



REPUBLIC OF KENYA



Agricultural Handling Services Limited v Chengo & 10 others (Environment & Land Case 108 of 2022) [2023] KEELC 787 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEELC 787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 108 OF 2022
SM KIBUNJA, J
FEBRUARY 15, 2023**

BETWEEN

AGRICULTURAL HANDLING SERVICES LIMITED PLAINTIFF

AND

**KEN CHENGO 1ST DEFENDANT
LEWIS MUCHAI 2ND DEFENDANT
JOHN NJOROGE 3RD DEFENDANT
IBRAHIM MUTHAMA 4TH DEFENDANT
IQBAL GITAU 5TH DEFENDANT
HUSSEIN SARBITI 6TH DEFENDANT
JANE MUCHE 7TH DEFENDANT
OMAR SALIM CHENGO 8TH DEFENDANT
ISA OMAR 9TH DEFENDANT
CORNELL L SHISANYA 10TH DEFENDANT
REGISTRAR OF TITLES 11TH DEFENDANT**

RULING

[Preliminary objection dated October 31, 2022 by 2nd defendant, notice of preliminary objection dated October 28, 2022 by 13th defendant And plaintiff's notice of motion dated October 14, 2022]

1. The plaintiff commenced this suit through the plaint dated the October 14, 2022 seeking for a declaration that the defendants have no right to any of the subdivisions arising out of plot No



MN/111/5533, injunction order restraining them from claiming any interest, entering, trespassing into, subdividing, allocating or apportioning portions of plot MN/111/5533 and costs. The plaintiff among others averred that it is the registered owner of MN/111/5533, the suit land, having bought it from Philemon Mwaisaka pursuant to the transfer dated the January 21, 2010. Filed contemporaneously with the said plaint is the notice of motion under certificate of urgency of even date that seeks for the following prayers;

- a. Injunction order restraining the defendants or those acting on their behalf or claiming under them from dealing or interfering with the suit land pending the hearing and determination of the application.
- b. The same order as in (a) above but pending the hearing and determination of the suit.
- c. The OCS, Mtwapa Police Station assisted by DCI, mtwapa, County Commander, Kilifi and Regional Commander Coast, to provide security to ensure compliance with the orders to be issued.
- d. Costs to be provided for.

The application is based on the five (5) grounds on its surface and supported by the affidavit sworn by Latimo Ochanda, a director to the plaintiff, on the October 14, 2022.

2. The application is opposed by the Lawis Muchai, the 2nd defendant, though his replying affidavit sworn on the October 31, 2022, grounds of objection and preliminary objection also dated the October 31, 2022.
3. The application is also opposed by Cornel L Shisanya, the 13th defendant, through the notice of preliminary objection dated the October 28, 2022.
4. The court issued directions on the filing and exchanging submissions on the preliminary objections on the November 1, 2022. The plaintiff filed their submissions on the November 14, 2022, while the 2nd and 5th defendants filed their submissions on the January 25, 2023.
5. The following are the issues for the court's determinations;
 - a. Whether the preliminary objections raised are matters of law, and if so whether the defendants have made a reasonable case for the same to be upheld.
 - b. Whether the prayers sought by the plaintiff in the notice of motion should be granted.
 - c. Who pays the costs.
6. The court has carefully considered the grounds of preliminary objections, grounds on the notice of motion, parties' submissions and come to the following findings;
 - a. That from the documents filed by the 2nd, 5th and 13th defendants, the issues being raised as preliminary objections are more or less similar, in that they inter alia relate to whether the plaintiff [Mr Latino Ochanda], obtained the land subject matter of this suit when there was in force a court order of injunction against such transactions; whether the plaintiff came to court in clean hands as demanded by equity; and whether the said land is among the parcels allocated to Omar Salim Chengo and 1400 others by the National Land Commission *vide* the letters of allotment dated the July 6, 2017. That while the 2nd, 5th and 13th defendants have sought for the plaintiff's suit to be struck out and or dismissed with costs, the plaintiff has objected and submitted that all the issues raised in the preliminary objections are broadly phrased and are all matters of facts that are contested. The learned counsel referred the court to the decision in



the case of *Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors Ltd [1969] EA 696* where the court stated that a “preliminary objection consists of a point of law which has been pleaded or which arise by clear implications out of the pleadings and which if agreed as a preliminary point may dispose of the suit.”

- b. That having considered the grounds on the preliminary objections raised, pleadings and the submissions filed, it is crystal clear that the issues or grounds raised by the defendants would require evidence to be tendered before the court can make determinations thereof. Such evidence would include, but not limited to, the issuance of the court order(s) of injunctions to stop transactions involving plot numbers Mtwapa/Kilifi/324 and 334; relationship of the aforementioned plots and MN/111/5533 and 515, and whether the suit property is part of the plots reportedly allocated by the National Land Commission in 2017.
 - c. That indeed as submitted by counsel for the plaintiff, what the defendants call grounds of their preliminary objections can best be taken as their responses to the plaintiff’s notice of motion and or the plaint, and requires directions to be given for their hearing and determinations on merit.
 - d. What the plaintiff seeks in their application as can be seen at prayers 2 to 4 of the notice of motion is to stop the defendants from entering, trespassing into, remaining on the said land, subdividing or apportioning parts of the land to third parties pending the hearing and determination of the application initially, and thereafter the determination of the suit. That as the prayers presupposes that the defendants may already be on the land, and no reasonable grounds have been given why orders that may result to their eviction should be considered at the interlocutory stage without according the parties an opportunity to tender their evidence first, the court finds no prima facie case has been established by the plaintiff for the orders to issue.
 - e. That noting that the defendants who had raised preliminary objections and or submissions are in person and that the plaintiff has been unsuccessful in its notice of motion, and further the stage of the proceedings of the suit, each party will bear their own costs the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
 - f. That the court has on its own motion noted the suit property may be outside its territorial jurisdiction and wishes to be addressed before making further directions on the hearing of this matter, on whether the land subject matter of this suit is in within the territorial jurisdiction of this court or ELC Malindi. In other words, is the suit land in Mombasa or Kilifi County?
7. In view of the foregoing, the preliminary objections raised by the defendants herein and the notice of motion by the plaintiff are found to be without merit. The court orders as follows;
- a. The defendants’ preliminary objections be and are hereby rejected.
 - b. That the plaintiff’s notice of motion dated the October 14, 2022 be and is hereby dismissed.
 - c. Each party to bear their own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF FEBRUARY 2023

SM Kibunja, J

ELC MOMBASA.



IN THE PRESENCE OF;

Plaintiff : Absent

Defendants : 5th defendant present

COUNSEL : Mr Wameyo for plaintiff and Mr Kai for 3rd, 4th, 6th, 8th to 10th defendants.

Wilson .. Court Assistant.

SM Kibunja, J

ELC MOMBASA.

