



REPUBLIC OF KENYA



KENYA LAW
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**Khasiani v Grove Development Limited (Land Case 254 of 2022)
[2023] KEELC 880 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE 254 OF 2022
AE DENA, J
FEBRUARY 16, 2023**

BETWEEN

ANDREW KHASIANI PLAINTIFF

AND

GROVE DEVELOPMENT LIMITED DEFENDANT

RULING

The Application

1. This is a ruling on the notice of motion dated July 14, 2022, brought by the defendant under certificate of urgency. The application was brought under sections 3[1] and 13[7][a] of the [Environment and Land Court Act](#), sections 3A of the [Civil Procedure Act](#) and order 37 rules 19[1] 2, 3 and 4 and order 40 of the [Civil Procedure Rules, 2010](#). The motion sought orders, *inter-alia*:
 1. Spent
 2. The honourable court be pleased to grant interim temporary orders of injunction to restrain the plaintiff or any other person claiming through him from constructing, erecting or putting up any structure on the suit property or in any way cutting down trees or destroying any vegetation thereon pending the interparties hearing of this application.
 3. The honourable court be pleased to grant interim temporary orders of injunction to restrain the plaintiff or any other person claiming through him from constructing erecting or putting up any structure on the suit property or in any way cutting down trees or destroying any vegetation thereon pending the interparties hearing of this application and /or suit.
 4. The honourable court be pleased to order that the proceedings herein should be continued as if the cause had been begun by filing a plaint in accordance with order 37 rule 19 of the [Civil](#)



Procedure Rules and for the originating summons dated April 28, 2021 to be deemed as a plaint and the attendant affidavits to stand as pleadings.

5. This honourable court be pleased to admit the defendant's draft defence and counter claim annexed to the supporting affidavit herein and the same be deemed as duly filed and served.
6. Costs to be provided for.
2. The application is premised upon grounds that the defendant is the registered owner of the suit property known as Kwale/Diani Beach Block/20. That on or about January 28, 1995 the defendant retained the plaintiff as an employee and duly gave permission to the plaintiff to occupy the suit property as caretaker on an agreed salary. The said employer-employee relationship is still in existence. That upon discovery of the existence of this suit, the defendant's personnel visited the suit property and realized that the plaintiff had cut down trees including indigenous trees and converted them to poles and firewood for sale. The plaintiff further destroyed the delicate vegetation within the suit property. The defendants state that they are keen on filing a counterclaim seeking eviction orders against the plaintiff. The defendants state that in the event the orders sought are not granted they stand to suffer irreparable loss and damage.
3. The application is supported by an affidavit dated July 14, 2022 sworn by one Minesh Rameshchandra Pandya a director of the defendant. He avers that the defendant company is the registered owner of the suit property Kwale/Diani Beach Block/20. That the plaintiff entered into the suit property by virtue of the employer-employee relationship as between the parties herein. It is stated that the plaintiff was allowed by the defendant to occupy the structures on the suit property and put up a kiosk thereon on the basis of him being the caretaker who also earned a monthly salary of Kshs 2,800/-. It is averred that the employer-employee relationship is still intact as outlined under paragraph 4 of the affidavit.
4. It is deponed that upon the suit being brought to the attention of the defendant, the deponent herein personally visited the suit property and noted that the plaintiff was destroying the property. According to the defendants the court has unfettered jurisdiction under order 37 rule 19 of the Civil Procedure Rules to convert the originating summons into a plaint and attendant affidavits into pleadings. The same will enable the defendant to effectively file a counterclaim so as to enable the court determine all the issues relating to this suit. The defendant states that in the event the orders sought are not granted, they stand to suffer irreparable loss and damage as stated under paragraph 9 of the affidavit. The court is asked to allow the application as prayed.

Response

5. The application was opposed through a notice of preliminary objection dated July 27, 2022. The following grounds are raised;
 - a. The whole application and replying affidavit are defective, misconceived and an abuse of the process of this honourable court designed to solely delay the expeditious determination of the suit herein
 - b. The application together with the replying affidavit dated July 14, 2022 were filed without due authority from the defendant company
 - c. There is no resolution or valid resolution of the defendant company approving filing of the application and the replying affidavit dated July 14, 2022.



