



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 162 OF 2021

SIYAD ISSAK HASSAN.....PLAINTIFF/APPLICANT

- VERSUS -

NDEGWA NGATI.....1ST DEFENDANT/RESPONDENT

MGUDUMA NGATI.....2ND DEFENDANT/RESPONDENT

RULING

I. Preliminaries

1. Before the Honorable Court for determination is Chamber Summons application dated 18th August, 2021 filed in Court on 19th August, 2021 by the Plaintiff/Applicant herein. The application is brought under the provisions of Article 159 (2) (d) of the Constitution of Kenya, Order 42 (b) of the Civil Procedure Rules 2010 Order 40, (1) (2) and (3), Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B 3 and 3A of the Civil Procedure Act Cap 21.

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant seeks for the following orders:-

(a) Spend

(b) That pending the hearing and determination of this Application inter-parties the Honorable court be pleased to grant an order restraining the Defendants, their agents, their clansmen, their workmen or any of their proxies or in any way from interfering, dispossessing, disturbing with the Applicant's possession and quiet enjoyment of the suit property situate at Dokata village, Mackinon Road.

(c) That pending the hearing and determination of this Application inter-parties the Honorable court be pleased to grant an order restraining the Respondents, their agents, their clansmen, their workmen or any of their proxies from interfering, disturbing with the Applicant's livestock's movements and habitation in the property situate at Dokata village, Mackinon Road.

(d) That pending the hearing and determination of the main suit, the Honorable court be pleased to grant an order restraining the Defendants, their agents, their clansmen, their workmen or any of their proxies or in any way from interfering, dispossessing, disturbing with the Applicant's possession and quiet enjoyment of the suit property situate at Dokata village, Mackinon Road.

(e) That pending the hearing and determination of the main suit the Honorable court be pleased to grant an order restraining the Respondents, their agents, their clansmen, their workmen or any of their proxies from interfering, with the Applicant's livestock's movements and habitation.

(f) That pending the hearing and determination of the main suit the Honorable court be pleased to order for the Principal Land Surveyor, Kwale County to undertake a survey of the parcels of land and establish the boundaries.

(g) That the Honorable Court be pleased to order the OCS Samburu Location, OCS Makinon Road and the County Commissioner do ensure compliance and enforcement of the orders for peace to prevail.

(h) That the Honorable Court be pleased to issue such further orders it deems just and convenient in the circumstances of the

case.

3. The said application is premised on the grounds, testimony and averments founded in the 14 Paragraphed Supporting Affidavit of SIYAD ISSAK HASSAN sworn and dated 18th August, 2021 and two (2) annexures marked “SIH – 1& 2”. The deponent stated that he had been in occupation of the suit land situated at the Samburu area, Kwale County Plot in Dokata village of Mackinon Road Location of Kinango Sub-County in the County of Kwale, since he bought a from the owners sometimes in the year 2020. He annexed a copy of the sale agreement dated 25th November, 2020 terms and conditions stipulated thereof. He held that they had peacefully co-existed with all his neighbours without having had any problem with any one.

4. He deponed that later on the 1st and 2nd Defendants/Respondents started laying claim on the ownership over his property alleging it to be a property belonging to their fathers and fore fathers. He averred that they claimed that he had no right to own such big land yet he was not a local there.

His contention was that on many occasions the 1st and 2nd Defendants/Respondents and their clansmen had illegally and irregularly stormed into his property. He deponed that on all these times he had reported to the police.

5. He further deposed that the County Commissioner intervened and summoned on all the parties to avail their documents. According to him despite of this the 1st and 2nd Defendants/Respondents though turned up but failed to show any ownership documents and the County Police head ruled that he be accorded peace and tranquility to enjoy his property. This notwithstanding the Respondents insisted on him leaving the area. They declared him as a “*persona non-grata*” and if he failed to oblige they would dispossess him and steal all his livestock.

6. He deposed that the 1st and 2nd Defendants/Respondents were hell bent on removing him from his parcel of land. They were eager to grab the suit property without any justification. He stated that on 16th August, 2021 a group of youths led by the 1st and 2nd Defendants/Respondents stormed into the property and destroyed a large swaths of vegetation and vandalized some pillars of the fence on his land.

