



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Suit 20 of 2012

1. KATANA

KAPOMBE KINEWA

2.ALPHONCE

KINAWA AND

3.MWALIMU KAPOMBEPLAINTIFFS

-VERSUS-

KITSAO KINEWADEFENDANT

R U L I N G

1. The plaintiff's application filed on 22nd February, 2012 was argued together with the Preliminary Objection raised by the Defendant. The application is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules and is supported by the affidavit of Mwalimu Kapombe, the 3rd Plaintiff. The Defendant swore the Replying Affidavit and a Preliminary objection.

2. The relevant uncontested facts of the case can be stated briefly as follows: the parties are all brothers and sons of the late Kinewa Ngoka. They are disputing over a parcel of land known as KILIFI/MBARAKACHEMBE/120 which measures 6.2ha. The Plaintiffs have been occupying and using the land for many years even though the same was registered in the name of the Defendant in 1976. In a bid to assert his ownership the Defendant filed a claim in 2005 before the Malindi Land Disputes Tribunal. The matter determined in the Defendant's favour and the tribunal ordered the plaintiffs to vacate the suit property.

3. The decision was subsequently adopted as a judgment of the Court and a decree issued in the same year by the Senior Resident Magistrate, Malindi. In February, 2012 the plaintiffs were forcibly removed by the court bailiff in execution of the said decree, prompting the filing of this suit.

4. It is the Plaintiff's contention, and strongly denied by the Defendant that the suit property is ancestral

land and that the Defendant holds the land in trust on behalf of the Kinewa family.

5. This being an application for an interim injunction, the principles to be applied are as enunciated in the famous case of **GIELLA VS CASSMAN BROWN**:-

1. Have the Plaintiffs demonstrated a prima facie case.

2. Have they shown that they stand to suffer irreparable damage if the orders sought are denied.

3. If in doubt, the court will decide on a balance of convenience.

6. At the heart of the dispute is the question whether the suit property is family land held in trust by the Defendant, and which the plaintiffs are entitled to occupy, or whether the same is individual property at the sole discretion of the Defendant, upon which the Plaintiffs have no right. While the Plaintiffs rely on their prolonged use and occupation thereof, the defendant places reliance on the decision of the Land Disputes Tribunal, as well as the fact of registration. The circumstances in which the plaintiff first occupied the land are equally in dispute.

7. The judgment of the tribunal attempted to deal with the latter issue. The Defendant's objection that this matter is *res judicata* based on the tribunal decision is in my considered view, like the question of the Plaintiff's claims to the suit land, issues that can only be resolved through evidence. The wording of the orders of the tribunal raises the question of the tribunal's jurisdiction, as correctly argued by the counsel for the plaintiffs. Similarly HCCC No. 95 of 2005 (OS) over the subject matter was struck out before it could be heard on merit.

8. And while it is true that the original papers of the Plaintiffs did not disclose that such a case had been filed, the plaint refers to the Tribunal Case. I find no merit in the other objections raised by the plaintiff with regard to payment of costs under Order 25 rule 4 because the previous suit namely HCCC 95/2005 (OS) was not discontinued. Also there is nothing in the pleadings suggesting that this is a representative suit requiring leave under Order 1 rule 8 as argued by the Defendant's Counsel.

9. However, the fact that the eviction process in respect of the tribunal case has already been carried out warrants some attention, even though incorrectly raised as a preliminary objection. There is no dispute that the plaintiffs were aware of the decision of the tribunal and the subsequent execution efforts. It is not clear whether this prompted the filing of the HCCC 95 of 2005 but after it was struck out the plaintiffs seemingly did not take any other action until February, 2012. The plaintiffs ran to court then because they had finally been evicted by the court bailiff.

10. That long period of inaction has not been to their benefit. And I agree with the submissions of the defendant's counsel that this action has been brought rather late, especially since the present application seeks an equitable remedy. Secondly, the court cannot bar events that have already occurred or worse, reverse the situation by ordering that the plaintiffs be allowed back on the land; the circumstances herein do not warrant such orders.

11. There may be sentimental value attached to the suit land by the plaintiffs that cannot be compensated by damages. This however is dependent on proof that the land is ancestral property. As for the defendant's houses, the same have already been demolished in execution of the decree in the Lower Court. Should the plaintiffs succeed, they would be compensated adequately by damages.

12. For all these reasons, I am not satisfied that the Plaintiffs have surmounted the first two legal hurdles in the **GIELLA Case**, and moreover, the balance of convenience appears to tilt in the Defendant's favour as the registered proprietor of the suit property. I therefore decline to grant an injunction in the terms prayed for by the plaintiffs. However, in light of the defendant's bold statement in paragraph 8 of his defence regarding his intention to alienate the suit property. I would in the interest of justice, and in exercise of my discretion under Order 40 rule 1 to "make such other order for the purpose of staying and preventing the wasting...alienation....disposition of the property" make the following orders:-

1. That pending the hearing and determination of this suit the status quo be maintained with respect to the suit property and no party should take any action prejudicial to the same.

For the avoidance of doubt, the status quo at present is that the plaintiffs stand evicted of the suit land currently in the possession of the defendant.

2. Order 1 above will remain in force for a period of one year during which the parties are to take all necessary steps to ensure that the suit set down for hearing and disposal.

3. Costs will be in the cause.

Read and delivered at Malindi this **11th** day of **May, 2012** in the presence of:

C. W. MEOLI
JUDGE