



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 176 OF 2017**

**HILLARY MJOMBA & FAMILY.....PLAINTIFFS**

**VERSUS**

**FRANCIS MWASHIGHADI**

**ADAN KIHARA.....DEFENDANTS**

**JUDGEMENT**

The 1<sup>st</sup> Plaintiff avers that she is competent to swear this affidavit on her own behalf and on behalf of all her family who have consented and authorized her to do so as per the authority filed herein. That they are all adult persons who have settled on a portion of the subject parcel of land known as Adjudication Section Taru-Voi P/No. 78 Done-1996 measuring approximately 6.20 acres which belonged to her husband's father Mwachofi Mwalago of ID/No. xxxx/xxx/xx he resided since the year 1974. That they have been utilizing their land since it was given and constructed house in the said parcel of land no one even complained about their land. They have always controlled their land affairs and have all along recognized as legitimate owner of said parcel of land and they have for all purposes and intent called the subject parcel of land their home and most of their family members were buried on this same land. That in year 2009 a person by the name Adan Kihara, a Somali by tribe started to construct a house on their land, when they asked him he said he is there temporarily but he is now using force to use the land. That he purchased the land from the 1<sup>st</sup> Defendant. That the Defendant says that the land belongs to their family when all the years they used the land they never raised any complaint regarding their land. That currently the Defendants are in the process of alienating portions of the subject land. The Plaintiffs pray judgment against the Defendants:

- a) An order of permanent injunction to restrain the Defendants by themselves or their families, servants or agents or whomsoever from selling, constructing and/or in other way alienating any portion of Land at the mentioned area - Adjudication Section Taxu - Voi P/No.78.
- b) Costs of the suit
- c) Interest at court rates
- d) Any other relief this court may deem fit to grant

The Defendants in their defence state that the Plaintiff has no authority to represent the other family members as per the law as no authority has been filed and the other plaintiffs are unknown. The Defendants aver that this Honourable court has no jurisdiction to entertain the suit at hand.

This court has considered the case and the submissions therein. PW1 testified that they have lived on the suit land since 1974 and the Defendants have never lived there. Her husband and mother in law are buried there. Soon thereafter the Defendants invaded the land and threatened to evict her and her family. PW2 a neighbour moved there in 1990 and confirms that she found the Plaintiff and her family living there. PW3 and PW4 corroborated the Plaintiff's case. PW5 an adjudication officer identified the sketch plan of the suit land and confirmed that it was demarcated and given to Mwachofi Mfuko Mwalogo the Plaintiff's family. There was no appeal to their offices in this matter. DW1 the 1<sup>st</sup> Defendant stated that the land belonged to his father and that the Plaintiff's father was merely given land to graze. That 2<sup>nd</sup> Defendant was given the land by his father in 1985. DW2 the 2<sup>nd</sup> Defendant states he was given land by DW1 and then he bought his plot.

The case 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. That the Plaintiff stated that they have settled on a portion of the subject parcel of land known as Adjudication Section Taru-Voi P/No. 78 Done-1996 measuring approximately 6.20 acres which belonged to her husband's father Mwachofi Mwalogo of ID/No. xxxx/xxx/xx he resided since the year 1974. That they have been utilizing their and since it was given and constructed house in the said parcel of land no one even complained about their land. PW2, PW3 and PW4 corroborated the Plaintiff's case. PW5 an Adjudication Officer identified the sketch plan PEx1 of the suit land and confirmed that it was demarcated and given to Mwachofi Mfuko Mwalogo the Plaintiff's family. There was no appeal to their offices in this matter. The Defendants produced no evidence to contradict the sketch plan. DW1 produced proceedings from the DO where it was not clear how the decision was arrived at. I find the balance of convenience titles in favour of the Plaintiffs as they have been in occupation of the suit land since 1974. The Defendants have not produced any proof of ownership. The defence did not call any independent witness to corroborate evidence. I find that the Plaintiffs have established their case on a balance of probabilities and I grant the following orders;

1. An order of permanent injunction to restrain the Defendants by themselves or their families, servants or agents or whomsoever from selling, constructing and/or in other way alienating any portion of Land at the mentioned area - Adjudication Section Taxy - Voi P/No.78.

2. Costs of the suit

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MARCH 2022.**

**N.A. MATHEKA**

**JUDGE**