



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO.33 OF 2010

CHRISTINE MWENDE.....1ST PLAINTIFF
ANITA A. PAMBA.....2ND PLAINTIFF

VERSUS

NICHOLAS KUPU KATANA KARISA.....1ST DEFENDANT
BARAKA MOHAMED.....2ND DEFENDANT
HAMIS ORE.....3RD DEFENDANT
KASUNGU MASHI.....4TH DEFENDANT
KASUNGU WANJE.....5TH DEFENDANT
PETER CHARO.....6TH DEFENDANT
KATANA MASHAKAKA.....7TH DEFENDANT
MWAMULAND MWAKIRANDA.....8TH DEFENDANT
SANDEI ZIRO.....8TH DEFENDANT
KIJI JEW A.....10TH DEFENDANT
MAMA RITA.....11TH DEFENDANT

RULING

The application dated 14th April 2010 is made by way of Chamber Summons under order XXXIX Rule 1 (a), 2, and 9 of the Civil Procedure Rules, and section 3A CPA. It seeks for order of injunction to issue restraining the Defendant/Respondent personally or through their agents and/or assignees from interfering, trespassing and/or planting seedlings thereon or in any way putting any structure or interfering with the quiet occupation of the applicant's plot No. Kilifi/Mtwapa/1528 until this suit herein is heard and determined. It also prays for costs. The basis for the application is that;

- (1) They are the legal owners of plot NO.Kilifi/Mtwapa 1528.
- (2) The Respondents have forcefully entered, trespassed upon the said property and are planting seedlings thereon.
- (3) The Respondents had threatened the applicants with harm should they enter into the property.

(4) The Respondents have stopped the applicants from continuing with the construction of a borehole which they had dug on the property and which risks getting damaged besides the erosion of the soil by the respondent farming and construction activities.

In the supporting affidavit sworn by Christine Mwendu (1st applicant) she annexes a copy of the Title Deed issued to her and the 2nd respondent. Incidentally they purchased the property from one Beatrice Muli on 9th May 2008 and its after that purchase that respondent (who are neighbours) entered the suit property and began demanding for money. Attempts to get the respondent to leave the property have failed as evidenced by correspondences annexed and marked CM 2 A-C.

The Respondents have their own property which neighbours the suit property and are trespassers who intend to annoy the applicants by making unreasonable demands. When the rains fell in March 2012, the respondents began planting crops on the property and are now in the process of erecting some illegal structures. When 1st applicant went to enquire about their actions, the Respondents became violent and chased her away- they also chased away her friend.

Applicant now wishes to fence her property and carry out a small scale farming enterprises but is unable due to harassment and trespass by the respondent's

1st Applicant reported the matter to Mtwapa police station vide OB NO.8/24/3/10 but no action was taken. She refers to respondents as professional squatters whose actions should be put in check.

The application is opposed, and in a replying affidavit sworn by 1st defendant on its own behalf and on behalf of the other respondents, he depones that they are not aware of the purchase of Title No. KILIFI/MTWAPA/1528 by the plaintiff from Beatrice Muli and they do not even know her.

The said Nicholas Kopu Katana Karisa (has annexed a document of title marked NKK2) issued in his name – the other defendants who are on the land are his kin. He depones that he has occupied Kilifi/Mtwapa/206 for over 28 years openly, peacefully and without interruption since 1982. Prior to 1982, the parcel was occupied by Nawaz Mohammed Mirdor who left the land and jurisdiction of this court over 19 years prior to his (1st defendant) obtaining the said title on adverse possession. On 22/9/05, he made an application to the High Court (Nairobi) vide Miscellaneous Application No. 142 of 2005 for adverse possession of Land Title No. Kilifi/Mtwapa/206 which was granted (a copy of the application is annexed as NKK3).

He avers that it is the applicants who have fraudulently grabbed part of his land and renamed it 1328 then laid a claim on it. (He has annexed a copy of the original map).

The plaintiffs grabbed the land without 1st respondents' acknowledges altered the boundaries and fraudulently renamed it Kilifi/Mtwapa/1528 (a copy of new map showing the grabbed land and alteration of the boundaries as annexed).

The Plaintiffs'/Applicants used their influence as AP and effected eviction of the Respondents from the land then began cultivating it while threatening respondents with dire consequences if they dared to reclaim the land.

It is pointed out that applicants have not annexed a sale agreement with the alleged Beatrice.

They deny being neighbours to the disputed land and say they have always, lived on the land and their children were born there, some of their kin have been married there, some have passed on and are buried there. It is their contention that the applicant's claim of ownership is false and they have not received any notice to vacate, the land from the Provincial Administration, the police, or applicants advocates.

The counsel for respective parties filed written submissions as a way of disposing of this application.

Plaintiffs/Applicants counsel submitted that the applicants have established a prima facie case with a high likelihood of success and met the conditions laid down in the decision in **Giella V Cassman Brown (1972) EA page 358** on injunctions. Actually with the greatest respect to the applicant's counsel, he has not argued the application, all he has done is repeat the contents of the application.

The Respondents' counsel submitted that respondents have demonstrated they are the registered proprietors of the parcel and it's the applicants who have invaded and grabbed a portion of that land. It is his argument that applicants have not demonstrated how they acquired the land from the said Beatrice Muli as no copy of the purchase agreement or even an official search from the Land Registry has been presented to confirm there was sale and purchase of the land. He points out that the onus is on the applicants who claimed to have purchased the land in 2008 whereas the respondents say they have lived on the land even before 2008 having legally acquired it, and cannot be described as professional squatters. From what the applicants and respondents have presented, it would appear there originally existed plot No. 206- somehow this was later subdivided through undisclosed process and hived to become 1528.

True applicants claim to have bought the land from Beatrice Muli but no sale agreement is annexed. The applicants have also not annexed a search certificate to confirm what the current status of the land is.

No other documents demonstrating the process through which applicants got the land has been presented to this court, thus the applicants have failed to establish a prima facie case with probabilities of success.

Are the applicants likely to suffer loss which cannot be adequately compensated by way of damages? It has not been demonstrated how cultivation of crops on the land would lead to erosion, and the constructions which Respondents are said to have started constructing have not been described nor are any pictures of structures annexed to confirm that claim and they remain mere allegations. If there is a borehole under construction, then nothing would have been easier than to annexe photographs of the same or even receipts to confirm purchase of materials for use in such conditions. This has not been done, so the 2nd principal of **Giella** is not fulfilled.

This then obligates me to look at the third option – where does the balance of convenience tilt? The applicants have not demonstrated that they are in actual possession of the land and having failed to satisfy this court as to how they acquired the land, then I am afraid the scale tilts unfavourably against them.

Consequently the prayers are not merited and the application fails to meet the threshold contemplated in the **Giella** decision. The upshot is that the application is dismissed with costs to Respondents.

Delivered and dated this 15th Day of December 2010 at Malindi.

H. A. OMONDI

JUDGE