- d. There is no resolution or no valid resolution of the defendant company appointing the firm of Sitonik Advocates to file the application and replying affidavit dated July 14, 2022 for and on behalf of the defendant company
 - e. The filing of this application by the said firm of advocates is invalid for want of authority from the defendant company
 - f. The defendant company did not authorize Minesh Rameshchandra Pandya to swear the supporting affidavit and replying affidavit dated July 14, 2022.
 - g. The lease held by the defendant company marked as M-1 having expired in 2013 means that legally they are not the owners of the suit subject and therefore cannot seek prayers contained in their application.
 - h. The supporting affidavit is irregular as the jurat is an overleaf and thus should be struck out.
6. The plaintiff/respondent further filed a replying affidavit dated September 20, 2022 denting being an employee of the applicant and state that exhibit M-2 indicating that he had been employed is unknown to him. That his employer Mrs Grant gave him permission over the suit property Kwale/Diani Beach Block/194 which ceased to exist when the government compulsorily acquired a portion of the suit property to build a road through it and a new title Kwale/Diani Beach Block 20 was acquired. That the area the plaintiff was permitted to occupy is now a road reserve and not the suit property. The plaintiff states that he was employed by Mrs Grant at the Granderson House sometime in the year 1986 as a caretaker of the cottages in the suit property. That at the time of his employment he did not reside on the suit property and only moved in when Mrs Grant left the country in the year 1996. He states that he has never been aware of any permission given to him to take occupation of the suit property. That during his stay on the suit property and the permission attached in the affidavit in support of the application is a replica of the permission issued by his employer Mrs Grant in the year 1993. That sometime in the year 2015 he was attacked twice while residing on the suit property and on both occasions the attackers made away with documents in his possession. That the defendant s have not shown any evidence to the effect that he was their employee and that they paid his salary from the year 1996 to date. He states there was no employment contract between himself and the defendant as stipulated under the [Employment Act](#).
7. The plaintiff refutes the claim that he was being paid a sum of Kshs 2,800/- monthly by the applicant at the end of each year and states that the said amount is unrealistic and could not have sustained him and his family. Allegations of him cutting down the tress are vehemently denied. The plaintiff further states that it has come to his attention that the director of the defendant is someone known to him as he has been supplying him with timber and poles from commercial forest trees as well as curio items. That for a living he buys and sales commercial forest trees which he procures from Shimba Hills as evidenced by permits from Kenya Forest Service.
8. The plaintiff avers that the branches as cut from the trees and the thickets cleared are as a result of a World Bank project for supply of clean water to residents within Diani Area. That water pipes are being laid on the road reserve created in the suit property. it is stated that the photographs attached in the supporting affidavit to the application cannot be admitted as evidence as no certificate of electronic evidence has been attached. Further that the firm of Sitonik Advocates did not attach a company resolution authorising Mr Minesh Ramesh Chandra Pandya to execute documents or pleadings on behalf of the defendant . That the defence and counterclaim filed ought to be struck out for lacking the requisite authority from the Board of Directors. That the plaintiff has been meeting the costs of electricity and water of the suit without the assistant of the defendant /applicant. That the defendant



