



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO.191 OF 2021

ALI MOHAMED ALI

JUMA RASHID MWAMBA

MOHAMED BAKARI AWADH

HAMISI MOHAMED OMARI

NANA HUSSEIN SALIM.....PLAINTIFFS/APPLICANTS

VERSUS

1. SHEIKH ZAYED CHILDREN WELFARE CENTRE

2. NATIONAL LAND COMMISSION

3. LIKONI POLICE STATION

4. COUNTY GOVERNMENT OF MOMBASA.....DEFENDANTS/RESPONDENT

RULING

The application is dated 16th September 2021 and is brought under Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, Section 1A & B and Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya Article 40(2) (a) and (b) of the Constitution of Kenya, 2010 seeking the following orders;

1. This application be certified as urgent and service thereof be dispensed with in the first instance.
2. This Honourable Court do grant an injunction against the Defendants/Respondents. Their agents, employees, servants, assignees and or any other person authorized by them restraining them from trespassing into and or from demolishing the Plaintiffs/Applicants structures on Plot Number MS/BLOCK 1/1590 or in any other way from interfering with the suit property pending the hearing and determination of this application.
3. This Honourable Court do grant an injunction against the Defendants/Respondents their agents, employees, servants, assignees and or any other person authorized by them restraining them from trespassing into and or from evicting the Plaintiffs/Applicants from Plot No.MS/BLOCK 1/1590 or in any other way from interfering with the suit property pending the hearing and determination of this suit.
4. This Honourable Court do grant an Order compelling the Officer Commanding Station (OCS) Likoni Police station, Mombasa to enforce the interim orders against interference of the suit property known as MS/BLOCK 1/1590 pending hearing and determination of this application.
5. This Honourable court do grant an order compelling the Officer Commanding Station(OCS) Likoni Police Station, Mombasa to maintain law and order pending hearing and determination of this suit.
6. Costs of this application

It is based on the grounds that the Plaintiffs/Applicants are the proprietors of the suit property herein and have lived on the suit property registered as PLOT NUMBER MS/BLOCK 1/1590 for more than Forty (40) years. Sometimes on 8th June, 2021 the Plaintiffs/Applicants were served with a notice by Ministry of Lands and Physical Planning from the office of the Regional Survey Office Mombasa giving the Plaintiffs/Applicants notice of a Survey Visit to the suit property for purposes of identifying the plot on the ground. The Plaintiffs/Applicants reiterate that they have been living in the suit property un interrupted for now almost 50 years evidenced by their cemetery and permanent building structures on the same for their subsistence. That on 10th June, 2021 the Plaintiffs/Respondents were surprised to find surveyors purportedly instructed by the 1st Defendant /Respondent of the land to identify his land. The documents presented by the 1st Defendant/Respondent show the land was issued to him on 1st February, 1988 on 99 years lease while the Certificate of Lease was issued to him 27 years later on 7th October, 2015. It is only in 2021 more than 33 years later that he has come to look for his said land which he had never seen before.

The 1st defendant submitted that the suit herein is defective and incurable for failing to attach the copy of title which the Applicants are contesting for contrary to the mandatory provisions of Order 37 of the Civil Procedure Rules 2010. That the title deed of the suit premises was lost long ago and a report was made to the police station and an abstract was issued to that effect. (Annexed is a copy of the abstract marked AHD1). That the Defendant applied for advertisement of the lost title deed and on 10th April 2015, the advertisement was made on the Kenya Gazette vide Notice NO. 2339. (Annexed is a copy of the Gazette Notice marked AHD 2). That on 7th October 2015, the Land Registrar entered a record of the Gazette Notice NO. 2339 and issued the Defendant with Certificate of Lease of the suit property. (Annexed is a copy of the Certificate of Lease marked AHD 3). That the Plaintiffs have not established the grounds for adverse possession because they have not occupied/possessed the suit land for a period of more than 12 years, uninterrupted and against the will of the Defendants and therefore they cannot claim adverse possession of the suit premises. That in 2004, the 1st Defendant instructed AD Design Architect to survey and prepare on the suit property with the help of C.P.R.S and cadastral information and topography which clearly indicated that the suit property was currently devoid of any permanent built structure but there are some makuti temporary structures for fishermen and squatters who are farming on the plot. (Annexed is a copy of the Report marked AHD 5).

The 4th respondent raised a preliminary objection that the application and the suit are incompetent and wrongly brought by the Applicant against the 4th Defendant/Respondent as lease presented by Plaintiff indicates a lease from the Government of Kenya. That the application contravenes the mandatory provision of the law as the 4th Respondent is wrongly sued as the Applicant has not no cause of action against it and as such the 4th Respondent should be expunged from these proceedings. The plaintiff/respondents in response submitted that despite a lease from the National Government, the said County has jurisdiction and mandate to control development within its jurisdiction I adherence to the laws of Kenya including the County Government Act, 2012 and the Physical Planning Act and the Public Health Act. I concur with the applicants' submissions that the issue as to whether or not there is a cause of action against the 4th Respondent can only be proved or disproved once the matter goes to full trial. I find the objection cannot be sustained and it is overruled.

This court has considered the application and submissions therein. The application 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. The applicants submitted that they are the proprietors of the suit property herein and have lived on the suit property registered as PLOT NUMBER MS/BLOCK 1/1590 for more than Forty (40) years. that they have been living in the suit property un interrupted for now almost 50 years evidenced by their cemetery and permanent building structures on the same for their subsistence. That on 10th June, 2021 the Plaintiffs/Respondents were surprised to find surveyors purportedly instructed by the 1st Defendant /Respondent of the land to identify his land. The documents presented by the 1st Defendant/Respondent show the land was issued to him on 1st February, 1988 on 99 years lease while the Certificate of Lease was issued to him 27 years later on 7th October, 2015. I find that the applicants have established a prima facie case. I find this application is merited and order that status quo be maintained pending the hearing and determination of this matter. Cost to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE