



Faraj & 4 others v Halai & 17 others (Environment & Land Case 198 of 2015) [2024] KEELC 3828 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3828 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2015**

SM KIBUNJA, J

MAY 15, 2024

BETWEEN

MUSA JUMA FARAJ & 4 OTHERS PLAINTIFF

AND

PARBAT LALJI HALAI & 17 OTHERS DEFENDANT

RULING

1. The plaintiffs filed the application dated 5th May 2023 seeking for orders that:
 - a. Spent.
 - b. Spent.
 - c. That the Defendants/Respondents by themselves, servants, agents, or any other third party be restrained by an injunction order from transferring, leasing, selling, charging, fencing, digging and wasting or in any way dealing thereof with the suit land property known as CV/35/Mainland South of its subdivision known as plot no. M/S/V/78, M/S/V/79, (which is further sub-divided into various plot no 163, 164, 165 and 166), M/S/V/80, M/S/V/81, M/S/V/82, M/S/V/83, M/S/V/84 and M/S/V/85 situated at Shelly Beach pending the hearing and determination of this suit.
 - d. That the Registrar of titles be directed to register a prohibition order in terms of prayer (3) above.
 - e. That the OCS (Officer Commanding Station) Likoni Police Station to assist in effecting the Court Orders, prayer 2 and 3 above.
 - f. That the cost of the Application be provided for.



The application is based on the eight (8) grounds on its face and is supported by the affidavit of Musa Juma Faraj, the 1st plaintiff, sworn on the 5th May 2023. It is the plaintiffs' case that the defendants are encroaching on the suit property known as CV/35/Mainland South and the subdivisions thereof by digging trenches for purposes of construction, and erecting fences while accompanied by administration police officers. That the caveat they had placed against the suit property was removed by the land registry without their knowledge.

2. The 8th defendant opposed the application through the four (4) grounds of opposition dated the 19th March 2024 *inter alia* that the application is defective an abuse of court process and should be struck out; that the plaintiffs have not proved ownership or occupation over Mombasa/Block V/Mainland South/ 80, that is owned by 8th defendant; and that the plaintiffs have not proved encroachment in respect of the 8th defendants.
3. The court gave directions on filing and exchanging submissions but only the learned counsel for the plaintiffs filed theirs dated 30th august 2023 and 26th October 2023, which the court has considered. Counsel for the plaintiffs relied on the case of *Giella v Cassman Brown & Co. Ltd* 1973 EA 333 and submitted on the following three principle therein:
 - i. That they have a *prima facie* case against the respondents with high chances of success.
 - ii. That the applicant will suffer irreparable loss that cannot be compensated by way of damage of the orders.
 - iii. That when in doubt the court determines the matter on a balance of convenience.

Counsel argued that after the suit was filed in 2015, the plaintiffs had to serve three times by way of substituted service and on 24/2/2020, the court ordered the plaint to be amended and served again. This time only the 7th, 8th, 17th and 18th defendants entered appearance. While the suit was going on the defendants invaded the suit property and started digging trenches to erect a perimeter wall, with the supervision of police officers. The counsel referred to a judgment in PMCC 2304 of 1993 Mombasa *Musa Juma Faraj and Others v Athuman Mwakuwaza Mohamed* where the court cancelled all subdivisions and vested the plaintiffs with title. The plaintiffs are fearful that if the application is not allowed, the plaintiffs and their families will be rendered homeless. Counsel also argued that the plaintiffs will suffer irreparable loss which money cannot compensate. In conclusion, the counsel stated that the respondents will not suffer any prejudice and that they have failed to reply to the plaintiffs' application.

4. The following are the issues for the determinations by the court.
 - a. Whether the plaintiffs have met the threshold for the issuing of injunction order at this interlocutory stage.
 - b. Who pays the costs.
5. I have considered the grounds on the application, affidavit evidence, grounds of opposition, submissions filed, superior courts cases cited and come to the following determinations:
 - a. This application was filed on 9th May 2023 and the only response filed is that of the 8th defendant. There is no affidavit of service by the plaintiffs on the application. However, during the court session of 9/5/2023, counsel for the plaintiffs admitted to only serving the 7th, 8th and 18th defendants whose counsel were present. I have perused the record and noted that in the ruling dated 28th July 2022, the suit against the 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th defendants was dismissed. That ruling has not been appealed against, reviewed or set aside. The



ruling of the 28th July 2022 means only the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 17th and 18th defendants are defending this suit.

- b. During the court session of 9th May 2023, counsel for the plaintiffs claimed to have served the 7th, 8th and 18th defendants with the application through email. The counsel for the said parties were present, but only the counsel for the 7th defendant acknowledged receipt of the application. The court *inter alia* directed that the application be served upon those not served and an affidavit of service to be filed. I have perused the record, and have not traced any evidence of service of the application. Therefore, other than the 7th defendant who admitted service, and the 8th defendant who has filed grounds of opposition to the application, the court will take it that the 1st to 5th, 17th and 18th defendants have not been served with the application. Service of the application enables the defendants become aware of what it seeks, and how it affects them. Service is proved through an affidavit of service as required under Order 5 Rule 15 of the [Civil Procedure Rules](#). It is only after a defendant is made aware of the application through service that he/she/it can exercise the right to reply as required under Order 51 Rule 14 of the [Civil Procedure Rules](#), by filing notice of preliminary objection, replying affidavit and grounds of opposition.
- c. No orders can legally be issued, against those parties not served, as to do so will contravene their right to a fair hearing under Article 50 of the [Constitution](#) 2010. In the case of [Msagha v. Chief Justice & 7 Others](#) Nairobi HCMCA no. 1062 of 2004 [2006] 2 KLR 553 the court held that:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”



- d. Further, Section 109 of the *Evidence Act* chapter 80 of Laws of Kenya places the responsibility of proving a fact to the party who wishes the court believe it, in the following words:
- “ The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- e. That grounds of opposition filed by the 8th defendants that the application was defective, an abuse of court process, and that the plaintiffs have not proved ownership of the suit property mirrors the grounds of preliminary objection by the same party dated the 20th February 2023 that was rejected vide the ruling of 29th November 2023. In view of the court’s finding at paragraphs (a) to (f) of the ruling of 29th November 2023, the court finds no need of interrogating the grounds of opposition any further, as the court will not come to a different decision. I therefore find the plaintiffs have shown there is need to maintain the legal status of the suit properties as it is, pending the hearing and determination of the suit.
- f. The costs of the application will abide the outcome of the suit, the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
6. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That the plaintiffs’ application dated the 5th May 2023 is compromised by confirming order (4) that was issued on 9th May 2023, to be inforce pending the hearing and determination of this suit.
- b. The costs of the application to abide the outcome of this suit.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF MAY 2024.

S. M. Kibunja, J.

ELC MOMBASA

In The Presence of:-

Plaintiffs M/s Chesaro

Defendants : M/s Wamuyu for Muthee for 7th Defendant

M/s Orura for 8th Defendant

M/s Kiti for 17th and 18th Defendants.

Leakey – Court Assistant.

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S. M. Kibunja, J.

ELC MOMBASA

