



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 133 OF 2015 (O.S.)

ALI MOHAMED MUSA & 6 OTHERS.....PLAINTIFF/RESPONDENT

- VERSUS -

MAHMOOD HASSAM & 4 OTHERS.....DEFENDANTS/APPLICANTS

RULING

I. PRELIMINARIES

1. When this matter was slated for mention on 7th December, 2021, parties did make an application requesting the Honorable Court to grant them a practical direction on how the matter was to proceed henceforth from where it had reached before the previous ELC Judge, Justice Honorable Yano.

Upon conducting a quick perusal of the file, the Honorable Court noted that on the 17th July, 2018, this Honorable Court delivered a Ruling authorizing and directing the Deputy Registrar (DR) of the Environment and Land Court, pursuant to the Provisions of Order 18 Rule 11 of the Civil Procedure Rules 2010 to undertake and conduct a site visit (“*Locus in Quo*”) for purposes of inspecting, examining the facts on the ground and establishing the actual situation of the suit property known as Land Reference Number 819/II/MN (Hereinafter referred to as the Suit Land). Indeed, the said site visit took place and thereafter for the DR to prepare a report to be presented to court.

Subsequently, this took place in the presence of all the parties and adequate security operations. A report dated 20th August, 2021 was presented to court to that effect. It’s based on this report that the directions of the Honorable Court was sought. Therefore, the Honorable Court having obliged to do so, it now on this date proceeds to provide the said directions as requested.

II. THE BACKGROUND

2. Prior to proceeding further, on, it is imperative that I extrapolate on some brief background facts to the matter. Primarily, this is a suit on a dispute pertaining to the ownership to the suit land between the Plaintiffs and the Defendant herein. As shall be indicated herein below, while the Plaintiffs are laying claim on the land by virtue of the Land Adverse Possession, the Defendant holds that he is the legal and absolute proprietor to the suit land with all the indefeasible title, rights and interest vested in him by law.

However, the immediate issue emanates from two (2) filed Notice of Motion applications dated 22nd March 2018 and another dated 10th April, 2018 respectively. Both of these applications were filed before this Honorable Court by the Defendants/ Applicants herein.

(a) The Notice of Motion application dated 22nd March, 2018

This application was brought under the Provisions of Rules 15, 16, and 17 of The High Court (Organization and Administration General) Rules, 2016, Sections 3A, 6 and 7 of the Civil Procedure Rules 2010, Articles 40, 50 and 162 (2) (b) of the Constitution of Kenya. The said application sought for orders stay of the execution of the Judgment delivered on dated 17th January, 2012 and issued on 30th January, 2018. It sought to stay it and its consequential orders pending the hearing and determination of the said applications. It further sought to have the judgment and all the consequential orders be discharged and/or set aside and the Defendants be allowed to defend the suit. Eventually, on 17th July, 2021 the application was heard the granting the orders sought were granted accordingly. Indeed, the Defendants were granted 14 days to file their Defence.

(b) The Notice of Motion Application dated 10th April, 2018

This application was brought under the provisions of Article 40 (1) and (2) of the Constitution of Kenya, Section 63(e) of the Civil Procedure Act Cap. 21 and Order 40 Rules 1 (a) and 10(1) (a) and (c) of the Civil Procedure Rules, 2010 respectively.

The aforesaid application sought orders for temporary injunction restraining any persons from interfering with all that the suit property known as Land Reference numbers 819/11/MN pending its hearing and final determination. It further sought prayers for court to conduct a site visit ("*Locus in quo*") in order to inspect the suit property and make its observations establishing the fact whether or not the Defendants/Respondents were in occupation or possession of the suit property as alleged. It will be noted from its pleadings the Plaintiffs/Respondents had alleged that the suit land had been unoccupied, and without any development on it. They alleged that there were no structures, crops and/or activities on the suit property a fact which the Defendants/Applicants vehemently refuted. It was a highly contested issue and therefore needful to have the site visit conducted. Finally, the Defendants/Applicants sought to be granted permanent injunction orders restraining the Plaintiffs/Respondents from entering, constructing, cultivating, cutting vegetation or in any way interfering with the Defendants quiet possession of the suit property.

