



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 218 OF 2020

HASSANAT MWANADZOMBA HASSAN.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH KITHUKU KITONGA.....1ST DEFENDANT/RESPONDENT

LARRY NGALA MWAHENDO.....2ND DEFENDANT/RESPONDENT

JARVIS DONDO MWAHENDO.....3RD DEFENDANT/RESPONDENT

RULING

The application is dated 19th February 2021 and is brought under Section 1A, IB, 3, 3A of the Civil Procedure Act (Cap 21) and Order 40 Rule 1 and 3 and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this Honourable Court be pleased to certify this Application as urgent and be heard ex parte.

2. That pending the hearing of this application inter partes the Honourable

Court be pleased to grant an order of temporary injunction restraining 1st Defendant, his servants and/or agents from trespassing, and/or constructing and/or erecting structures on parcel of land Title No. Kilifi/Kadzonzo / Madzimbani/502.

3. That upon hearing of this application inter partes the Honourable Court be pleased to issue an injunction restraining the 1st Defendant, his servants and/or agents from trespassing, constructing and/or erecting structures on parcel Title No. Kilifi/Kadzonzo / Madzimbani/502 pending the hearing and determination of this suit.

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

It is based on the grounds that the Plaintiff is an Administrator and heir of the Estate of the Late Mwanabaraka Juma Hassan. That the late Mwanabaraka Juma Hassan was at all material times the legal beneficiary and/or lawful proprietor of parcel of land Title No. Kilifi/Kadzonzo/Madzimbani/502 situated at Mariakiani, Kilifi County. That the Late Mwanabaraka Juma Hassan and her family have hitherto been in possession, use and control and therefore entitled to parcel of land Title No. Kilifi/Kadzonzo/Madzimbani/502. That on diverse dates intermittently between the months of December 2020 and January 2021 and persistently since February 2021, the 1st Defendant unlawfully entered into the late Mwanabaraka Juma Hassan parcel of land Title No. Kilifi/Kadzonzo/Madzimbani/502 and threatened the Plaintiffs family to quit and/or vacate and/or cease the use of the suit land they have used, developed and occupied for a period of over 30 years uninterruptedly and commenced to assemble building materials with the intention to construct erect and/or structures on the said parcel of land and currently built a car washing structure/yard therein.

The 1st defendant stated that he is the registered owner and in occupation of parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 and that the same was sold to him by the 2nd defendant as per the attached documents. That he was informed by the 2nd and 3rd Defendants that the 2nd defendant is the son of the 3rd defendant and during the adjudication process, the 2nd defendant was correctly disclosed as the owner of the of parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 as a minor and his guardian was correctly disclosed as the 3rd defendant as this was family land always occupied by the 2nd and 3rd defendants and their family since time immemorial. The plaintiff and her deceased mother have never been in occupation of the suit land. That neither the plaintiff nor her family have been in charge of the said property as they were unable to prove any ownership when the matter was reported to the DCIO (Mariakani) about 2 years ago. That the 2nd and 3rd defendant's never interfered with any adjudication record as alleged and the same disclosed the true position of ownership and

possession on the ground. That the title deed properly issued in the name of the 2nd defendant on the 8th August 2013 upon attaining the age of majority. That he purchased the parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 from the 2nd defendant vide a sale agreement and transfer executed on the 23rd May 2014. That the valuation was duly conducted. That the consent from Land Control Board was obtained and the transfer registered on the 12th March 2015 and title issued. That the 2nd and 3rd defendants have been in occupation and use of the suit land and he took over occupation upon the property being transferred to him and he has been conducting car wash business and selling building materials on the land. That the plaintiff has no legal capacity to file the suit herein as no grant has been issued to her with respect to his parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 which belongs him. That that this Court lacks territorial jurisdiction to entertain the entire suit as the Malindi Court has jurisdiction to entertain this suit. That his occupation of that land is legal because he has all documents registered in his name including the title deed and official search. That the plaintiff and her family have never owned the said property neither has her family as there is no single document that proves so. That the plaintiff and her family have never been in control of the property as he took charge of it once he purchased it sometime back in 2014 and he has been conducting business of car wash and sale of building materials on the property.

The 3rd respondent confirms that he is the father and the then guardian of the 2nd Respondent who was registered owner and they were both in occupation of parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 before and at the time of adjudication process. That during the adjudication process, the 2nd defendant was correctly disclosed as the owner of the of parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 as a minor and his guardian was correctly disclosed as the 3rd defendant as this was family land always occupied by the 2nd and 3rd defendants and their family since time immemorial. The plaintiff and her deceased mother have never been in occupation of the suit land. That the title deed properly issued in the name of the 2nd defendant on the 8th August 2013 upon attaining the age of majority. That the 1st Defendant purchased the parcel of land known as Kilifi /Kadzonzo /Madzimbani/50 from the 2nd defendant vide a sale agreement and transfer executed on the 23rd May 2014.

This court has considered the submissions therein. The supplementary submissions were filed without leave of the court and hence will be disregarded. The application being one that seeks injunctions, has to be considered within the principles set out in the case of Giella vs Cassman Brown & Co Ltd 1973 E.A 358 and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*
2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity.

The application is based on the grounds that the on diverse dates intermittently between the months of December 2020 and January 2021 and persistently since February 2021, the 1st Defendant/respondent unlawfully entered into the late Mwanabaraka Juma Hassan parcel of land Title No. Kilifi/Kadzonzo/Madzimbani/502 and threatened the Plaintiffs family to quit and/or vacate and/or cease the use of the suit land they have used, developed and occupied for a period of over 30 years. It is not disputed that the 1st defendant/respondent is the absolute registered proprietor of the suit property. The balance of convenience does not shift in favour of the applicants. I find that the applicant has failed to establish a prima facie case against the respondents. This application has no merit and I dismiss the same and costs to be in the cause. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JANUARY 2022.

N.A. MATHEKA

JUDGE