REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 292 of 2009

MWANAMKASI HAMISI NIMAMBEA……..…1ST PLAINTIFF/APPLICANT

ASHA BAKARI GAWAYU……2ND PLAINTIFF/APPLICANT

BINTI BAKARI GAWAYU ……3RD PLAINTIFF/APPLICANT

-VERSUS-

JUMA ALI MWABAKO ……1ST DEFENDANT/RESPONDENT

ORAZIO MAZZONETTO…….2ND DEFENDANT/RESPONDENT

SALIM BAKARI GAWAYU……3RD DEFENDANT/RESPONDENT

HASSAN BAKARI GAWAYU……4TH DEFENDANT/RESPONDENT

RULING

The applicants came before the Court by Chamber Summons dated 27th August, 2009, brought under Order XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules, and ss. 3, 3a and 63 (e) of the Civil Procedure Act (Cap. 21, Laws of Kenya). The applicants had one substantive prayer to be disposed of in this application:

> "THAT this Honourable Court be pleased to issue a temporary injunction restraining the 1st, 2nd, 3rd and 4th defendants either by themselves, [their] servants [or] employees from demolishing the plaintiffs' structures, [or forcefully evicting the plaintiffs] from Plot No. Kwale/Diani/390 and/or transferring, [registering], or in any way … dealing with the … said parcel of land pending the hearing and determination of the suit".

In the general grounds upon which the application was founded, it was stated that: the plaintiffs and their families have their houses, structures, and homestead on plot No. Kwale/Diani/390 and that this was their ancestral land; the plaintiffs have been residents on the plot together with 3rd and 4th defendants who are sons of the 1st plaintiff; the 3rd and 4th defendants were compromised by 1st defendant who gave them Kshs.500,000/= and so they consented to vacate the suit property without 1st plaintiff's consent and without the knowledge of the plaintiffs; 1st defendant has sold and/or is in the process of transferring the plot, Kwale/Diani/390 to 2nd defendant for an unknown amount; 2nd defendant has begun the construction of a perimeter wall, and threatens to evict the plaintiffs any time; the plaintiffs also have a stake on Plot No. Kwale/Diani/390 as their ancestral land, and through beneficial ownership; 1st defendant currently holds the title document for Plot No. Kwale/Diani/390 as trustee to other family members including the plaintiffs.

The foregoing grounds, it is clear, are intricately mixed with factual matters which ought to come as evidence, so the Court may be able to determine the truth – and the accuracy of such facts can only be ascertained during the hearing of the main cause.

For a fact-basis at this interlocutory stage, the Court will consider the affidavits sworn in support of, and against the prayers in the

application.

The 1st plaintiff, ***Mwanamkasi Hamisi Nimambea*** depones that her affidavit represents her position and that of her co-plaintiffs.

It is deponed that each of the plaintiffs has a house, structures and homestead on Plot NO. Kwale/Diani/390 (the suit plot) which is "family-clan land", and that has been the position since the 1960s. Sometime in June 2009, the deponent overheard from others that there was an agreement under which 1st, 3rd and 4th defendants were asserting a claim over the suit land, and taking the position that 1st plaintiff had to vacate. The deponent overheard that, 3rd and 4th defendants had accepted Kshs.500,000/= from 1st defendant and, in return, those referred to as "squatters" would vacate the suit land. The 1st plaintiff depones that she is the mother of 2nd plaintiff, 3rd plaintiff, 3rd defendant and 4th defendant, and that she had always lived with them on the suit plot where they have houses: she annexes photographs (MHN4) showing growing maize crop, plantations of trees and fruit, and thatched houses. The deponent avers that 3rd and 4th defendants who are her sons, have given oblivion to the rights of the plaintiffs who are women and have unilaterally arranged to dispose of the family land. She further depones that 1st defendant had taken the suit property's title deed without the knowledge of the plaintiff, and had then acted in collusion with 3rd and 4th defendants to sell and transfer the family land to 2nd defendant; and 2nd defendant has already started asserting his ownership, and has started building a perimeter wall around the suit plot.

The 1st plaintiff depones that the suit plot measures about 5 acres in size, and she estimates that its true value would be more than Kshs.10,000,000/=; but that the defendants have not disclose the price at which they were purporting to sell this land. The deponent apprehends that the plaintiffs may be evicted, their houses demolished, and their crops uprooted; and she prays that such a course of action be stopped by injunction orders.