- did not file any suit for the recovery of land within the period prescribed by law being 17 years. The respondent states that he has provided sufficient evidence to prove that he has been in occupation of the suit land openly and for a period more than 12 years after discontinuation of possession by the owners on their own volition. That during the time he has been in occupation of the land the defendant has never asserted their rights over the property.
9. In response to the plaintiffs replying affidavit the defendant filed a supplementary affidavit sworn by Nitichandra Krishnalal Pandya also a Director to the company. Relying on the supporting affidavit sworn by his co-director Minesh Rameshchandra Pandya on July 14, 2022 he avers that Minesh Rameshchandra Pandya is a Director in the defendant company since 2014. A copy of the defendant's annual returns dated July 31, 2014 is exhibited. He states that the registrar of companies was duly notified of Minesh Pandya's directorship and was expected to update the company register. That the plaintiff's assertion that he has never been an employee of the defendant is not true.
 10. The same is evidenced by the handwritten salary tabulations annexed to the affidavit. That the plaintiff has at one given point tried to interfere with the suit property and necessary action was taken against him which included a letter from the firm of Deche, Nandwa & Byrant Advocates. The defendant states that indeed the plaintiff is illegally cutting down mature trees in the suit property and clearing vegetation while aiding third parties to put up temporary structures on the suit property. It is stated that no activities have been undertaken on the suit property by the World Bank. That at no given point has the suit property been compulsorily acquired by any government institution or entity and no road reserve is on the property. The defendant denies being supplied with logs by the plaintiff as alleged.
 11. According to the deponent, the suit property was purchased vide an agreement dated October 28, 1994. That the leasehold on the suit property was scheduled to end on October 29, 2009. That the defendant made an application for extension of the lease and on October 26, 2009 was informed of approval of its application. That due to the delays in effecting the approvals, the defendant's filed a JR application vide Mombasa Misc JR No 10 of 2014 against the National Land Commission seeking for orders of mandamus to compel the commission to renew and extend the defendant's lease and permit the subdivision and change of user of the suit property.
 12. The defendant's state that it was sufficient for Mr Minesh to depone that he was duly authorised by the defendant company and it was upon the plaintiff to demonstrate with evidence why Mr Minesh did not have the requisite authority which the plaintiff has not demonstrated. It is lastly deponed that the defendant company has and continues to be the legal owner of the suit property. The allegation that the defendant ought to have filed a suit for recovery of land is misplaced as the defendant has at all material times been the legal leasehold owner.

Submissions

Defendant /Applicant's Submissions

13. The defendant's submissions address the preliminary objection dated July 27, 2022 and the notice of motion dated July 14, 2022. On the preliminary objection the defendant contends that it was enough for Mr Minesh R Pandya to depone that he had been authorised to depone that he was duly authorised to swear the affidavit on behalf of the defendant company as was held in *Spire Bank Ltd v Land Registrar & 2 Others* [2019] eKLR. That a party if personally seized of the matter can swear the affidavit on behalf of the defendant company. Reliance is further placed in the court appeal decision of *Makupa Transit Shade Ltd v Kenya Ports Authority & another* [2015] eKLR. On the claim that there is no authority or resolution from the defendant company approving the filing of the affidavits it



is submitted that there is no law that requires a company should file a resolution to defend itself once sued. Several authorities have been listed in support of this and which the court has duly noted.

14. On the claim that the application by the firm of Sitonik Advocates is invalid for want of authority by the defendant, it is submitted that issues as to whether the company has instructed the defence advocate is a matter of fact and therefore not an appropriate issue to be dealt with by way of preliminary objection as was held in *Hadson Moffat Kamau v Makomboki Tea Factory Limited* [2008] eKLR. It is stated that the claim on the defendant's supporting affidavit on record being irregular as the jurat is an overleaf hence invalid is misplaced as the law does not demand that the jurat be on the same page where the text of the oath or affidavit ends. Reliance is placed in the case of *Jimoko Enterprises Ltd v Deposit Protection Fund Board & 2 others* [2006] eKLR.
15. On the application for injunction, it is submitted that the applicant has satisfied the condition for grant of injunction as spelt out in the *Giella v Cassman Brown* case. The conditions include establishment of a *prima facie* case, demonstrating irreparable injury if the injunction is not granted and showing balance of convenience in his favour. On what constitutes a *prima facie* case it is stated that the existence of an employer-employee relationship has been demonstrated by the applicant. That it is trite that where an employee is in possession of land or a house by virtue of employment, they cannot plead for adverse possession and reliance was placed in *Delamere Estates v Ndungu Njai & others* [2006] eKLR.
17. It is submitted that the defendant is likely to suffer substantial loss owing to the plaintiff's destructive nature cutting down trees and destroying the vegetation in the suit property unless the orders sought are granted. Further that the balance of convenience tilts towards the defendant as the damage being caused is permanent and irreversible.
18. Additionally, it was argued that the suit having been commenced by way of originating summons cannot accommodate the defendant's intended counterclaim for orders of eviction as against the plaintiff including mesne profits for the destruction herein.

