application for injunction which I have considered. The Defendants did not any file submissions.
12. The application is brought under the provisions of Order 1 Rule 14 of the Civil Procedure Rules which states that an application to add or strike out or substitute a Plaintiff or Defendant may be made to the court at any time before trial or at the trial of the suit in a summary manner.
13. However, Order 1 Rule 10 of the Civil Procedure lay out the guidelines. as follows; -
 - (1)
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
 - (3)
 - (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.
14. From the foregoing it is clear the power to add a party to proceedings is discretionary but the provisions above have also given a criteria and or what should guide the court in exercising its discretion. Further in making a determination on whether or not to enjoin a party in proceedings, the court mainly seeks to identify the said party's stake in the case given that they were initially not a party to the same at the time of commencing the suit. In this regard I'm persuaded by Lady Justice Mbugua J. in Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties) [2021] eKLR, where it was stated,

A party claiming to be enjoined in proceedings must have an interest in the pending litigation”



15. The Defendants have clearly stated that they were contracted by Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu. These are the parties who seek to be added to these proceedings. The said parties state that they are the registered owners of Kwale/Diani Beach Block/993 which was subdivided without their knowledge giving rise to Kwale/Diani Beach Block/1171, Kwale/Diani Beach Block/1172 and Kwale/Diani Beach Block/1173 the suit properties herein which the Plaintiff in the present proceedings claim to be registered proprietors. The Applicants have also produced a copy of their title Kwale/Diani Beach Block/993. I have noted the depositions made by Mr. Omollo advocate and which are germane including the court order where the Applicants declared no interest in the property. I will not at this stage delve into this issue to avoid going into the merits of the case.
16. Having noted the above the question that the court should pose is whether the presence of Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu before the court is necessary in order to enable this court effectually and completely to adjudicate upon and settle all questions involved in the suit. In my view their presence is necessary considering the depositions by Mr. Omollo counsel for the Plaintiffs which indeed link the three to issues surrounding the suit property starting with their claim for adverse possession. As it is they are not in a position to respond to the depositions being not parties to the present suit and therefore clearly the court cannot make informed decision on the allegations raised by Counsel.
17. For the foregoing reason this court is inclined to allow the application dated 25/10/23.
18. I will now proceed to look into the Notice of Motion dated 5th September 2023 seeking orders to restrain the Defendants from entering upon and carrying out construction of any nature on the suit properties Kwale/Diani Beach Block/1171, Kwale/Diani Beach Block/1172 and Kwale/Diani Beach Block/1173 or dealing with the suit premises in any manner whatsoever pending the hearing and determination of the suit.
19. On 6/09/23 my sister Hon. Lady Justice Millicent Odeny granted a temporary injunction restraining the Defendants/their agents from entering and constructing on the suit land for a period of 14 days which has been extended pending the ruling on this application. This court also notes there is enough material on record filed through the replying affidavit of the original defendants and the supporting affidavit of Mwinyi Juma Bugu to dispose of the application for injunction.
20. The application is filed under Order 40 Rule 1 and 2 of Civil Procedure Rules which provides: -
 1. Where in any suit it is proved by affidavit or otherwise—
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
21. The conditions for granting a temporary injunction were well laid out in the case of *Giella...Vs... Cassman Brown & Co. Ltd (1978) EA*. The 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 might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries ...Vs. Trufoods (1972) EA 420.*”



22. The Plaintiff has attached Certificates of Lease issued on 18/11/20, 1/12/20, for Kwale/Diani Beach Block/1171, Kwale/Diani Beach Block/1172 and Kwale/Diani Beach Block/1173 the suit properties and the attendant certificates of official searches all evidencing Kefa Michemi Nyaga as the proprietor. This is in law prima facie evidence of ownership until proven otherwise and the title is impeached on the basis of fraud or irregularity. On their part the Defendants have placed before court a copy of title but which they claim to be the mother title. it is my finding that the Plaintiff have established a prima facie case.
23. The Plaintiff has also attached photos showing the building materials placed in the suit properties and which has been admitted by Erick Omollo and Muhsin Bugu except that they speak to Kwale/Diani Beach Block/993. It is however noteworthy that the two properties are connected. To let the construction progress will be to defeat the very objectives of Order 40 to wit the preservation of the suit property.
24. Black's Law Dictionary, Butter Worths 9th Edition, defines Status Quo as a Latin word which means "the situation as it exists". The purpose of an order of status quo was stated in Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR, Odunga J. stated;

When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."
25. The development has not yet commenced or progressed only the material has been placed on the property. It is my view that this should be the state of affairs that should be maintained pending determination of this suit.
26. It is this court findings that the Notice of Motion dated 5th September 2023 is merited.
27. The following orders therefore issue to dispose the applications dated 5th September 2023 and 25/10/23; -
 - i. That Halima Mohamed Mambo, Kadiri Juma Mwanabirwa, Nassoro Juma Mwawali and Mwinyi Juma Bugu are hereby enjoined as Defendants in this suit and the pleadings shall be deemed to be amended accordingly.
 - ii. That the status quo on properties Kwale/Diani Beach Block/1171, Kwale/Diani Beach Block/1172 and Kwale/Diani Beach Block/1173 shall be maintained. For the avoidance of doubt there shall be no further construction or development thereon.
 - iii. The said status quo to remain in force pending the hearing and determination of this suit.
 - iv. Each party to bear its own cost.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 12TH DAY OF APRIL 2024.

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A.E DENA

JUDGE

Mr. V. Omollo for the Plaintiff



Mr. Daniel Disii – Court Assistant

