



**Postal Corporation of Kenya v Hassan Kombo Budugu t/a Budugu & Company & 2 others; National Land Commission & 2 others (Interested Parties) (Environment & Land Case E137 of 2022) [2024] KEELC 5290 (KLR) (17 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5290 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E137 OF 2022  
SM KIBUNJA, J  
JULY 17, 2024**

**BETWEEN**

**POSTAL CORPORATION OF KENYA ..... PLAINTIFF**

**AND**

**HASSAN KOMBO BUDUGU T/A BUDUGU & COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**NOVA HOLDINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AHARAB EBRAHIM KHATIRI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**DIRECTOR OF SURVEY ..... INTERESTED PARTY**

**RULING**

1. The plaintiff moved the court through the notice of motion dated the November 14, 2022 seeking for orders inter alia:
  - a. That pending the hearing and determination of this suit, an injunction be issued, restraining the defendants jointly and severally from interfering with the plaintiff's quiet possession of all that property originally known as plot No. MN/1/683, including the illegally subdivided portion known as L.R. No. MN/1/12406-7.
  - b. That pending the hearing and determination of this suit, an injunction be issued, restraining the defendants from constructing a house and or in any way whatsoever interfering with all



that property originally known as plot MN/1/683, including the illegally subdivided portion known as L.R.No. MN/1/12406-7.

c. The OCS, Nyali Police Station to enforce the orders issued.

The application is based on the nineteen (19) grounds on its face and supported by the affidavit of Horace Avedi, Assistant Manager Facilities, sworn on the November 14, 2022, in which he inter alia deposed that the plaintiff has been the owner of plot MN/1/683, suit property, from 1999, and before then it was owned by its predecessors; that the plaintiff had constructed a building housing Nyali Post Office on the suit property and has therefore been in occupation; that the plaintiff has come to know that the suit property was illegally and without its authority subdivided on or about November 2001 into MN/1/12406/ and 124067, and a portion thereof measuring 0.1714 allotted to the 1<sup>st</sup> defendant, and grant No. I.R.35009 for 99 years from November 1, 2001 issued; that the said portion was then transferred to the 2<sup>nd</sup> defendant on or about January 2, 2002 and then, on 8<sup>th</sup> April 2008 to the 3<sup>rd</sup> defendant; that *vide* lease dated January 19, 2021, the plaintiff leased the suit property to Ultimate General and Engineering Limited, who were blocked from accessing it by the 3<sup>rd</sup> defendant; that on or about July 2021, the 3<sup>rd</sup> defendant trespassed onto the said property, fenced it off and commenced a construction without the plaintiff's authority; that the plaintiff reported to EACC, Police and NLC and consequently filed this suit.

2. The 3<sup>rd</sup> defendant entered appearance through Ms. Oluga & Company Advocates *vide* the notice of appointment of advocates dated December 7, 2022.
3. That *vide* notice of motion dated the June 27, 2023, the plaintiff applied for, and was granted leave on September 19, 2023 to serve the 1<sup>st</sup> and 2<sup>nd</sup> defendants with the suit papers through advertisement. The service was effected through the Daily Nation Newspaper of October 25, 2023, and affidavit of service by Elna Mudibo sworn on October 31, 2023 filed.
4. The 2<sup>nd</sup> defendant entered appearance through Ms. Muthee Kihiko & Associates Advocates *vide* the notice of appointment of advocates dated the October 12, 2023. The 2<sup>nd</sup> defendant opposed the application through the replying affidavit sworn by Ashok Labhshanker Doshi, a director, on the 15<sup>th</sup> January 2024, inter alia deposing that the plaintiff is neither the registered nor beneficial owner of the suit property and hence lacks capacity to institute and prosecute this suit; that the Post Office building is on L.R. No. MN/1/12406 which is distinct from L.R. No. 12407, which the 2<sup>nd</sup> defendant had regularly obtained from 1<sup>st</sup> defendant and subsequently sold to the 3<sup>rd</sup> defendant; that as the cause of action arose in 1999, the plaintiff's suit is time barred under section 7 as read with section 26 of the *Limitation of Actions Act*; that the original parcel from which the suit property emanated from, was registered with Nyali Limited which has not been joined in the suit and the application should be dismissed with costs.
5. The court issued an order of *status quo* to be maintained, on the November 21, 2022, which was extended on the December 8, 2022 and March 23, 2023. The court further issued directions on filing and exchanging submissions on the 22<sup>nd</sup> January 2024 and 8<sup>th</sup> April 2024. The learned counsel for the plaintiff and 2<sup>nd</sup> defendant filed their submissions dated the 15<sup>th</sup> April 2024 and 3<sup>rd</sup> May 2024 respectively, which the court has considered. The 3<sup>rd</sup> defendant indicated through counsel that he will rely on the replying affidavit and submissions filed by the 2<sup>nd</sup> defendant.
6. The following are the issues for determination by the court:
  - a. Whether the plaintiff has met the threshold for the injunction orders sought to issue at this interlocutory stage.



