



Mwabware & 173 others v Shikely & 8 others (Sued as the Legal Administrator of the Estate of Sood Mohamed Said Shikely, Deceased); Kituo Cha Sheria (Interested Party) (Environment & Land Petition E002 of 2024) [2024] KEELC 7188 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E002 OF 2024
SM KIBUNJA, J
OCTOBER 30, 2024**

BETWEEN

HAMISI CHOKWE MWABWARE & 173 OTHERS PETITIONER

AND

**SAID SOOD MOHAMED SAID SHIKELY & 8 OTHERS RESPONDENT
SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF SOOD
MOHAMED SAID SHIKELY, DECEASED**

AND

KITUO CHA SHERIA INTERESTED PARTY

RULING

Notices of Motion Dated 26th January 2024 & 25th March 2024

1. The petitioners moved the court through the application dated the 26th January 2024 seeking for twenty-three [23] prayers, marked (1) to (23). Prayers (4) to (23) are similar prayers 130 (a) to (v) in the petition dated 23rd January 2024, and may not be considered at this interlocutory stage. Prayer [1] & [2] of the notice of motion are now spent, and I will deal with prayer [3] which is for:

“3.the defendants/respondents, their employees, agents and/or assignees be restrained from intimidating, harassing, colluding to evict the petitioner/respondents, demolitions or in any way dealing with the suit property pending the hearing and determination of the petition.”

The application is premised on the thirty (30) grounds on its face and supported by the affidavit of Rama Hassan Chokwe, the 3rd petitioner, sworn on the 26th January 2024, inter alia deposing



that the petitioners are settled on various sections of plots 7540/1/MN, 82/1/MN, 83/1MN and 261/1/MN, Mgongeni Frere Town, Mombasa, the suit properties; that they have constructed semi-permanent houses, business structures and have been supplied with some social amenities and services like water and electricity; that suit parcels MN/1/82 and 261 are registered with Mohamed Said Bin Mbaruk, while parcels MN/1/7540 under Sood Mohamed Said Shikely, both deceased; that the 1st & 2nd respondents have posed as caretakers and or beneficiaries of the registered owners for purposes of collecting and receiving ground rent, and the freehold interests were transferred to the petitioners by the registered owners when they dealt; that the purchase agreement between the petitioners and the registered owners was couched in permanent basis and was silent on termination on the existing ownership of land; that the petitioners have enjoyed peaceful occupation until the demise of registered owners when threats to evict them and demolish their structures occurred, due to failure to pay new ground rent that was procedurally unfair, unlawful and exorbitantly increased by the 1st & 2nd respondents, without affording them an opportunity to be heard; that though the suit properties were agricultural lands they have been converted to residential without obtaining change of user; that due to the threats and acts of harassment that has been set out, the order sought should be granted.

2. The 1st & 2nd respondents opposed the application through the replying affidavit of Said Sood Mohamed Said Shikely, the 1st respondent, sworn on 03rd May 2024, inter alia deposing that they are beneficiaries of the suit properties that are registered as below:
 - a. Plot 7540/1/MN in the names of Said Sood Mohamed Shikely, Noor Sood Said Hemed Sood Mohamed Said Shikely, Rahma Sood Mohamed and Rashid Sood Shikely.
 - b. Plot 82/1/MN & 83/1/MN in the name of Mohamed Said Bin Mbaruk Shikely.
 - c. Plot 261/1/MN in the names of Said Sood Mohammed Shikely, Khadija Soud Shikely, Noor Sood Said, Hemed Sood Mohamed Said Shikely, Rahma Sood Mohammed and Rashid Sood Shikely

That the suit properties are occupied by monthly rent paying tenants, including some of the petitioners on a house without land basis; that some of the tenants were allowed to put up Swahili houses and others to buy existing Swahili houses by the successive property owners; that the dispute herein is by the named 174 named petitioners, some deceased or unknown, in their personal capacities, and not as representatives of 200 unnamed residents and or 100 children, against the suit property owners, who do not include the 3rd to 9th respondents and interested party; that the issues of alleged purchase of portions where the petitioners' houses stand should not be raised through a constitutional petition, but a normal land claim, and the petition should be dismissed; that as the tenants came onto the land and remained thereon with the owners consent, adverse possession claim cannot arise; that the suit property owners want to subdivide their land and sell freehold titles to the swahili houses owners, but no notices to vacate has been issued, and those who vacated did so on their free will after failing to raise the ground rent; that there are other three suits pending over the suit properties being ELC NO. E201 of 2023 & E122 of 2023 and CMCC NO. 44 of 2023; that the injunction order sought is to allow the petitioners extend their structures to the open areas thereby causing irreparable loss to the 1st and 2nd respondents.

3. In the application dated the 25th March 2024, the petitioners seeks for inter alia:
 - “ 3. That the 1st and 2nd respondents, their employees, agents, and/or assignees be restrained from trespassing, entering upon, demolishing or in any way dealing with the suit property pending the hearing and determination of the main suit.



4. That pending inter-parties hearing of the application and main suit, this honourable court be pleased to issue an interim order directing the OCS Mbungoni Police Station to enforce compliance and ensure that the petitioners enjoy quiet possession of their properties.”

The application is based on the three (3) grounds on its face and supported by the affidavit of Patrick Nyabola, 13th petitioner, sworn on the 25th March 2024, among others deposing that he is the proprietor of Junda school that is on the suit properties; that on the 25th March 2024, the 1st and 2nd respondents illegally demolished his school thereby interfering with the learners’ right to education; that during the said demolition, the school guard was injured by the goons sent to the institution.