plaintiff's submissions

18. The plaintiff's submissions are filed before court on October 28, 2022. Two issues for determination are highlighted;
 - a. Whether on the evidence and material placed before court, the defendant has satisfied the condition upon which a temporary injunction can be granted.
 - b. Whether the pleadings filed by the defendant /applicant are irregular.
19. It is submitted that the test for grant of interlocutory injunction was considered in the *American Cyanamid v Ethicon Limited* [1975] A AER case where three elements were noted. The same were there must be serious/fair issues to be tried, damages are not adequate remedy and the balance of convenience lies in favour of granting or refusing the application. It is submitted that the applicant has failed to meet these conditions as there has not been any concrete proof that suggests the plaintiff is responsible for destruction of the environment within the suit property. That the photographs annexed by the applicant do not meet the standard set by the *Evidence Act* for production of electronic evidence. That the defendant has also failed to prove that they had employed the plaintiff as alleged but simply trying to create a non-existent employer-employee relationship with the intention of denying the plaintiff his claim for adverse possession. It is urged that the defendant /applicant has therefore not demonstrated a *prima facie* case with a probability of success and neither has it been able to show it stands to suffer irreparable loss as the requirements warranting issuance of injunction orders.



20. On whether the pleadings filed by the defendant /applicant are regular, it is submitted that the defendant lacked a resolution authorising on Minesh Pandya to swear affidavits on its behalf and similarly the firm of Sitonik Advocates did not provide authority from the defendant giving them instructions to represent them. The plaintiff refers to the holding in *East African Air Limited v Anthony Ambaka Kegode & another* [2011] eKLR, *Affordable Homes Africa Limited v Ian Henderson & 2 others* HCCC No 524 of 2004 and *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR where the courts stressed the need for an advocate acting for a company to get the necessary authorizations to do so. It is averred that the person who swore affidavits on behalf of the defendant was not authorised to do so and is also not the director as the CR12 of the defendant does not contain his name as one of the shareholders or directors.

defendant s Supplementary Submissions

21. Additionally, and in response to the foregoing the defendant submitted that the photographs duly annexed demonstrate the cutting down of trees. That the plaintiff has failed to establish that the photographs correspond to the definition of electronic evidence. Reliance is placed on the holding in *Re Estate of Washington Olweny [Deceased]*[2021] eKLR. It is also submitted that there are no allegations that the photographs are fake or that they have been altered in any way or form and the provisions of sections 106B of the *Evidence Act* ought not to be used to lock out the defendant 's photographs considering that courts are bound to ensure that justice is served in each case.

Analysis And Determination

22. I have considered the application, affidavits and submissions of the respective parties and the case law presented. The main issue as I see it at this interlocutory stage is whether the orders of injunction should issue in the circumstances. I will briefly consider the conversion of the originating summons into a plaint and whether the preliminary issues raised should be sustained.
23. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules 2010* which provides: -
- “ 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 [Rev. 2012] Civil Procedure cap. 21 [subsidiary] c17 – 165;
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.”
24. This suit as earlier stated elsewhere in this ruling is commenced by way of originating summons in November 2021. It appears to have been filed against a backdrop of an alleged intended eviction of the plaintiff by the defendant s. The plaintiff in his supporting affidavit avers he has lived in the suit property for over a period of 12 years having been residing therein since 1988 when he started working for the Grants who are said to have been the original registered owners of the suit property.



The defendant applicant on the other hand state that the plaintiff has embarked on activities that were geared towards degrading the suit property cutting down indigenous trees which have taken decades to mature and also erecting temporary structures. The plaintiff denies this. I have also noted the allegations that the lease expired and the original suit property may not exist. I have also noted the allegations and the affidavit sworn by Sammy Ratemo a staff from Kwale Water & Sewerage Company that the trees were felled by the said body pursuant to a World Bank project and the same was on a road reserve ostensibly compulsorily acquired by the government for this purpose. The plaintiff also says the wood he is allegedly selling are duly procured from elsewhere under license from the relevant authorities and not the suit property.

