



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 60 OF 2020

OMAR SALIM CHENGO & 5 OTHERS.....PLAINTIFFS

VERSUS

PHILEMON MWAIKA & 13 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be applied; plaintiffs claiming that land held by some of the respondents was illegally amalgamated by the Government then subdivided and titles issued to them; plaintiffs further claiming that they have a judgment in their favour that held that the land is held in their trust; evidence showing that the judgment upon which the plaintiffs base their claim was set aside and the suit struck out; there is therefore no judgment in favour of the plaintiffs that the Government holds the land in trust for them; no evidence of fraud demonstrated; suit also filed on behalf of persons who remain undisclosed in the plaint; no prima facie case established; application dismissed with costs)

1. The application before me is that dated 27 May 2020 filed by the plaintiffs contemporaneously with the plaint. The application is basically one for injunction seeking to restrain the 1st, 2nd, 9th, 11th, 12th, 13th and 14th defendants from dealing or interfering with the alleged possession of the plaintiffs on the Plots No. 324 and 334/III/MN/Kilifi/Mtwapa pending the hearing and determination of the suit. In addition it seeks an order for the court to direct the OCS Mtwapa Police Station not to provide security for demolition of properties on the suit lands, alongside a prayer that the court do order the 6th defendant to commence investigations into the fraud and forgery allegations of consolidation of the Plots No. 324 and 334/III/MN/Kilifi/Mtwapa into the plots Nos. MN/III/515 – MN/III/527 by the Kenya Government in 1971 and that the findings be forwarded to the 5th defendant so that he may arrest and prosecute all persons found culpable. The application is supported by an affidavit sworn jointly by Omar Salim Chengo, David Mwambire, Cornell Shisanya, Issa Omar, Lawis Muchai and Margaret Luvuno. The application is opposed.

2. The plaintiffs filed suit in person. There are six named plaintiffs and they allege to be suing as owners and on behalf of 1395 families who are said to be in occupation of the Plots No. 324 and 334/III/MN/Kilifi/Mtwapa under Mtwapa Maweni Settlement Scheme (hereinafter referred to as Plots No. 324 and 334). The plaintiffs claim to have acquired the two plots “under Section 62 of the Constitution” and they allege that the Kenyan Government is holding it in trust for them. It is pleaded that the plaintiffs obtained a decree dated 30 March 2012 which has never been challenged. They aver that they commenced a survey which was approved by the concerned authorities and thereafter a subdivision of the land was done and the plaintiffs awarded and given plot numbers but the Registrar of Titles has disobeyed orders which directed him to issue title to the plaintiffs. They claim that the Government fraudulently consolidated the Plots No. 324 and 334 into the land parcels No. 515 to 527/III/MN without the permission or knowledge of the registered owners. It is thus their pleading that this process was fraudulent and all titles issued following this process should be nullified and the culprits be arrested and charged. They allege that the 1st, 2nd, 9th, 11th, 12th, 13th and 14th defendants are the ones behind the illegal subdivision and need to be investigated fully by the 6th defendant (Director of Criminal Investigations). They plead that the 1st, 2nd, 9th, 11th, 12th, 13th and 14th defendants have resorted to using the police to harass the plaintiffs and they have descended on the plots and demolished buildings belonging to the plaintiffs. In the suit, they ask for the following orders:-

(a) A permanent injunction restraining the 1st, 2nd, 9th, 11th, 12th, 13th, 14th defendants from trespassing or dealing, or demolishing buildings erected and being erected by the plaintiffs on the Plots Nos. 324 and 334/III/MN.

(b) A declaration directed to the 3rd defendant to commence issuance of certificates of titles to the plaintiff as ordered by the court on 11 April 2017 in ELC No. 166 of 2015.

(c) A declaration directing the 4th defendant to issue titles to the plaintiffs.

(d) A declaration directing the 5th and 6th defendants to investigate the fraud in the Plots Nos. 324 and 334/III/MN.

