



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 244 OF 2018

CHARO KARISA & 5 OTHERS.....PLAINTIFFS

VERSUS

SHABAN MATOLEDEFENDANT

RULING

(Application by the plaintiffs seeking orders of temporary injunction; plaintiffs claiming that they are the beneficial owners of the disputed land through inheritance; plaintiffs alleging that the defendant is now interfering with the land; there being two descriptions of the disputed land; no tangible proof of ownership of the disputed land displayed by the plaintiffs; no tangible evidence of interference by defendant; no prima facie case established; no explanation why, since filing suit in 2018, plaintiffs did not seek for injunction earlier, or set down the suit for hearing, despite defendant not entering appearance; application dismissed)

1. The application before me is that dated 4 March 2021 and filed on 8 March 2021 by the plaintiffs. The plaintiffs seek for orders of injunction restraining the defendant from occupying and / or trespassing into the parcel of land identified by the plaintiffs as Plot No. 1964/Mikomani/Kaloleni until the conclusion of this case. The application is based on the grounds inter alia that the plaintiffs are the owners of the suit land and that the defendant has no right over it. It is alleged that the defendant has fenced the land and is in the process of cutting down permanent trees with a view to cultivate it. It is also claimed that the defendant has gone into the business of subdividing the land and selling portions of it to people unknown to the plaintiffs.

2. The application is supported by an affidavit sworn by the 1st plaintiff, Charo Karisa. Mr. Karisa deposed that the plaintiffs are the owners of the land by way of inheritance and are in active occupation of portions thereof. It is deposed the defendant has trespassed into the land and is in the process of fencing and cutting down permanent trees. He has attached photographs of the alleged dealings by the defendant. He has averred that the defendant is in the process of clearing the land for cultivation in the month of March 2021 and is offering portions of the land for sale to other people. He deposed that this suit was filed in the year 2018 and the defendant has been served with summons to enter appearance but he has declined to respond. Mr. Karisa deposed that the plaintiffs stand to suffer irreparably if the defendant is not restrained from dealing with the suit land.

3. The application is not opposed, despite there being an affidavit of service of record stating that the defendant was duly served.

4. The background of this suit is that it was commenced by way of a plaint filed on 18 October 2018. It is the case of the plaintiffs that they are the beneficial owners of a large un-demarcated and un-registered parcel of land that is identified by known boundaries and on paper as plot No. 2124 at Mikomani Kaloleni. They aver that they are brothers and entitled to the land as beneficiaries of Karisa Tsuma (deceased). The plaintiffs plead that the defendant invaded the suit land and claimed ownership. The plaintiffs aver that despite demands having been made, meetings having been held, and notice of intention to sue having been given, the defendant has declined to stop and/or cease interfering with the land. It is for these reasons that the plaintiff prays for judgment for orders declaring them as the beneficial owners of the suit land, and an order of permanent injunction restraining the defendant from dealing with the suit land.

5. There is no defence on record. Summons to enter appearance were taken out and there is an affidavit of service stating that the defendant was duly served.

6. I have considered the application but I am unable to allow it. First, I note that in the plaint, the plaintiffs claim a land known as Plot No. 2124. Within this application, they want the defendant enjoined from land that they identify as Plot No. 1964/Mikomani/Kaloleni. The relationship between the Plot No. 2124 in the plaint, and the Plot No. 1964/Mikomani/Kaloleni, is not explained. In addition, no documentation whatsoever has been presented before me to demonstrate the existence of these plots, the origin of these parcel numbers, or any proof of ownership by the plaintiffs. Save from mere photographs, of which there is no certificate connecting them with any of the parcels of land in dispute, there is really nothing before me to show invasion by the defendant. I do not think, that given the above gaps, it can be said that the plaintiffs have demonstrated a prima facie case with a probability of success to entitle them to an order of injunction.

7. All the above notwithstanding, it has also not been explained to me why the plaintiffs have taken three years since they filed the suit to file an application for injunction. My perusal of the file shows that since they filed suit in the year 2018, the plaintiffs have made no attempt to list the suit for hearing. If the case is undefended, why not simply take a hearing date and have the matter concluded once and for all instead of filing applications?

8. All these reasons militate against me making orders of injunction as sought by the plaintiffs.

9. The upshot is that I find no merit in this application and it is hereby dismissed. However, I make no orders as to costs since the defendant did not deem it fit to oppose it.

10. Orders accordingly.

DATED AND DELIVERED THIS 23 DAY OF SEPTEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

In the presence of:

Mr P. Magolo for the applicant

Court Assistant; Wilson Rabong'o