



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 55 OF 2020 (OS)

DOMINIC JUMA KIRAO & 106 OTHERS PLAINTIFF/RESPONDENT

-VERSUS-

SHABBIR KASSAMJEE DEFENDANT/APPLICANT

RULING

1. By the Notice of Motion dated 19th January, 2021, Shabbir Kassamjee (*the Defendant*) prays for an order of temporary injunction restraining the 107 Plaintiffs from further trespassing on, wasting, further constructing on, alienating, sub-dividing, leasing, selling or otherwise interfering or dealing with the Defendant's Plot No. 120 Malindi pending the hearing and determination of this court.
2. The Defendant further craves an order of this Court directing the Officer Commanding Malindi Police Station, the Area Chief Ganda Location and the Assistant Chief Ganda Sub-location to enforce and supervise compliance with the said order of injunction.
3. The application which is supported by an affidavit sworn by the Defendant is premised on the grounds:
 - (i) *That the Defendant is the registered proprietor of all the parcel of land known as Plot No. 120 Malindi, LT:37, Folio: 225, File 3403 measuring approximately 50.07 Acres or thereabouts as more particularly demarcated and delineated on Deed Plan No. 5079;*
 - (ii) *That the Plaintiffs have interfered with the said property by trespassing thereupon, occupying parts thereof and erecting permanent structures as well as disposing parts thereof by way of sale to other people;*
 - (iii) *That the Plaintiffs' actions have led to more people settling on the suit property as squatters with an intention of dispossessing the Defendant of his parcel of land and claiming ownership thereof by way of adverse possession.*
 - (iv) *That unless otherwise restrained the Plaintiffs will continue to interfere with the Defendant's enjoyment of the said parcel of land by erecting permanent structures thereon and disposing off portions thereof; and*
 - (v) *That the Plaintiffs stand to suffer no prejudice if the orders sought are granted and it is only fair and in the interest of justice that the same be granted.*
4. The application is opposed. In a Replying Affidavit sworn on their behalf by the 1st Plaintiff – Dominic Juma Kirao and filed herein on 8th February 2021, the Plaintiffs aver that while the Defendant may be the registered owner of the suit premises, his proprietary rights and/or interest were extinguished by virtue of Section 7 as read with Section 17 of the Limitation of Actions Act and consequently therefore he has no cause of action against them.
5. The Plaintiffs deny that they are recent entrants to the suit property and assert that they have been residing and/or occupying the same from the year 1960 and even before. It is further the Plaintiffs' case that the Defendant has failed to prove construction of new structures on the suit premises as the photos exhibited are of old structures taken way back before the commencement of the suit.
6. In addition to the Replying Affidavit, the Plaintiffs have also filed Grounds of Opposition dated 8th February, 2021.
7. I have perused and considered the Defendant's application and the response thereto by the Plaintiffs. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.
8. The Defendant herein prays for an order of injunction to restrain the Plaintiffs from further trespassing onto the suit property, wasting the

same, carrying on further constructions, alienating and/or dealing or interfering in any manner whatsoever with the suit property. The Plaintiffs however contend that any rights that the Defendant may have had on the suit property have been extinguished by operation of the law.

9. By their Originating Summons filed herein on 27th July, 2020, the Plaintiffs seek for an order declaring that they are the proprietors of the suit property said to be measuring some 50.07 Acres on the grounds that they have acquired the same by way of adverse possession. They also desire to be issued with certificates of title in respect of the suit property.

10. By his Replying Affidavit sworn on 31st August, 2020 and filed herein on 1st September 2020, the Defendant denies that the Plaintiffs acquired the said property by way of adverse possession or at all. By his counter-claim dated and filed herein on 1st September 2021, the Defendant on the other hand prays for an order of vacant possession of the portion of land measuring 4 acres that he states has been illegally occupied by the plaintiffs, their servants and/or agents.

11. It is the Defendant's case that notwithstanding their institution of this suit, the Plaintiffs have further encroached into other parts of the suit property and have now commenced construction of permanent and semi-permanent structures thereon. It is the Defendant's case that unless restrained by this Court the Plaintiffs shall continue with the said constructions and further wastage of the land.

12. The Principles for the grant of an order of injunction were long-settled in the often cited case of **Giella -vs- Cassman Brown & Company Limited (1973) 1 EA 358**. Those principles require that the Applicant establishes a *prima facie* case with a probability of success at the trial, that the Applicant demonstrates that damages will not be an adequate remedy and that if the Court is in doubt on the foregoing, it proceeds to determine the matter on a balance of convenience.

13. As to what would amount to a *prima facie* case in a case such as this, the Court of Appeal offered guidance in **Mrao Limited - vs- First American Bank of Kenya Limited and 2 Others (2003) eKLR**, thus:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable” case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has been apparently infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. In the matter before me, there was no dispute that the Defendant is as at now the registered proprietor of the suit property. That much is clear from Paragraph 3 of the Affidavit of the 1st Plaintiff in support of the Originating Summons. At Annexure SK-2 of his Replying Affidavit, the Defendant confirms that position by exhibiting a certificate of Postal Search showing that as at 10th July 2019, he was the registered proprietor of the land.

15. While they do not dispute the Defendant's registration as the owner of the land, the Plaintiffs contend that they have lived on and occupied the land for a period exceeding 12 years and that hence, the Defendant's rights to the land have since been extinguished by the operation of the law. They aver that they are now entitled to the land under the doctrine of adverse possession.

16. I have looked at Plaintiffs Supporting Affidavit to the Originating Summons. I was unable to find anywhere where the Plaintiffs claim to have occupied the entire 50.07 acres comprised in the suit land. Indeed the said Affidavit does not show the portion of land claimed to be occupied by any of the Plaintiffs.

17. I have similarly taken a careful look at the Grounds of Opposition as well as the Replying Affidavit sworn by the 1st Plaintiff in opposition to this present application. There is absolutely no denial of the Defendant's contention that the Plaintiffs have now encroached onto other parts of the suit property hitherto unoccupied by themselves and/or that they are selling portions thereof to third parties.

18. Unless and until a determination is made herein, the Defendant remains the registered proprietor of the suit property. His rights as such are protected under **Section 26(1) of the Land Registration Act** which provides as follows:

“(1) The Certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

19. While the Plaintiffs are certainly in occupation of portions of the suit property as admitted by the Defendant, it was clear to me that their continued encroachment on other parts of the property would occasion further wastage of the land and that the Defendant stands to suffer irreparable loss.

20. Accordingly, I am satisfied that the Motion before me dated 19th January, 2021 has merit. I allow the same in terms of Prayer No. 3 thereof. The Officer Commanding Malindi Police Station is hereby directed to enforce and supervise compliance with the order as sought under Prayer No. 4 of the Application.

21. The costs of the application shall be in the cause.

Ruling dated, signed and delivered virtually at Nyeri this 10th day of February, 2022 via Microsoft Teams.

In the presence of:

Mr. Kenga for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. Olola

JUDGE