3. The said application was not opposed. Hence, all circumstances and facts of the case remaining constant and based on the ingredients founded in *Locus Classius* case of the famous **Giella – Versus - Cassman Brown case (Supra)** being:-

- (a) The Applicant has established having a *Prima Facie*.
- (b) The Applicant will suffer irreparable damage if not granted the orders.
- (c) The Balance of convenience is to grant the orders.

the Honorable Court was inclined to grant the orders as prayed by the Defendants/Applicants in the aforesaid application.

4. Nonetheless, despite granting the above orders, and rather cautious and circumspect this honorable court still wisely decided to direct that the Deputy Registrar organizes and conducts a site visit "*locus in quo*" for purposes of carrying out an inspection by court of the suit property and make its observations to establish the actual situations on the ground – the persons in occupation or possession of the land.

III. The Site Visit by the Deputy Registrar.

5. It is based on this direction by the Honorable Court that the Deputy Registrar upon conducting the site visit in the presence of all parties on 20th August 2021 prepared a detailed and comprehensive report. From the contents of this report these are the observations made in summary form:-

- (a) The site visit was in the presence of the Advocates
- (b) There were residents of the area who were visibly hostile and hence the need for supervision by the police and the General Service Unit (also referred to as the G.S.U.) officers.
- (c) The area had several temporary structures/shanties across the vast disputed parcel of land.
- (d) A random selection of the house was conducted as agreed with all the Advocates present as well as identified representatives of the residents. These included a sample of six (6) houses belonging to Mariam Fondo (22 years old), Sheru Msomba 43 years old, Mwyni Badi Khamisi 46 years old, Emmanuel Ndoro Dida, Gabriel Mwamburi and Musa Ksaam Hussein.

From the above sampled observations some unique features seem to cut across all of them. These are analyzed as follows:-

- (a) Some of the houses were inhabited by the owners with their families while others were vacant.
- (b) The residents had been living on the land and had their houses on diverse dates, from as far as the years of 1975, 2000, 2001, 2014, 2017 respectively.
- (c) There had been some periodic demolition of the shelters by the police.
- (d) There were both permanent and temporary structures separated by a marram road. These included shops, schools, Mosques, cattle dips, churches.

IV. THE DIRECTIONS

8. Apparently, from the filed pleadings and the contents of the site visit report, there are still several pending legal issues particularly on the legal ownership and possession of the suit property which will inevitably require the hearing and final determination through a full trial conducted by this Honorable Court hereof. Therefore, it's for these reasons that I do proceed to provide the following tangible, practical and workable directions with a clear time frame to be strictly adhered with. These are:-

(1) THAT this matter be fixed for a full trial by all parties upon holding a pre - trial conference session under the provision of Order 11 of the Civil Procedure Code 2010. In order to tackle and finally determine all the pending issues concerning this case, the matter to be mentioned on 17th February, 2022 for this purpose.

(2) THAT for the sake of expediency this matter be fixed and heard within the next ninety (90) days from the date of this ruling direction.

(3) THAT directions on the Originating Summons dated 12th June, 2015 under the Provisions of Order 37 Rules 16, 17, 18 and 19 of the Civil Procedure Rules 2010 be and are hereby taken as follows:-

(i) The Originating Summons be converted to a Plaint and the Replying Affidavit to a Defence.

(ii) The filed Supporting Affidavit by the Plaintiffs/Defendants to be converted to witness statement.

(iii) The Defendants/Respondents filed Replying Affidavit to be converted to a Defence. Nonetheless the Defendants be at liberty within the next Twenty One (21) days to file an Amended Defence and Counter Claim, if need be.

(iv) The Plaintiffs is granted Fourteen (14) days upon service to file and serve Reply to Defence.

(v) The matter to be heard by adducing “Viva Voce” evidence and upon service, the Plaintiffs are granted seven (7) days to file a Reply to Defence.

IT IS ORDERED ACCORDINGLY

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS.....18TH.....DAY OF.....JANUARY....., 2022.

HON. JUSTICE L.L. NAIKUNI (JUDGE)

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna Hassan – the Court Assistant

M/s. Barayiani Advocate for the Plaintiffs

Mr. Gathi Holding Brief for Mr. Sitonik Advocate for the Defendants