7. He said that the was apprehensive that the 1st and 2nd Defendants/Respondents would continue with their illegal actions and impunity if they were not deterred and he stood to lose his property. Therefore, it was this reason that he urged court to grant the prayers as sought in the application.

III. The 1st and 2nd Defendants/Respondents Replying Affidavit And Grounds Of Opposition.

8. On 29th September, 2021 the 1st and 2nd Defendants/ Respondents filed their 14 Paragraphed Replying Affidavit sworn and dated on 29th September 2021 by HAMISI MGDUMA NGATI and an annexure marked as “HMN”. They also filed grounds of opposition dated 29th September, 2021. He deposed that he was the 2nd Defendant/Respondent and a holder of the national identity card bearing numbers 20566778. He deponed that he had the authority from the 1st Defendant to file and plead in this case on his behalf. He annexed the authority marked as “HMN – 1”.

He held that they were peasant farmers in a place called Dokota Village. They were both siblings being the sons of the late Ngata Mgodoma and Mkambe Chitsunyu who lived at the place called Dokota Village. Indeed they were buried there.

9. He stated that their grandfather the said Mgodoma had four sons namely Ngudi Mgodoma, Charo Mgodoma, Kombo Mgodoma and Nagi Mgodoma in the order their of births.

The Deponent averred that the late Kombo Mgodoma and his younger siblings the late Ngari Mgodoma bought suit land situated on the lower part of Dokota Village which neighbors the Maili Kubwa village, in Mackinon road location. On the said land they constructed houses and became neighbors.

10. It was his disposition that the two Mgodoma siblings left their father’s initial settlements which were situated in the upper part of Dokota village which was currently occupied by their heirs of the late Ngundi Mgodoma and Kombo Mgodoma. He held that, he believed the present family feud which now the Plaintiff had rekindled, was fueled by Ngundi Mwachilungo the son of Ngundi Mgodoma and Menza Mgodoma the son of Kombo Mgodoma and their respective dependents all of whom had conspired who have all conspired to disinherit their families of their portion of land. The Plaintiff ought to but did not take keen interest to identify their specific family – For instance the Plaintiff disregarded the Permanent home built in the year 2013 before committing his funds nor its boundaries.

He denied that the Plaintiff was the legal owner to the suit property as the same was not bought legally and/or procedurally and without any proper land sale contract as the same is tainted with fraud. The Plaintiff failed to recognize the existence of the Community Interest and Mgodoma family over the suit property. He influenced the local administration particularly the area Assistant Chief and without the approval of the Community Land Management Committee and the Plaintiff failed to produce the minutes of all crucial Mgodoma family members.

IV. The Plaintiff’s Further Affidavit

11. On 25th October, 2021, having sought and granted leave of court the Plaintiffs filed a 15 Paragraphed Further Affidavit dated and sworn by SIYAD ISSAK HASSAN on 21st October, 2021. He denied there being any family feud as to who owned the large parcels of land he bought from the Ngundi family. He stated that the Ngari family through their father were welcomed and given a small portion of the land belonging to the Ngundi and Kombo but when he died his sons, the 1st and 2nd Defendants/Respondents herein refused to leave and go back to their ancestral land. Therefore, his argument was that the 1st and 2nd Defendants/Respondents were squatters who had been asked to leave

but had refused and defied the clan elders, religious leaders, area Chief, OCS, County Commissioner to leave the land as who through their efforts to resolve the dispute established that they had no right over the suit land which belonged to the Ngundi and Kombo Mgodoma family.

12. He averred that he undertook due diligence of the suit land before he purchased it through Community and Clan elders and area government officials whom all confirmed to him that the whole grazing land belonged only to the Ngundi and Kombo families. He denied that the 1st and 2nd Defendants/Respondents had any semi-permanent dwellings on the land and there was no boundary dispute as the Ngati family had no land there.

He held and as advised by his Advocate that the sale agreement of land only involved the sellers and purchasers of the respective land and not any other 3rd Party as was alleged. Indeed the agreement duly executed was proper, valid and above board and legally binding to protect the Plaintiff from the interference by the 1st and 2nd Defendants/Respondents who are illegally on the land as squatters. His contention was that the land was a private property and its approval did not require any body's approval. He stated that the property was purchased via a sale agreement signed by all the members of the families of Ngundi and Mgodoma witnessed by the area Chief and the said families who shall be summoned as witnesses during the full trial.

V. The Submissions

13. On 30th September, 2021 while all the parties were present in court, directions were granted to the effect that the Notice of Motion application dated 18.8.2021 be canvassed by way of written submissions.

Pursuant to that on 11th November, 2021 it was confirmed that all the parties had obliged and thus this Honorable Court reserved 19th January 2022 as the date for the Ruling.

A. The Plaintiff's Submissions

16. On 25th October, 2021, the Advocates for the Plaintiff/Applicants the law firms of Messrs. Abdi Aziz and Company filed their written submissions dated 22nd October, 2021. The Learned Counsels posed only one issue for the determination by this Honorable Court – whether the Plaintiff were entitled to an order for temporary injunction in terms of the prayer sought. To respond to the query, the Learned Counsel submitted on the well-established fundamental principles and threshold for granting the temporary injunction under Order 40 of the Civil Procedure Rules 2010 and the courts discretion on doing so. They held that in exercising this discretion the court ought to appreciate the facts and apply the law. They cited the Provisions of Order 40(1) (a) and (b) to support their point hereof.

They argued that Order 40 (a) and (b) required that an Applicant to prove that a property in dispute was in danger of being alienated or disposed of or damaged and that the 1st and 2nd Defendants/Respondents had threatened or intended to remove or damage the same and hence the court was asked to grant a temporary injunction to restrain such acts.

17. According to the Learned Counsel, from the instant case the Plaintiff/Applicant had sworn that the 1st and 2nd Defendants/Respondents intend or had alienated or damaged the property and had impeded on the grazing path of the Plaintiffs/Applicant's livestock without lawful justification.

To buttress on this argument they relied on the two cases of ***Giella –Versus- Cassman brown and Co. limited 1973 E.A. and Mrao Limited –versus- First American Bank of Kenya Limited. Civil Appeal No. 39 of 2002.***

They argued that the Plaintiff/Applicant had a *Prima Facie* case with high chances of succession. He was the legal owner of the large herds of livestock consisting mainly of camels and goats. He required a large grazing area and after an extensive search he settled on the suit land on Dokota, Mackinon Road, County of Kwale owned and inhabited by the Ngundi and Kombo Families. They averred that after extensive background check involving the area religious leaders, Community Leaders, Area Chief, Local Security apparatus entered into an agreement for the purchase of the parcel of land measuring approximately 300 acres.

18. The Learned Counsel averred that the Plaintiff/Applicant made sure that the sale process and/or transaction was above board by ensuring that all the Ngundi and Kombo families executed the sale agreement and which was witnessed by the local leaders.

They submitted that part of the terms and conditions of the agreement was that the Plaintiff/Applicant was to be given vacant possession of the whole parcel of land for him to move in with his herd of livestock and settle in the area without any problem. On this end he developed a certain legitimate expectations that the 1st Defendant/Respondent who had no claim on the land would vacate and go back to their ancestral land.

However, he came to learn that the Defendant/Respondents sold their ancestral land and were illegal occupying their cousins land.

It was their contention that the Defendants/Respondents had failed, declined and/or neglected to produce any document or witness from the elders of the community who knew the history of the Mgodoma families who could testify that they owned the suit land.

Therefore it was the Learned Counsel's submissions that the Plaintiffs/Applicants was an innocent purchaser for value who was fully protected by the Constitution of Kenya and the Land registration Act and hence they implored the court to safeguard his interest in the suit property. The Learned Counsel in summary held:-

(a) They denied the Plaintiffs/Applicants feud fuelled by Ngundi Mwachilungo & Menza Kombo in a bid to disinherit them.

(b) He consulted widely and his agreement was not fraud

(c) There were clear family boundaries. He bought from the Ngundi family and the Ngati family had no land there. Instead they were squatters and had defied elders, clan, religious leaders, area chief and OCS to return to their land.

The Learned counsel argued that the Plaintiff/Applicant stood to suffer irreparable injury if an order of injunction was not granted having entered into a sale agreement and taken vacant possession with legitimate expectation to carry out the livestock farming in the land.