25. The court has considered the orders for injunction as sought by the applicant against the foregoing allegations and counter allegations. It is trite that at this stage of the application the court is not supposed to delve into the merits of the case which I note the parties have done. These can only be interrogated at a full hearing where parties will be put through the rigours of cross examination to enable the court effectually adjudicate over the contest between the parties which is whether the plaintiff is entitled to the suit property by way of adverse possession. For now, it would appear that the plaintiff is in possession and the balance of convenience would tilt in his favor provided that the suit property is also preserved.
26. Faced with the above circumstances it is this courts view that the best approach this court can take is to see how the status quo will be maintained. For guidance I resorted to the persuasive dictum in the case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] e KLR. In that case Justice Anguto (may his soul rest in peace) explained the circumstances under which orders for status quo may be issue as follows; -

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

27. Applying the above to the present circumstances it is the view of this court that the status quo orders will suffice in this instance. The same will not only help in the preservation of the suit property but will also ensure that no party suffers any prejudice if the orders sought are granted.
28. The applicant seeks for the originating summons herein to be converted into a plaint. Order 37 rule 19 of the *Civil procedure* empowers the court to convert an originating summons into a plaint and to proceed with the hearing of the matter as if the action had been commenced by way of a plaint. The same provides as follows:

“Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings,



with or without liberty to any of the parties to add, or to apply for particulars of those affidavits.

29. The court has looked at the nature of the allegations by the parties herein. Several issues are contested and which include whether there existed an employer-employee relationship between the parties herein. Who is the legal proprietor of the suit property and establishment of the history of such ownership. The nature of the issues in contention dictate that oral evidence is necessary. The applicant has further indicated that it is interested in filing a counterclaim against the plaintiffs claim. I see no prejudice that will be suffered if the conversion happens to ensure that the same will enable the court to enhance the facts to be placed before it to enable it deal with the issues effectively for the ends of justice to be met. The Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR cements this when it stated; -

It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law.

30. I have noted the issues raised in the preliminary objections and I will not spend a lot of time on them. The plaintiff seems to focus a lot on technicalities some of which may not be fatal, with capability of being infused with life and while others may not fit within the space of a preliminary objection. On company resolutions I'm guided by the Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR where the court upheld Justice Angote's decision when faced with a similar objection, to proceed on the merits of the case. For me technicalities will not get us to justice. Justice must entail focus on the real and substantive issues before the court, where parties can lay before the court their cases without watching over their backs for the next technical objection. Article 159 (2) (d) gives to the court the power to administer justice without undue regard to the technicalities of procedure. The *Civil Procedure Act* under sections 1A,1B and 3A enjoins the courts to administer justice in a just expeditious, efficient and cost-effective manner. This overriding objective otherwise referred to as the oxygen principle (O2) is mirrored under section 3 of the *Environment and Land Court Act* while section 19 (1) of the *Environment and Land Court Act* restates the provisions of article 159 (2) (d) of the *Constitution* in the following terms: -

19 (1) In any proceedings to which this act applies, the court shall act expeditiously, without undue regard to technicalities of procedure.

30. The following orders shall therefore issue to dispose of the notice of motion application dated 14/07/22
- i. The originating summons herein be and is hereby converted into a plaint with the affidavits in support as the witness statements as parties will deem necessary. The **Civil Procedure Rules** shall be complied with to that extent.
 - ii. The defendant's draft defence and counter claim dated July 14, 2022 annexed to the supporting affidavit of Minesh Rameshchandra Pandya be and is hereby deemed as duly filed and served.
 - iii. The plaintiff shall respond to ii) above within 14 days of this order.
 - iv. The Deputy Registrar Kwale shall visit the suit property in the presence of the parties and their counsels to prepare a report on the status quo on the suit property. The report shall include a draft status quo order which will be specific and neat in description for consideration and for adoption by the court.
 - v. The report on iv) above shall be prepared and filed with this court within 21 days of today's date.



- vi. The existing orders on status quo shall remain in force pending further directions of this court.
- vii. Costs of the application be in the cause

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF FEBRUARY,2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Sitonik for defendant / Applicants

Matende for respondents/plaintiffs

Mr. Daniel Disiii- Court Assistant.