4. The application is opposed by the 1st and 2nd respondent through the replying affidavit sworn by Said Sood Mohamed Said Shikley, 1st respondent, on the 19th April 2024, among others deposing that the prayer sought in this application is similar to that in the motion dated 26th January 2024, and no interim order has been issued; that they have not threatened to demolish Junda school and the alleged attack on 25th March 2024 was stage managed by the 13th petitioner for purposes of seeking injunctive orders; that the 13th petitioner is their ground tenant and erected a private school thereon which is not registered, and has extended the structures beyond his portion; that they sent a demand letter to 13th petitioner dated 5th September 2023 demanding Kshs.1,692,000 for rent arrears from 13th December 2013, and Kshs.7,000,000 for illegal extensions; that the said petitioner has not complied, but has instead extended the school further, and seeks for injunction order so as to continue with the extensions without paying ground rent or obtaining consent.
5. The learned counsel for the petitioners and the 1st & 2nd respondents filed their submissions dated the 20th April 2024 and 12th June 2024 respectively, on the two applications which the court has considered.
6. The issues for the determinations by the court are as follows:
 - a. Whether the petitioners have met the threshold for the injunctive orders sought to be issued.
 - b. Who pays the costs in each of the two applications?
7. The court has carefully considered the grounds on each of the two applications, affidavit evidence, submissions filed by the two learned counsel, superior courts decisions cited and come to the following determinations:
 - a. That as pointed out in (1) above, the 23 prayers sought by the petitioners in the the application dated the 26th January 2024, includes prayers (4) to (23) that are similar to prayers 130 (a) to (v) in the petition dated 23rd January 2024. The said prayers cannot be considered at this interlocutory stage, and the court is left wondering why the learned counsel found it necessary to be included in the motion. That as prayers [1] & [2] of the notice of motion are now spent, the court will only deal with prayer [3] which seeks for:
 - “ 3.the defendants/respondents, their employees, agents and/or assignees be restrained from intimidating, harassing, colluding to evict the petitioner/ respondents, demolitions or in any way dealing with the suit property pending the hearing and determination of the petition.”

From the grounds on the motion and deposition by the petitioners through the supporting affidavit of 3rd petitioner, sworn on the 26th January 2024, they are settled on various sections of plots 7540/1/MN, 82/1/MN, 83/1MN and 261/1/MN, Mgonjeni Frere Town, Mombasa, the suit properties, where



they have constructed semi-permanent houses, business structures and have been supplied with some social amenities and services like water and electricity. The petitioners have acknowledged the 1st & 2nd respondents as caretakers and or beneficiaries of the registered owners for purposes of collecting and receiving ground rent. They allege that though they had enjoyed peaceful occupation until the demise of registered owners, threats to evict them and demolish their structures occurred after they failed to pay new ground rent that was increased by the 1st & 2nd respondents, without affording them an opportunity to be heard. That on the 25th March 2024, goons attacked and demolished Junda school, belonging to the 13th petitioner, and injured the guard, and the order sought should be granted.

- b. The 1st & 2nd respondents have through the replying affidavits by the 1st respondent opposed the two applications and deposed inter alia that the dispute herein is a private one between the petitioners and the 1st & 2nd respondents, and should have been pursued through an ordinary suit and not a petition; that some of the petitioners are their tenants with Swahili houses on portions of the suit properties, others are deceased and others are unknown to them; that as owners of the land, they are in the process of subdividing it with a view of selling the portions thereof to the tenants with Swahili houses there; that the two applications for injunction orders are aimed to be used by the petitioners who are in arrears or occupying portions of land larger than that agreed to continue extending their structures and in occupation without consent and or payments.
- c. The court is not expected to pronounce itself with finality on any issue of fact and of law at this stage. The court will only do so after the parties present their evidence in the hearing of the main petition after the pleadings are closed. I however wish to point out that the practise of parties/litigants annexing documents to their written submissions, as the petitioners did in this case, and expecting the court to take those documents as evidence to be considered by the court in its ruling/determination, does not have the backing of the substantive law or rules. The documents attached to the petitioners' submissions are not properly before the court are therefore expunged from the record. See *Kaur versus Suri ELC Land Case No.738 of 2013, [2022] KEELC 58 KLR.*
- d. Having considered the positions taken by the petitioners on one side and 1st & 2nd respondent on the other side, and upon considering the case law presented by both sides, I find the petitioners, including the 13th petitioner, have not made out a case for the court to issue any injunction order in the nature sought in the two applications. However, for the interest of ensuring the legal title to the suit properties does not change when the petition is pending hearing and determination, I find this an appropriate case to issue an inhibition order in terms of section 68 of the *Land Registration Act* No.3 of 2012, to be registered against the suit properties.
- e. That in view of the nature of the claim herein, I find it fair and just to order the costs in the two applications to abide the outcome of the petition.

8. Flowing from the foregoing the court finds and orders as follows:

- a. The petitioners' application dated the 26th January 2024, and 25th March 2024 are without merit and are dismissed.
- b. That the costs to abide the outcome of the petition.
- c. That nevertheless, the court on its own motion issues an inhibition order in terms of section 68 of the *Land Registration Act* No. 3 of 2012, to be registered against the suit properties and remain in force until the petition is heard and determined.



It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30TH DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioners: Mr. Mutwiri for Ms. Ombat

M/s Kabole for 1st and 2nd Respondents

Respondents: M/s Mwanazumbah for 3rd, 5th and 9th Respondents

Interested Party: No appearance

Leakey- Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