- b. Who pays the costs?
7. The court has carefully considered the grounds on the notice of motion, affidavit evidence by the plaintiff and 2<sup>nd</sup> defendant, submissions by the two learned counsel, superior courts decisions cited thereon, and come to the following findings:
- a. Both learned counsel have submitted on the threshold an applicant like the plaintiff, seeking injunction orders at the interlocutory stage must meet to succeed. They have both cited several superior courts decisions on the applicable tests including *Giella v Cassman Brown* [1973] EA 358, *Nguruman Limited v Jan Bonde Nielson & 2 others* [2014] eKLR, *Mrao Limited v First American Bank of Kenya Limited* (2003) eKLR, *John Daniel Muiryuro v Nicodemus Migiro* [2014] eKLR, *Japheth Bore v Rhoda Chebon* [2017] eKLR, *Hezron Kamau Gichuru v Kianjoya Enterprises Limited & another* [2022] eKLR, *Dina Management Limited v County Government of Mombasa & 5 others* SCOK Pet. No. 8 (E010) of 2021, *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, and *Ngugi v Towett & 4 others* (Civil Appeal 38 of 2019 [2024] KECA 362 (KLR)). It is trite from the above precedents that the tests includes the existence of a *prima facie* case with a probability of success, irreparable loss which would not adequately be compensated by an award of damages, and where the court is in doubt, the balance of convenience.
- b. The court will therefore embark in assessing and analysing the affidavit evidence presented by the two parties, and submissions by their counsel to find out whether the plaintiff has met the set threshold to be found deserving of the two injunction orders sought. That while doing so, the court must remind itself that it is not expected to make any final or exhaustive determinations on any issues of law and fact at this stage, as that has to wait for the parties to present their evidence in the main suit, when witnesses will be cross examined and re-examined and thereafter, the court will render its judgement on merit, on all the issues raised for determinations.
- c. That the plaintiff's case is that it became the registered owner of plot L.R. No. MN/1/683, through legal notice No. 156 of 1999, marked HA-3, that is attached to the supporting affidavit. I have perused the said legal notice, which is headed "Transfer and Vesting of Assets and Liabilities-The Postal Corporation of Kenya" and at number 63 of the annexed schedule is the property described as "MSA/SEC 1/683". The plaintiff's title to the said land has been disputed by the 2<sup>nd</sup> defendant who has attached to his replying affidavit a letter dated October 3, 2023 to the Chief Registration Officer, Mombasa Land Registry, seeking details of the land and ownership of C.R.No. 8508, and a reply thereof dated 17th October 2023, indicating that the said "CR.8508 is the registration of plot No. 67 Section 1 Mainland North owned by Nyali Limited" and that "the plot has since been subdivided into several subdivisions thereby ownership of CR 8508 does not exist."
- d. I have also perused the documents attached to the plaintiff's supporting affidavit and noted the lease agreement marked HA-6b at paragraph "A" describes the plaintiff as "the registered owner by Grant of all that piece of land known as Title Number Msa 1/683 situate in Mombasa County in the Republic of Kenya containing measurement approximately 0.99 acres comprised in a certificate of title dated 13.12.1932 and registered in the Registry of Titles at Mombasa as No. C.R. 8508/1 and with dimensions, abutments and boundaries thereof as delineated on Land Survey Plan No. 32618 hereinafter described as The Nyali Post Office Property." That the 2<sup>nd</sup> Defendant depositions, specifically at paragraph 10 to 12 of the replying affidavit, inter alia that MN/1/683 was never registered in the name of the plaintiff



or its predecessors, but in that of Nyali Limited, and it has since subdivided it into several subdivisions, has not been challenged or rebutted through an affidavit by the plaintiff. That deposition creates reasonable doubts as to the foundation of the plaintiff's claim of title, and the court finds it has failed on the test for establishing a prima facie case.

- e. On whether or not the plaintiff will be exposed to irreparable loss, should the injunction orders not be granted at this stage, not much has been presented to the court except the income it would have accrued from leasing the land to Ultimate General and Engineering Limited. That loss or damage can be ascertained in financial terms, and an award made in compensation, should the plaintiff be victorious at the end of the trial. It is therefore not an irreparable loss. The balance of convenience tilts against issuing the injunction order at this time.
  - f. Noting that the order for the parties to maintain status quo has been in force from the 21<sup>st</sup> November 2022, the court finds it is for the convenience of all claimants to the suit property herein for that order to continue in force, pending the hearing and determination of this suit.
  - g. Though section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events unless where for good reasons the court directs otherwise, I am of the view that justice in the case will better be served with an order that the costs in the application do abide the outcome of the suit.
8. That having come to the above determinations on the application dated the November 14, 2022, the court finds and orders as follows:
- a. That the application has no merit and is hereby dismissed.
  - b. That the costs of the application to abide the outcome of the suit.
  - c. The parties are nevertheless to maintain status quo obtaining today on the suit property to enable the suit proceed to the main hearing without the need for other interlocutory applications being filed, thereby occasioning more delays.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17<sup>TH</sup> DAY OF JULY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff: Mr. Kiprono for Mbogo

Defendants: Mr Mutugi for 2<sup>nd</sup> Defendant

Interested Parties: Mr. Kilonzo for 3<sup>rd</sup> Defendant

Leakey – Court Assistant.