The 1st defendant swore a replying affidavit dated 23rd September, 2009. He depones that he is the registered owner of the property known as L.R. No. Kwale/Diani/390 having been issued with the title deed on ***17th December, 2002***, and that the plot had squatters on it at the time. He depones that nobody had claimed the land after he obtained the title deed on 17th December, 2002 and that no encumbrance has ever been lodged against his title. The 1st defendant depones that the suit land had been part of a settlement scheme and was Government land; he denied that the plaintiffs had always lived on the suit plot.

Regarding the alleged alienation-transaction, the deponent stated that it was on or about ***22nd April, 2009*** when he entered into a sale agreement with 2nd defendant, who purchased the suit plot at the price of Kshs.3,000,000/=. At the time of the sale, the deponent had informed the purchaser that there were squatters living on the suit land – and he asked the purchaser to negotiate with the squatters and arrive at a settlement.

The 1st defendant depones that he has been paid the purchase price in full, and he has transferred the suit premises to 2nd defendant: he annexes a copy of the title deed which has since been issued in the name of 2nd defendant. The deponent depones that, prior to the finalization of the land transfer, he ***and*** 1st plaintiff, 2nd plaintiff, 3rd defendant and 4th defendant attended a meeting at the local Chief's Camp for the purpose of agreeing on settlement for squatters; and that thereafter, an agreement was reached, on re-settlement for the plaintiffs; the sum of Kshs.500,000/= was to be paid by the deponent, in aid of the relocation process. After the sum of Kshs.500,000/= had been paid to 1st plaintiff's sons (3rd and 4th defendant), 1st plaintiff and her family demolished their own structures and indeed, vacated the suit land, which is currently vacant and where 2nd defendant has commenced the building of a perimeter wall.

The deponent averred that the 1st plaintiff had failed to disclose material facts: she and the co-plaintiffs had vacated the suit plot voluntarily and they are no longer on the suit land. It was deponed that no crops had been uprooted from the suit plot. The deponent deposed that he had information showing that 1st plaintiff and the co-plaintiffs had disagreed with 3rd and 4th defendants over the sharing of the Kshs.500,000/= which had been paid for squatter-settlement, and this is what led to the current suit.

The 3rd defendant swore a separate affidavit, dated 13th November, 2009 in which he deponed – in opposition to 1st defendant's – that: in the transactions relating to the suit land, 1st defendant had unduly prevailed over him; thee were no squatters, but only family members, on the suit land at the time 1st defendant conducted the sale transactions; the 1st defendant did not disclose the sale price for the suit land, to the other defendants; etc.

The Court has noted that 3rd defendant's replying affidavit is not a normal affidavit; it rarely makes complete statements on matters of fact; and it is long on casting blame up on other parties, particularly 1st defendant.

Hearing took place on 17th November, 2009, the plaintiffs/applicants being represented by learned counsel ***Mr. Okanga***, the 1st and 2nd defendants/respondents being represented by learned counsel ***Mrs. Okech***; and the 3rd and 4th defendants/respondents appearing in

person.

Lack of common purpose among the defendants became evident at the beginning, when both 3rd and 4th defendants, who were unrepresented, each informed the Court that he was in agreement with the plaintiff's application and would not be opposing.

Mr. Okanga urged that the 1st defendant, without the knowledge of the plaintiffs, had sold the family land, and that the effect has been to render the plaintiffs landless. Counsel urged that the photograph annexures to the supporting affidavit showed growing crops, paw paw trees, coconut palms and a homestead – and that this was the evidence of a homestead which was occupied by members of the family. Counsel submitted that the plaintiffs were due to be evicted from the suit land, as perimeter-wall construction by 2nd defendant was in progress – but the Court's interim orders had enabled them to stay on for the time being.

Mr. Okanga questioned the ***bona fides*** of the sale of the suit land to 2nd defendant – on the basis that there were improprieties, such as lack of evidence of a sale agreement; lack of evidence of consent by the local Land Control Board. Counsel submitted that the sale was improper, and the impropriety was being concealed by the payment by 1st defendant of Kshs.500,000/=to 3rd and 4th defendants, without providing for the mother of 3rd and 4th defendants and the sisters of 3rd and 4th defendants (1st – 3rd plaintiffs). Counsel founded the claim of impropriety in the land sale, on the contention that the suit land was ***family land***, requiring that its occupants be party to the relevant transactions. For legal concept, counsel attached ***trust*** to the said family land: 1st defendant was the custodian and ***trustee*** of family land, and so he could not unilaterally dispose of the same. Counsel, on that basis, asked that all developments on the suit land be restrained by orders of injunction.

Learned counsel ***Mrs. Okech***, for 1st and 2nd defendants, contested the application, urging that 1st defendant was not part of the family of the plaintiffs, and that he had held the land under registered title under the Registered Land Act (Cap. 300, Laws of Kenya) before disposing of it to 2nd defendant. Counsel contested the use by the applicants of suit-land photographs showing trees and crops ***in situ*** – as there had been no indication of the ownership of the same.

