



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 185 OF 2019

MOHAMED PARAGO MWINYIHAJI.....PLAINTIFF

-VS-

KHALIFA OMAR PARAGO.....DEFENDANT

AND

1. MWALAGO PARAGO HAJI

2. HAJI OMAR PARAGO.....INTERESTED PARTIES

RULING

1. This ruling is in respect of the application for injunction dated 16th October 2019 which was filed by the Plaintiff seeking to restrain the defendant by himself, his servants and/or agents from continued use, transferring, leasing, constructing or in any other way disposing off or whatsoever dealing with all that parcel of land known as KWALE/SHIMONI S.S/703 pending the hearing and determination of the suit. The plaintiff's case is that he is the registered owner of the suit property and that the defendant has without any colour of right invaded the said land and commenced construction thereon. The plaintiff avers that he has never at any given time allowed the defendant to build or enter into the land or at all. It is the plaintiff's contention that the defendant, using his prominence, is using the area police to harass and intimidate the plaintiff and that the defendant has invaded and taken possession of the suit land.
2. In the supporting affidavit to the application for injunction, the plaintiff has annexed a copy of title in his name and a copy of a letter from the area chief confirming that the suit land belongs to the plaintiff. The plaintiff has deposed that the defendant without any colour of right has invaded the suit land and has started construction on it without the plaintiff's permission. He has annexed photographs showing the said construction.
3. The defendant has opposed the application for injunction through an affidavit in reply sworn on 15th November, 2019. He has deposed that the plaintiff is his brother and besides him, they have other siblings, Mwarago Parago Mwinyihaji, Haji Omar Parago and Kudura Parago Mwinyihaji (deceased). He deposed that the plaintiff had previously filed another suit, Kwale SPMCC No. 514 of 2018. Copies of the pleadings and order issued in that case have been annexed. It is the defendant's contention that the suit property originally belonged to their deceased father, Parago Mwinyihaji Parago before it was turned into part of a settlement scheme sometime in 1995. That at that time, the land was known as KWALE/SHIMONI/435. He deposed that the land became the estate of his deceased father upon his demise. That in the meantime, some parts of the land were sold to third parties. He has further deposed that they agreed as a family to have the suit land registered in the plaintiff's name to hold in trust for the estate of their deceased father pending the completion of succession process. That they were shocked to learn that the plaintiff registered the suit land in his name fraudulently without disclosing the other dependants interest. He has contended that the suit property remains estate of their deceased father and that numerous meetings have been held to try and resolve the dispute without success. He has attached some correspondences. The defendant avers that he is a beneficiary of the estate of his late father and therefore cannot be enjoined as sought by the plaintiff. The defendant has annexed a caution registered on the title.
4. The defendant has also filed grounds of opposition on the grounds that the applicant seeks equity without doing equity, that the applicant has come to court without clean hands, that the applicant is guilty of material non-disclosure and that the matter is res judicata.
5. The interested parties filed an affidavit sworn by Mwalago Parago Haji on 30th January, 2020. He has deposed that he is the first born son of the late Parago Mwinyihaji Parago while the applicant is his follower. He states that the land belonged to their late father and forms part of his estate. That the applicant sold off parts of the land with their knowledge and has annexed a copy of agreement of sale. He has contended that the applicant took advantage of their illiteracy and trust to sub-divide the land and transfer it to his name.

6. The applicant filed a further supporting affidavit sworn on 3rd November 2019 in which he avers that the suit filed at Kwale Magistrate's court was withdrawn for lack of jurisdiction. That he settled in Shimoni where the suit land was allocated to him by the government in 1996 and invited his aging parents to settle on it. At the time the land was known as PLOT NO. KWALE/SHIMONI/435. That his siblings were young and did not understand anything. That upon his siblings reaching majority age, the applicant out of good heart subdivided the property and gave them plot Nos. 704, 705 and 706 which, he states they later sold. It is the applicant's contention that the respondents can only inherit from the estate of their late father, but not the suit plot which he maintains is solely his.

7. I invited counsel to file written submissions which they did and I have taken these into account.

8. The case of the plaintiff is that he owns the suit property and the defendants ought to be kept off the same. There are claims by the respondents that the suit property belonged to their deceased father. The respondents therefore claim to be entitled to the suit property together with the applicant as heirs to the estate of their deceased father. It is the respondent's contention that the applicant holds the titles in their trust.

9. I have looked at the material before me. I have seen the copy of the title held by the applicant which bears his name. Section 26 of the Land Registration Act directs courts to take title as prima facie evidence of ownership. However, a title under the said Section can be impeached where it has been procured by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. However, until such vitiating factors are proved, the court is to assume that the title is a good title and that is why there is the direction that the court needs to take title as prima facie evidence of ownership. I however note that the applicant has admitted inviting the respondents who are his siblings into the land. Given that position, and given that the applicant has title to the suit property and the respondents have displayed none, it follows that the applicant has established a prima facie case with a probability of success. The applicant certainly stands to suffer irreparable loss if the respondents proceed to transfer or dispose of or carry out further developments on the suit property. The respondents will have a chance at the hearing of the suit to show that the suit land is part of the estate of their late father, and until that is determined, the status quo prevailing ought to be maintained. In my view, the balance of convenience in this case, if I had doubt, tilts towards maintaining the status quo ante until this suit is heard and determined.

10. Given the above discourse, I do allow the application for injunction as prayed. I do specifically order as follows:

i. That pending the hearing and determination of this suit, there is hereby ordered an order of injunction restraining the respondents, by themselves, their servants and/or agents from transferring, leasing, constructing or in any way disposing off that parcel of land known as KWALE/SHIMONI S.S./703.

ii. Considering the relationship of the parties, I order each party to bear own costs.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE