



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 44 OF 2016

NDEGWA BAYA & 9 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

THOMAS LUGWE TSUMA & 3 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. There are two applications pending determination. The 1st application was made by the plaintiffs and is dated 23rd March 2016 under the provisions of Order 40 of the Civil Procedure Rules and Section 1A, 1B, 3, 3A & 63 (e) of the Act. In this motion the plaintiff sought the following orders against the defendants:

1. Spent

2. Spent

3. That pending the interparties hearing of this application the defendants, their servants and or agents or otherwise be restrained from constructing structures, misusing, damaging, destroying or in any manner dealing with the suit property situated in Kinagoni Samburu referred to as SAMBURU GROUP RANCH.

4. That the OCS Samburu Police Station do give security in effecting this Order.

5. That the costs of this application be provided for.

2. The second application was made by the defendants is dated 17th August 2016 under similar provisions of the law as the plaintiff s' application. In this application, the defendants sought for the following orders against the plaintiffs':

1. Spent

2. Spent

3. That this Honourable Court be pleased to grant an injunction restraining the Plaintiffs/Respondents herein either by themselves, their employees, servants or agents from entering, taking possession of, evicting, leasing, letting, transferring, disposing off, vandalizing, constructing and or interfering in any other manner with the defendants' quiet

possession of the suit property situated at Kinagoni Mzizima Samburu pending hearing and determination of this suit.

4. That the OCS Samburu Police Station do provide security during execution of this order so as to maintain law and order.

5. That the cost of this application be provided for.

3. Both applications are supported by the grounds listed on the face of it and on the affidavit of the respective applicants. In opposing the defendants' application, the plaintiffs filed a preliminary objection stating that the orders do not lie in favour of the defendants because there is no counter-claim filed. The defendants did not file any response to the plaintiffs application dated 23.3.2016 as I have not seen any on record.

4. Both advocates for the parties filed written submissions in arguing each of the applications herein. The plaintiffs are submitting they are entitled to the orders they are seeking because they are the legal/beneficial owners of the un-demarcated piece of land having inherited the same through their grandfather Dzuga Dzombo. The plaintiffs submit further that the defendants were given a portion of the suit land but which was clearly identified and the defendants paid the late Dzuga Dombo. Lastly the plaintiffs aver that the defendants have attempted to evict them and are also encroaching on to other portions of the suit property. The plaintiffs are asking the Court to issue orders to stop the illegal occupations and constructions.

5. The defendants in their submissions to support their application dated 17.8.2016 states that their application meets the principles laid out in the renowned case of **Giella vs Cassman Brown & Co. Ltd (1973) E. A 358**. They submit that they have been in quiet possession of the suit property and that the plaintiffs are asking this Court's protection to aid an injustice. The defendants submit the plaintiffs' action unless restrained from subdividing and or selling the property, the defendants will suffer irreparable loss as the suit will have been defeated.

6. The defendants are also accusing the plaintiffs of encroachment cutting down trees and may render them homeless by disposing of the suit land. The defendants took a quote from the case of **Asia Resources (k0 EPZ Ltd vs Rafiki EPZ Ltd (2005) eKLR** although I did not understand its importance since the plaintiffs' application has also prayed for the orders to be confirmed pending determination of the suit.

7. From the pleadings and the submissions, it is clear both the defendants and the plaintiffs are in occupation of the suit property. There seems to have arisen a dispute which may be boundary related or not. The plaintiffs are objecting to the orders being granted in favour of the defendants because the defendants have not filed a counter-claim. However I find this objection to be without merit because under the provisions of Order 40 rule 1, the purpose of a temporary order of injunction is to protect the property in dispute.

(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

(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

8. The fact that it is the plaintiffs who have come to Court does not bestow on them a right to misuse the property the subject in dispute merely because a party has not counter-claimed. A temporary injunction is intended to preserve the subject matter of the dispute until the suit is fully heard and determined. In the circumstances of this case it is not possible for the Court to determine who is encroaching. Therefore in determining the two applications, I direct the plaintiffs and the defendants to live within the confines of the boundaries they are currently in possession of.

9. In order to be sure the said confines and or boundaries are kept let the status quo prevailing on the ground be maintained. This prevailing circumstances be maintained under the supervision of the local administration (Area Assistant Chief & Chief) in collaboration with the O.C.S Samburu Police Station. No party is allowed to carry out any subdivisions/survey of the suit land and or sell until this suit is heard and determined. Each party to bear their respective costs for each of the applications.

Dated and delivered in Mombasa this 24th February 2017.

A. OMOLLO

JUDGE