They relied on the decision of *Waithaka –versus- Industrial & Commercial Development Corporation (2000) eKLR pg. 381. & Joseph Siro Mosiomo –versus-HFCK & 3 Others Nairobi HCCC No. 265 of 2007 (UR)*

Finally, the Learned Counsel held the balance of convenience in granting the injunction orders sought was to allow the order as prayed as to disallow it would amount on conferring more benefit to the Defendant/Respondent at the expense of the Plaintiff/Applicant who already in danger of his livestock's movement being disrupted.

In the long run the y urged Court to allow the Notice of Motion application dated 18th August, 2021 with costs.

B) The Defendants Written Submissions

On 11.11.2021 while the Learned Counsels for the Plaintiffs/Applicants and 1st and 2nd Defendants/Respondents Learned Counsel for the Defendants Mr. Duncan Mwanyumba appeared in court by virtual means he emphatically turn his attention to the Advocate for the Plaintiff Mr. Abdul Aziz for being the main cause. He kept on insisting on wanting to cross examine him on certain aspects he alleged the counsel had committed. This Honorable Court declined to that request. As a result, he opted not to even file written submissions on behalf of the 1st and 2nd Defendants/ Respondents. Hence the records do not bear the submissions.

VI. Analysis And Determination

19. I have read all the filed pleadings and the written submissions by all the written submissions by all the parties cited authorities and the relevant provisions of the law. With regard to the Notice of Motion application dated 18th August, 2021.

In order to arrive at an informed decision, I have framed the following issues for consideration.

(a) Whether the Plaintiff/Applicant's Notice of Motion application dated 18.8.2021 meets the fundamental threshold principles of granting temporary injunction as founded under Order 40 (1) (2) and (3) of the Civil Procedure Rules 2010.

(b) Whether the parties are entitled to the orders sought.

(c) Who will meet the costs of the application?

ISSUE No. (a) Whether the Plaintiff/Applicant's Notice of Motion application dated 18.8.2021 meets the fundamental threshold principles of granting temporary injunction as founded under Order 40 (1) (2) and (3) of the Civil Procedure Rules 2010.

Brief Facts

20. Prior to dealing with the analysis on this matter. I need to extrapolate on the brief facts to this case. From the filed pleadings by the Plaintiff/Applicant and the 1st and 2nd Defendants/Respondents herein it stated that on 25th November 2020 the Plaintiff/Applicant and the Ngundi and Kombo Mgodoma family entered into a sale agreement terms and condition stipulated thereof for the purchase of the suit land situated at Samburu are, County of Kwale known as Plot in Dakota Village of Mackinon Road Location of Kinango sub-County. From that time onwards he took possession and had been carrying out livestock farming of keeping mainly Camels and other domestic animals thereon. He bought it from the Ngundi and Kombo Mgodoma family. Thereafter he lived there peacefully.

21. Nonetheless, he started encountering problem from the 1st and 2nd Defendants/Respondents who laid claim to the suit property alleging that it belonged to their fathers and fore fathers. They felt bad that the Plaintiff owned such a large parcel of land yet he never belonged from that area. He reported the matter to the County Commissioner who intervened and summoned all the parties and urged them to produce their documents but in vain. Instead they would declare him a stranger there and threatened to steal all his livestock and dispose him of his land. Infact, in August, 2021 they made their threats good by vandalizing his farm vegetation and the pillars of his perimeter wall.

On the other hand the Defendants allege that land belonged to their ancestors and that is where they were all buried. They claim the Plaintiff/Applicant had fuelled the family funds and had influenced the local leaders particularly the local area chief to illegally acquire the land where they claim they had built permanent houses.

22. They wanted the Plaintiff/Applicant out of the suit property. It's for these reasons that the Plaintiff/Applicant decided to institute this suit seeking for temporary injunction orders to restrain them from any further interference on the suit land and/or trespassing and causing further damages and wastage on it until the matter was finally heard and determined.

23. Now having set out the brief facts on the matter, may I now turn to the issues at hand under this sub-heading.

I have relied on the principles laid down in the *Locus Classius Case of “The Giella –Versus- Cassman Brown Case (Supra)* where it laid down the conditions for granting of an interlocutory injunction were settled as follows:-

“The condition for the grant of an Interlocutory Injunction are now, I think well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success.

Secondly, an Interlocutory Injunction will be normally not granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Third, if the Court is in doubt, it will decide an application on the balance of convenience.