Counsel urged that the demand by the plaintiffs, of evidence of the sale agreement in respect of the suit land, was not a relevant consideration, as evidence had been shown of title now being in the hands of 2nd defendant.

Counsel submitted that it had been an act of goodwill, on the part of 1st defendant, to provide money for the resettlement of those who had the status of squatters on the suit land, at the time of sale and transfer of the same. In suing 1st defendant, it was urged, the person targeted was the previous registered owner; but as of now, the land has a new registered owner, namely 2nd defendant who is already in possession.

Counsel perceived the suit as misdirected, insofar as the crucial question was ***ownership of land***, but no provision of the law existed for clan land or community land, which could found the claim. There was no evidence, counsel urged, of a succession process by which a clan or community could come to own the suit land. It was submitted that the clan or family in question had not been identified by the plaintiffs and, moreover, that it was not possible for the plaintiffs to refer to themselves as a clan. Counsel contended that if the plaintiff had in mind the interests of anyone else related to them, then their suit would be bad in law, as they had not brought a representative suit. Counsel submitted that the plaintiffs had not indicated the duration during which they have stayed on the suit land, and that they had made no claim based on ***adverse possession***.

Mrs.Okech submitted that the plaintiffs had not shown that fraud had characterized the acquisition of title for the suit land, by 1st or 2nd defendant; that the annexed title deed showed that the proprietor of the suit land today is 2nd defendant; that the annexed certificate of search showed that the said land had been registered first in the name of the Settlement Fund Trustees, and next, in the name of 1st defendant and then 2nd defendant; and in this scenario, the names of the plaintiffs did not feature. It was urged that 2nd defendant was an innocent purchaser for value, without notice of any defect in the title. Counsel also noted that the plaintiffs had not had any inhibitions entered against the Lands Office record of title.

Learned counsel submitted that the plaintiffs did not have a ***prima facie*** case, with a probability of success. It was submitted that if it should in the end be found that the plaintiffs have any legal rights in this matter, the same will be fit for compensation in **damages**. On a consideration of balance of probabilities, counsel urged that the same are with 2nd defendant, the registered owner of the suit land who is in possession. Counsel submitted that the Registered Land Act, s. 28 provided for the rights of a proprietor: and 2nd defendant wished to enjoy these rights.

Counsel urged that there was no basis for the plaintiffs' prayer that 2nd defendant's title deed be cancelled; their remedy would have been in judicial review, and they would then have enjoined the Registrar of Lands.

The plaintiffs/applicants' claim in their plaint of 27th August, 2009 is for cancellation of title No. Kwale/Diani/390 which is in the name of 2nd defendant; they ask that that title be registered instead, in their names. The plaintiffs also pray in the main suit, for a declaration that the registration of the suit land in the name of 2nd defendant, had been obtained by fraud, and they seek a permanent injunction against the four defendants, restraining them from transferring, leasing, or in any way dealing with the suit plot.

Such prayers, in their very nature, can only be dealt with after a full hearing of the main suit; but in effect, the same prayers are being urged at this stage of interlocutory application, and in aid of the prayer, detailed statements of an evidential nature are being made, the veracity of which the Court is not yet in a position to establish. The upshot is that no ***prima facie*** case has been placed before this Court.

Quite apart from that, I have considered the supporting affidavit in the context of the replying affidavits; and I find, firstly, that the 1st plaintiff's supporting affidavit does not disclose a clear and straightforward case; secondly, that the 3rd defendant's replying affidavit which substantially disagrees with both 1st plaintiff's affidavit and 1st defendant's affidavit, is not clear-minded and, most likely, is not laying all material facts before the Court; and thirdly, that 1st defendant's replying affidavit is more focused on relevant fact than 1st plaintiff's supporting affidavit is.

This places the Court in a position in which it will grant no prayers until the main case has been heard; the Court has to state at this stage that no ***prima facie*** case with a probability of success has been brought by the plaintiffs/applicants.

The proper orders to be made, in these circumstances, are as follows:

(a) The plaintiffs' prayers by their Chamber Summons application of 27th August, 2009 are refused.

(b) The plaintiffs shall bear the costs of the application.

DATED and ***DELIVERED*** at ***MOMBASA***this 17th day of December, 2009.

J.B. OJWANG
JUDGE

Coram: Ojwang, J.
Court Clerk: Ibrahim
For the Plaintiffs/Applicants: Mr. Okanga
For the 1st & 2nd defendants/Respondents: Ms. Okech
The 3rd and 4th Defendants/Respondents in ***person***