



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

CIVIL SUIT NO. 87 OF 2009

CHRISPUS CHENGO MASHA.....1ST PLAINTIFF

CHARO MWADIMA TUNJE.....2ND PLAINTIFF

JOSEPH KASENA YERI.....3RD PLAINTIFF

KATANA NWADUNA NWANGE.....4TH PLAINTIFF

MWANJE MWADIMA FINYANGE.....5TH PLAINTIFF

GEORGE KATANA YERI.....6TH PLAINTIFF

YERI FREDRICK CHANGAWA.....7TH PLAINTIFF

THOMAS HINZANO NGONYO.....8TH PLAINTIFF

VERSUS

DANIEL RICCI.....DEFENDANT

RULLING

The defendant filed two applications dated 28.7.2015 and 13.8.2015 respectively. Both applications are supported by the defendant's affidavits. Counsels for both parties agreed to determine the applications by way of written submissions. Only the defendant's counsel filed his submissions. The plaintiffs filed a replying affidavit in relation to the application dated 28.7.2015 sworn by Chrispus Chengo Masha, 1st plaintiff.

The combined prayers in both applications is that the defendants be restrained by an order of injunction from adversely dealing with plot numbers **Ngomeni Squatter Settlement Scheme/1884**, that the plaintiffs be ordered to discharge the undertaking on damages as directed by the court by transferring the suit property to the plaintiff and that the 1st plaintiff be summoned to court and questioned on his alleged disparaging remarks or utterances made on 9.7.2015.

The brief background is that the plaintiffs filed this suit and applied for orders of injunction against the defendants. By a ruling delivered on 23.2.2010 the plaintiffs were granted injunctive orders subject to deposit a sum of Kshs.500,000/= as undertaking for damages within 21 days. The plaintiffs deposited the

title deed for plot number Ngomeni Squatter Settlement Scheme/1884 as the security in lieu of the sum of Kshs.500,000/=. According to the first plaintiff the plot was valued at Kshs.14 million then.

The dispute proceeded to full hearing and the plaintiff's suit was dismissed on 9.7.2015. The defendant is now asking the plaintiffs to pay the sum of Kshs.500,000/= as damages or have the property transferred to the defendant.

The defendant further maintain that upon the delivery of the judgement, the 1st plaintiff communicated to one Mohamed Kilalo informing him that the plaintiffs will not honour the judgment and will block the defendant from utilising the property. The defendant would like the court to summon the 1st plaintiff on his remarks.

On their part, the plaintiffs admit that they were ordered to furnish security. They have lodged an appeal to the Court of Appeal. There was delay in having the proceedings typed but the record is now almost ready. It is contended that the application to make good the security is premature. There is no proof of any damages shown by the defendant.

With regard to the issue relating to the alledged contemptuous remark, it is clear that it is only Mohamed Kilalo who can swear an affidavit to that effect. The defendant's averments are based on the information given to him by the said Mohamed Kilalo. The court cannot take action on such information. Further, it is upto the defendant to execute the judgement/decree and if there is any resistance, then the court can take action. No decree has been extracted.

On the issue of restraining the plaintiffs from selling the land or from any other manner dealing adversely with the suit property, I do find that there is a good ground to grant that order. It is a case of double allocation whereby both parties are holding titles to the same land. Since the court dismissed the plaintiff's suit, it is logical to have the plaintiffs restrained from selling, disposing or in any other way adversely dealing with the property pending the hearing of their intended appeal.

On the issue of damages, it is true that the court ordered the plaintiffs to provide security to the extent of Kshs.500,000/=. However, the court cannot simply order that the plaintiffs pay that amount to the defendant. The defendant has to establish the damages suffered first. Such damage may be more or less than the security amount. It is also clear that parties are still litigating and the final decision is yet to be made. Should the appeal be successful, then the order on security will lapse.

The plaintiffs' suit was dismissed with costs. They should not interfere with the suit property until their appeal is determined. I do find that the prayers for orders of injunction in both application should be granted. I do grant prayer (c) of the application dated 13.8.2015 as it covers all the other requests by the defendant.

In the end, the applications dated 28.3.2015 and 13.8.2015 are allowed in the above terms. The rest of the prayers are disallowed. The plaintiffs herein shall be jointly restrained from dealing with the suit property in terms of prayer (c) of the the application dated 13.8.2015. Each party shall meet their own costs.

Dated and delivered in Malindi this 21st day of April, 2016.

S.J. CHITEMBWE

JUDGE