



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.18 OF 2015

1. KASSIM AHMED OMAR

2. ATHUMAN MUHAMAD BAKAR.....PLAINTIFFS/APPLICANTS

=VERSUS=

1. ANWAR AHMED ABEID

2. SALIM AHMED ABEID

3. HYDERY (P) LTD

4. THE REGISTRAR OF TITLES MOMBASA

5. THE NATIONAL LAND COMMISSION

6. THE HONORABLE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS

R U L I N G

1. The Application before me is the one dated 10th February 2015. In the Application, the Plaintiff is seeking for the following orders:

(a) That this Honourable court be pleased to issue orders of injunction restraining the 1st, 2nd and 3rd Defendants/Respondents their servants, agents or any person acting under them from trespassing upon, selling, mortgaging, transferring, or in any other way dealing with the Plaintiffs/Applicant's parcel of land, previously unregistered but no registered as portion numbers 28536 and 28771 Lamu pending the hearing and determination of this suit.

(b) That the costs of this application be in the cause.

(c) That this Honourable court do make such interlocutory orders as it may deem just and expedient pending the hearing and determination of this application.

2. The Application is premised on the grounds that the Plaintiffs are the rightful owners of the previously unregistered parcel of land, now registered as portion numbers 28536 and 28771 Lamu; that the 2nd Defendant fraudulently caused the suit property to be sub-divided into two portions

and that the 2nd Defendant has transferred and registered parcel of land number 28536 Lamu in the name of the 3rd Defendant.

The Plaintiffs'/Applicants' case:

3. The 1st Plaintiff deponed that the suit property initially measured approximately thirty eight (38) acres before it was registered into two portions known as 28536 and 28771 Lamu measuring 7.00 ha and 9.650 ha respectively.
4. It is the Plaintiffs' case that they sold to the 1st Defendant three acres; that unknown to them, the 1st Defendant subdivided the suit properties and had them registered in his name and that the 2nd Defendant transferred one portion being 28536 Lamu to the 3rd Defendant.

The Defendants'/Respondents' case:

5. The 2nd Defendant filed his grounds of opposition in which he averred that the Plaintiffs' Application is incompetent; that him and the 1st Defendant are purchasers for good value and consideration from the original owners of the suit property and that the allocation and the subsequent issuance of title was regular.
6. The 3rd Defendant's Director filed a Replying Affidavit in which he deponed that the 3rd Defendant is a bona fide registered proprietor of CR. NO. 51135 having purchased it from the 1st Defendant for Kshs.24,000,000.
7. According to the 3rd Defendant's Director, the 3rd Defendant has paid all the requisite ground rent and that there is no evidence that the suit property was allegedly acquired by the 1st Defendant.

Submissions:

8. The Plaintiff's advocate submitted that the Plaintiffs have always been and are still in occupation of the suit property; that the 1st Defendant fraudulently caused the suit property to be subdivided and registered in his name and that the Plaintiffs have a right over the suit property.
9. Counsel submitted that in considering whether or not a prima facie has been established, the court should not hold a mini trial. All the court has to see is that on the face of it, the person applying for injunction has a right which has been or is threatened with violation.
10. Counsel submitted that the Plaintiffs will lose the only place they call home if the suit property is not preserved.
11. The Plaintiffs' counsel relied on numerous authorities which I have considered.
12. The 3rd Defendant's counsel submitted that the suit property was regularly conveyed to the 1st and 2nd Defendants and subsequently to the 3rd Defendant.
13. Counsel submitted that the Plaintiffs have not given any evidence to show that they own the suit property.
14. Counsel submitted that the 3rd Defendant is in possession of a certificate of title; that according to Section 26 (1) of the Land Registration Act, a certificate of title is to be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and that such a title can only be challenged on the ground of fraud or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
15. Counsel submitted that the Plaintiffs have also not shown that they shall suffer injury or prejudice and that the value of the land can be quantified.

Analysis and findings:

16. The Application by the Plaintiffs is principally grounded on the fact that the suit property is part of the land measuring 38 acres which they are occupying.
17. According to the Plaintiffs, the suit property was unlawfully and fraudulently carved out of the 38 acres of land.

18. On the other hand, the 1st, 2nd and 3rd Defendants claim is that the suit property is duly registered in their names and that the Plaintiffs have not shown any evidence to show their proprietary rights in the two parcels of land.
19. The law relating to the grant of an injunction was settled in the case of **Giella Vs Cassman Brown & g. Ltd (1973) EA 358** where it was held that for a temporary injunction to issue, an applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the application would be determined on a balance of convenience.
20. On what constitutes a prima facie case, the Court of Appeal in the case of **Mr Rao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125** stated as follows:

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicants' case upon trial. That is clearly on standards which is higher than an arguable case.”

21. In **Nguruman Limited Vs Ian Bonde Nelson & 2 others (2014) e KLR**, the Court of Appeal held as follows:

“We reiterate that in considering whether or not a prima facie has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona question to raise as to the existence of the right which he alleges..... This means no more than that the court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed.”

22. Other than establishing that he has a prima facie, the Applicant must show the injury he is likely to suffer. In **the Nguruman Limited Case**, the court held as follows:

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted however strong the applicants' claim may appear at that stage. If prima facie case is not established, the irreparable injury and balance of convenience need no consideration.

23. The Deed Plans annexed on the Certificate of title for L.R. NO. 28536 and 28771 in the name of the Defendants and registered on 26th January 2011 shows that the land is part of Pate Island.
24. The Defendants have not rebutted the fact that the Plaintiffs are residents of the Island.
25. Being occupants of part of the land that was allocated to the 1st and 2nd Defendants, the Plaintiffs have the right of access to the said land pursuant to the provisions of Article 60(1)(a) of the Constitution.
26. It therefore does not matter that they do not have the title documents in respect to the suit property.
27. The fact that they are residing on the land that the suit property was carved from gives them a right to question the process that the 4th, 5th and 6th Respondents followed before allocating the suit property to the 1st and 2nd Defendants who then sold it to the 3rd Defendant.
28. Consequently, I find that the Plaintiffs have a right to question the process that the 1st and 2nd Defendants followed to be allocated the two parcels of land.
29. A certificate of title is an end product of a process. If the process that was followed in issuing the

title did not comply with the law, then such a title can be cancelled by the court. However, the question as to whether the proper procedure was followed before the same titles were issued can only be ventilated and determined by the trial court.

30. Considering that the Plaintiffs are living on the suit land, or on the land that formed part of the suit land, the Plaintiffs are likely to be evicted unless the interim orders of injunction are issued. Eviction of the Plaintiffs will definitely render them destitute thus occasioning them irreparable injury that may not be compensated by damages.

31. For those reasons, I allow the Application dated 10th February 2015 in terms of prayer numbers 3 and 4.

Dated and delivered in Malindi this 11th day of September 2015.

O. A. Angote

Judge