Before proceeding further the fundamental issue to ponder here is whether the Plaintiff/Applicant has made a “*Prima facie*” case with a probability of success. This question was clearly answered in the famous case of *MRAO –Versus- First American bank of Kenya Ltd. & 2 others (2003) eKLR 125* where “*a prima Facie*” case was described as follows:-

“A Prima Facie case in a civil application includes but not confirmed to “a genuine and arguable case”. It is a case which on material presented to the court a tribunal property directly itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

24. In this instant case, the Honorable Court is to answer whether the Plaintiff/Applicant has a “*Prima Facie case*” to warrant being granted interim temporary injunction or not. The matter before this court revolves around an issue of trespass, encroachment and interference onto the suit property by the Defendants.

Before proceedings even further, the Honorable Court has noted that the 1st and 2nd Defendants/Respondents have nothing to do with the suit land. There is no evidence placed before court to indicate them or being the legal owners to the suit land nor parties to the duly executed sale agreement on the sale of the land between the plaintiff and the seller. This court is anxious on their exact interest or locus to the suit.

Be that it may, the Plaintiffs claims to have legally bought the parcel of land from the Ngundi and Kombo family. Indeed upon completion he had lived and occupied it from the year 2020. He was carried out cultivation and farming of his livestock peacefully. He alleges that the Defendant who are also claiming ownership to the land on the basis of the being an ancestral land for their fore father and where they were buried and they built permanent houses had trespassed vandalized and destroyed his property.

Hence, the main question to answer, is whether indeed the Defendants/Respondents trespassed encroached into the land legally belonging to the Plaintiff.

Further, from records the Plaintiff duly executed a sale agreement on 25th November, 2020 with the 1st and 2nd Defendants/ term and conditions stipulated thereof. Again the court stresses there is nowhere the 1st and 2nd Defendants/Respondents are involved at all. All these are issues which would require adducing of examination in chief and cross-examination in a full trial as per the provisions of the Evidence Act Cap 80 of the Laws of Kenya. They cannot be determined adequately and fairly at this interlocutory stage.

However, in the meantime the Honorable Court holds that the Plaintiff/Applicant has adequately demonstrated to be having a “*Prima facie Case*” with a chance of success.

On the second arm of granting injunction, it is not in dispute that upon execution of the sale agreement the Plaintiff/Applicant made payment for the purchase of the land – 500 acres as consideration. Further, it is stated that he has invested on it substantially through building of structures and farming of large livestock. The 1st and 2nd Defendants/ Respondents have failed to produce any documents on ownership nor any costs incurred, or damages they are likely to suffer if the Plaintiff was to continue being in occupation of the suit land.

25. It is for this reason that this court is satisfied that to deny the Plaintiff/Applicant the orders of injunction he would stand to suffer substantial irreparable damages which he cannot be compensated by way of damages.

Besides, in the event that the case is heard eventually and the Plaintiff losses it the 1st and 2nd Defendants/Respondents will be given the suit land which the Plaintiff/Applicant would be holding in lieu. For this reason therefore the consideration is to grant the orders as prayed.

Thirdly, the balance of convenience in the given circumstances tilts in favour of granting the orders as prayed to the Plaintiff/Applicant.

VII. Determination

26. The upshot of the foregoing, and based on the detailed analysis, I do proceed to make the following orders:-

(a) THAT the Notice of Motion application by the Plaintiff/Applicant dated 18th August, 2021 is found to be meritorious and therefore is allowed on all the prayers sought with costs.

(b) THAT Costs is awarded to the Plaintiff/Applicant to be borne by the 1st and 2nd Defendants herein.

(c) THAT for expediency sake this matter to be heard and finalized within the next ninety (90) days from today. Thus the case to be mentioned on 17th February 2022 for purposes of Pre-trial conference and fixing a hearing date.

(d) THAT the costs to be in the cause.

IT IS ORDERED ACCORDINGLY.

RULING DELIEVERED ON THIS 19TH DAY OF JANUARY, 2022

HON. JUSTICE L. L NAIKUNI (JUDGE)

ELC MOMBASA

In the Presence of:

M/s. Yumna Court Assistant.

Mr. Abdi Aziz Advocate for the Plaintiff/Applicant

Mr. Duncan Mwanyumba Advocates for the 1st & 2nd Defendant/Respondents.