(e) *General Damages*

(f) *Costs and interest.*

(g) *Any further relief deemed fit.*

3. The supporting affidavit more or less reiterates the contents of the plaint which I have set out above. The plaintiffs claim that they were issued with a decree in the case Mombasa HCCC No. 560 of 2004 and no one has ever filed any appeal. They have annexed the judgment in that case. They therefore proceeded to survey the land and plot numbers were given to every applicant under Maweni Settlement Scheme. The plot numbers are said to be from 1 – 1401. They have annexed a survey plan and some letters inter alia from the District Surveyor, and an allotment letter from the National Land Commission. They have also annexed a consent said to have been entered into in the suit Mombasa ELC No. 166 of 2015.

4. The 8th defendant filed Grounds of Opposition. It is stated that the application does not satisfy the well established principles for granting such orders and that they have no reasonable cause of action against the 8th defendant.

5. The 9th defendant filed a replying affidavit to oppose the motion. He is the registered owner of the Plots Nos. MN/III/1428, 3469 and 3724. He deposed inter alia that the plots Nos. 324 and 334 do not exist and that they ceased to exist after they were consolidated on 11 March 1971 and subsequently subdivided. He annexed a survey report indicating this. He has stated that he became registered as proprietor of his plots between 1995 and 1998 and that he has been in continuous occupation thereof. He thus avers that the claim of the plaintiffs is time barred. He has deposed that contrary to the allegations of the plaintiffs, the suit ELC No. 560 of 2004 was dismissed, and that in any event, the whole of the judgment was set aside in rulings dated 5 July 2018 and 6 February 2020. It is his view that the plaintiffs have not demonstrated a prima facie case with a probability of success.

6. I directed parties to file written submissions and I have considered the submissions filed by the plaintiffs and the defendants who opposed the motion.

7. It is trite that to succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable injury if the application is not allowed; and where the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1975) EA 358*. So, have the plaintiffs demonstrated a prima facie case? The plaintiffs base their suit on the judgment dated 30 March 2012 in the suit Mombasa High Court Case No. 560 of 2004. It is their case that in that suit, the court held that the suit properties are held in trust for the plaintiffs and that no appeal has been preferred against the said judgment. The true position of the matter is that this judgment was set aside in a ruling delivered by Omollo J on 5 July 2018. Subsequently, the whole suit was struck out in a ruling dated 6 February 2020. The plaintiffs case is therefore founded on quack and on a judgment that is non-existent. The letters annexed by the plaintiffs do not help them because they were based on a judgment that has been set aside. I have also not seen any Government approved subdivision scheme subdividing the disputed land into 1401 plots which were allocated to other people.

8. Apart from the above, it is also the case of the plaintiffs that the parcels of land owned by the 1st, 2nd, 9th, 11th, 12th, 13th and 14th defendants were fraudulently acquired. Their case is that the Government illegally amalgamated the plots Nos. 324 and 334 in the year 1971 without the knowledge of the owners of the land. Well, if that was so, my position at this point in time, subject to being convinced later, is that it is the registered owners as at the year 1971 who have locus to complain about amalgamation of their land, or acquisition of, it by the Government. So far, I am not persuaded by the claims of fraud as put forth by the plaintiffs.

9. Apart from the above, although the plaintiffs say that they are filing this suit on behalf of 1395 families, these 1395 families are not named in the plaint. Nobody knows who they are. We cannot also tell whether they have authorised the 6 persons named as plaintiffs to file suit on their behalf. On that ground alone, this suit is in fact liable to be struck out, but at this point in time, I will not go that far, for it is not what is in issue in this ruling. However, it does have an impact in assessing whether or not the plaintiffs have demonstrated a prima facie case with a probability of success. It is difficult to see how it can be said that a prima facie case has been demonstrated where even the parties alleged to be before court are not known.

10. Given the forgoing, I am not persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success to entitle them to an order of injunction. The result is that they will need to prove their case without the benefit of an order of injunction in their favour. I also see no basis to issue any order to stop the police from assisting the 1st, 2nd, 9th, 11th, 12th, 13th and 14th defendants if they deserve any assistance. On the prayer that an order does issue for investigation, I am not persuaded, as so far, I have seen no evidence of fraud.

11. It will be seen that I see no merit in this application. It is hereby dismissed in its entirety with costs to the defendants.

12. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA