



**Osman & another v Abud & 4 others (Environment & Land Case E011 of 2023) [2024] KEELC 4269 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4269 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E011 OF 2023**

**EK MAKORI, J**

**MAY 15, 2024**

**BETWEEN**

**RAUF MOHAMED OSMAN ..... 1<sup>ST</sup> PLAINTIFF**

**AMIN MOHAMED OSMAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SALIM MOHAMED ABUD ..... 1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF TITLES MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated 8<sup>th</sup> May 2023 is quite expansive regarding the orders it seeks. The essential prayers of the application are as follows:
  - i. Spent
  - ii. Spent
  - iii. That this Court issues orders of inhibition restraining the defendants/ respondents jointly and severally from any dealings, transferring, issuing, and or registering the deed plan, issuing and or obtaining a certificate of title whatsoever on land parcel No. MN/III/3917 – Mtwapa Kilifi until this suit is heard and determined or until further orders from this Court.
  - iv. Spent



- v. An order of temporary injunction to issue restraining the defendants/respondents from illegally and unlawfully evicting, trespassing into or remaining upon, selling, mortgaging, transferring, otherwise howsoever interfering with the plaintiffs'/applicants' quiet, peaceful, actual, and exclusive possession, cultivation, user, development and enjoyment of Land parcel No. MN/III/3917 – Mtwapa Kilifi pending the hearing and determination of this suit.
  - vi. A temporary injunction to issue against the 1<sup>st</sup> defendant/respondent from illegally and unlawfully presenting a deed plan in his possession for land parcel No. MN/III/3917 – Mtwapa Kilifi for registration and issuance of title of the suit property by the 2<sup>nd</sup> defendant pending the hearing and determination of this suit.
  - vii. An order compelling the 4<sup>th</sup> defendant, acting through the Director of Survey, to rectify such a register of the deed plan for unsurveyed land parcel No. MN/III/3917 – Mtwapa Kilifi in the 1<sup>st</sup> defendant's name by cancelling the registration of the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant be directed to close such register.
  - viii. That in the alternative, an order be issued to compel the Registrar of Titles or Chief Land Registrar to rectify such register of the suit property made in the name of the 1<sup>st</sup> defendant/respondent by canceling his registration as the proprietor of the land parcel No. MN/III/3917 – Mtwapa Kilifi.
  - ix. An order to compel the 1<sup>st</sup> defendant/respondent to surrender the illegal deed plan regarding the suit property land parcel No. MN/III/3917 – Mtwapa Kilifi is in his possession to the Director of Survey for cancellation.
  - x. The Court to declare that the deed plan, which is in the possession of the 1st defendant/respondent, was procured through fraud and corrupt scheme.
  - xi. That the costs of the application be provided.
2. The Court directed parties to canvass the application through written submissions, a procedural step that allows each party to present their arguments and evidence in a structured and comprehensive manner. The plaintiffs/ applicants filed no submissions, but the first defendant/respondent did.
  3. The plaintiffs claim they have been in open, exclusive, continuous, and uninterrupted occupation of the property known as parcel No.MN/II/3917, situate in Mtwapa Kilifi County, since 1988. They claim to have acquired a beneficial interest in the property by way of adverse possession. This legal principle allows a person to claim ownership of a property if they have used it openly and without interference from the owner for twelve years.
  4. The property is subject to compulsory acquisition by the Kenya National Highway Authority (KeNHA), allowing the government to acquire private property for public use. The applicants claim that the 1st Respondent illegally trespassed onto the property and conducted a survey on it. They claim that the 4th Defendant issued him with a deed plan to register the property in his favour. The potential impact of the property's status as subject to compulsory acquisition includes that the 1<sup>st</sup> defendant is likely to be compensated at the expense of the applicants, who have a legitimate expectation of being compensated, too, having occupied the suit property for over twelve years under the doctrine of adverse possession.
  5. The applicants allege that the 1<sup>st</sup> defendant is unjustly attempting to enrich himself through the anticipated monetary compensation by KeNHA. They claim that they stand to suffer irreparable loss



and damage if the 1<sup>st</sup> defendant is allowed to register the property in his favour and acquire a certificate of title.

6. The 1<sup>st</sup> respondent, on the other hand, states that he is the registered owner of the suit property, having acquired the same by way of transmission as a beneficiary of the estate of his deceased mother, Said Binti Salim Jabir (deceased). His late mother owned a parcel of land LR No 284 Section III Mainland North, which was subdivided into several parcels of land, one of them being the suit property. She acquired the original property in 1962 from the previous owner, Nasor Bin Ali. The 1<sup>st</sup> respondent was issued a certificate of title in 2023, which he believes is valid proof of his ownership.
7. The land was subdivided sometime in 2000, and deed plan No. 230526 was issued. Although he was issued with a certificate of title in 2023, the suit property, as it is known today, has been in existence since 2000. The 1<sup>st</sup> respondent thus denies that the land was without any title, as alleged by the applicant; the land had been registered as far back as 1962. The 1<sup>st</sup> respondent argues that the plaintiffs' claim that the land was without any title is incorrect because, had it not been registered, transmission would not have been possible.
8. The 1<sup>st</sup> respondent states that the plaintiffs have not presented any evidence showing that they have any interest in the suit property and that they are the ones who are seeking to unjustly benefit from the monetary compensation to be paid by the government. Their only connection to the property is that they have been residing in a house without land belonging to Ali Ahmed Jahadhmy, whose house was constructed in 1987 after obtaining consent from the 1<sup>st</sup> respondent's deceased mother. The 1<sup>st</sup> respondent argues that the plaintiffs' adverse possession claim is unfounded because they have not been in exclusive occupation and use of the whole land other than the house aforesaid.
9. The first respondent maintains that the plaintiffs have no interest in the suit property and have not met the threshold to be granted any of the reliefs sought in their application.
10. The 1<sup>st</sup> respondents further submit that the plaintiffs have not placed a claim of adverse possession that may succeed at the hearing hereof and that the test in *Giella v Cassman Brown* [1973] EA 358 has not been achieved. The 1<sup>st</sup> respondent contends that the plaintiffs seek some final orders other than the temporary injunctions. Prayers Numbers 7, 8, and 9 seek to have the Land Registrar rectify the deed plan by canceling the registration of the 1<sup>st</sup> defendant and the register be closed. Such orders are final and can only be issued after the Court has analyzed the evidence presented to it and after the court deems it necessary to issue such orders. Issuing the stated orders before parties are heard will determine the matter without hearing parties on merit. The Court's orders ought only to be issued once the Court satisfies itself that there are valid grounds for issuance of the said orders. The *Giella v Cassman Brown* [1973] EA 358 case is a significant legal precedent that sets the standard for granting injunctions, and its principles should be applied in this case.
11. I have meticulously considered the material and submissions placed before me. The threshold to achieve before the grant of an injunction is as held in the *Giella v Cassman Brown* [1973] EA 358:  

“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.”



12. The first issue to determine then is whether the applicant has proved a prima facie case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125 as follows:

“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.”

13. The principles stated in the Giella case 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.”

14. Applying those principles, we have two warring claims: the applicants claiming adverse possession over the suit property and the first respondent claiming the same by way of transmission. At this point, each party is claiming to be in actual possession of the suit property. The only thing I can ascertain is that the property is already registered in the name of the first respondent. Whether the title was acquired through fraud or corrupt schemes cannot be determined at the interlocutory stage but during a full hearing.

15. Prayers Nos. 7, 8, and 9 seeking to have the Land Registrar rectify the deed plan by cancelling the registration of the 1st defendant and the register being closed are final. They can only be issued after the Court has analyzed the evidence. Issuing the stated orders before parties are heard will mean summary disposal of the whole matter at the interlocutory stage. These claims can only be ratified and authenticated through evidence at a hearing of the main suit.

16. The Court can only, at this point, issue status quo orders to preserve the substratum of the suit. At this point, then the only orders that commend for issuance are:

- i. An inhibition order is issued restraining the 1<sup>st</sup> defendant/respondent from any dealings on land Parcel No. MN/III/3917 till the current suit is heard and determined.
- ii. Status quo on its occupation remains until the suit is heard and determined.
- iii. Costs in the cause.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 15<sup>TH</sup> DAY OF MAY 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Ms. Ombat, for the Applicant

Ms. Amina, for the 1<sup>st</sup> Respondent

Court Assistant: Happy

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