



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 43 OF 2019

1. DAVID KATANA CHIPIRA

2. BAYA MWERI JEFWA

3. JUSTIN MWALIMU KALUME

4. MARTIN BAYA

5. KATANA SAMUEL J. SIRYA

6. SAMMY TUVA KIMERA

7. EDWARD PONDA KADZEHA & 134 OTHERS.....PLAINTIFFS

VERSUS

1. ABDALLA MOHAMED ISSA

2. REGISTRAR OF TITLES

3. HONOURABLE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By their Notice of Motion dated and filed herein on 20th June 2019, the 141 Plaintiffs pray for orders: -

3. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the 1st Defendant/Respondent, his servants, agents and/or any person acting under his authority from trespassing upon, sub-dividing, purporting to sell or dispose off, building upon, constructing upon, damaging, wasting or in any manner whatsoever carrying out any activities or purporting to deal with the suit property to wit all that Plot No. 371 within Kwachocha area, Malindi measuring approximately 37 acres.

4. That the Plaintiffs/Applicants be registered as the proprietors of the parcel of land known as Plot No. 371 Malindi situate at Kwachocha by reason and fact that the Plaintiffs/Applicants have become entitled to the said land by adverse possession.

5. That the Land Registrar-Mombasa do proceed and issue Title documents for the parcel of land known as Plot No. 371 Malindi in the names of the Plaintiffs/Applicants upon sub-division of the property into portions.

6. That the orders above herein be registered against the Title known as Plot No. 371 Malindi at the Mombasa Lands Registry in terms of Section 38(2) of the Limitation of Actions Act, and all other relevant enabling laws of Kenya.

7. That the costs of this application be in the cause.

2. The application which is supported by an Affidavit sworn by the 1st Plaintiff- David Katana Chipira is based on the grounds that:

i) The Plaintiffs are the rightful and beneficial owners of the suit property;

ii) The Plaintiffs interests in the property are derived and have been acquired by virtue of the fact that some of them arrived on the property in the early 1950s and along the years purchased and developed the same in addition to selling off other portions to the other Plaintiffs;

iii) Some other Plaintiffs derive their claim from the consent of the original squatters having purchased and sold portions of the land among themselves;

iv) During their occupation, they have subsequently built up and or put up family homes where they now reside with their families and practice garden farming;

v) The 1st Defendant has been invading the property at will, adamantly attempting to fence off the same on various occasions though he has no known rights over the same;

vi) Unless the 1st Defendant is restrained, he has threatened to continue with the said activities threatening to sell the land to unknown persons as a result whereof the Plaintiffs stand to suffer irreparable loss and damage.

3. By his Replying Affidavit sworn and filed herein on 15th July 2019, Abdalla Mohamed Issa (the 1st Defendant) is opposed to the grant of the orders sought. The 1st Defendant avers that the application is frivolous and amounts to an abuse of the Court process for a number of reasons, among them being the fact that he is the proprietor of the said Plot No. 371.

4. The 1st Defendant further avers that the entire proceedings are sub-judice **Malindi ELC Case No. 8 of 2016** wherein the subject matter is the same and in which the Court has directed that all those occupying the suit property do vacate. The 1st Defendant asserts that this application is merely seeking to frustrate the enforcement of the orders issued in the said **ELC No. 8 of 2016**.

5. The 1st Defendant further avers that the Plaintiffs have not demonstrated a prima facie case to warrant the grant of the orders sought herein and urges the Court to dismiss the same with costs.

6. Further to the said Replying Affidavit, the 1st Defendant has in addition filed a Notice of Preliminary Objection dated 15th July 2019 in which he objects to the application and the entire proceedings herein on the grounds: -

1. That the Honourable Court does not have the requisite jurisdiction to hear and try this matter in light of the provisions of Section 6 of the Civil Procedure Act;

2. That the Notice of Motion and the entire proceedings herein are sub- judice and res judicata ELC Case No. 8 of 2016 before the Environment and Land Court in Malindi;

3. That these proceedings offend the provisions of Section 6 and 7 of the Civil Procedure Act;

4. That it is in the interest of justice that the application and the entire proceedings be dismissed or stayed.

7. At the hearing hereof, the parties agreed that both the Motion and the Objection be disposed of together. I have accordingly perused and considered both the Plaintiffs Motion and the 1st Defendants Notice of Preliminary Objection. I have also perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties. The Registrar of Titles and the Honourable the Attorney General (the 2nd and 3rd Defendants) filed a Memorandum of Appearance and Statement of Defence and further filed submissions in opposition to the Motion.

8. Section 6 of the Civil Procedure Act provides that: -

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

9. According to the 1st Defendant, the subject matter in this suit and another suit previously filed by himself, being **Malindi ELC No. 8 of 2016**, is the same. It is further the 1st Defendant's submissions that the parties in the two suits are the same because in the previous suit, the 1st Defendant is the Plaintiff while the Plaintiffs in the present suit are the Defendants in the previously instituted suit. The 1st Defendant further submits that the only difference between this and the previous suit is the addition of the 2nd and 3rd Defendants from whom the Plaintiffs are not seeking any relief.

10. Unfortunately for the 1st Defendant, I did not find anything from the material placed before me to support that contention. While it is indeed true that the subject matter in both suits appears to be the ownership of Plot No. 371, Malindi, I could not find anything in support of the contention that the parties are the same.

11. In his Replying Affidavit sworn and filed herein on 15th July 2019, the 1st Defendant has attached a bundle of documents marked as “AM 1” in support of the averments made in the Affidavit. None of the documents contain any of the pleadings filed in the said **ELC No. 8 of 2016**. All that the 1st Defendant has annexed is a Consent Order recorded in Court on 13th March 2018 and a copy of my Ruling delivered on

21st February 2019.

12. A perusal of those two documents reveals the parties in *ELC No. 8 of 2016 as Abdalla Mohamed Issa –vs- Christopher Mumba Kambi & 18 Others*. I was unable to find out from what is before me if the named Defendant- Christopher Mumba Kambi is one of the Plaintiffs herein. The names of the 18 others are not given and I was therefore not in a position to compare and contrast the names of the parties in the previous suit with those in the present one.

13. What was clear to me was that while the previous suit had 19 Defendants, the present one has 141 Plaintiffs. It was not explained to me how the 141 Plaintiffs herein can be, and or are, the equivalent of the 19 Defendants sued by the 1st Defendant in the previous suit.

14. A party that seeks to invoke the doctrine of res sub-judice must establish that there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives. The test for the applicability of the sub-judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. From the material placed before me at this stage, this Court is unable to conclusively answer that question in the affirmative.

15. As was stated in *Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 676*: -

“A preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.....

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

16. Accordingly, and arising from the foregoing, I did not find any merit in the 1st Defendants Preliminary Objection and the same is hereby dismissed.

17. Turning to the Plaintiffs’ Motion dated 20th June 2019, it is their prayer that this Court grants an order of injunction to restrain the 1st Defendant in particular from dealing in any manner whatsoever with the suit property. The Plaintiffs also seek to be registered as the proprietors of the suit property and an order compelling the Land Registrar- Mombasa (the 2nd Defendant) to issue them with title documents for the suit property.

18. I did not know why the Plaintiffs who are duly represented by an Advocate herein got the idea that the Court can at this interlocutory stage grant orders for their registration as the proprietors of the suit property as sought in Prayers 4, 5 and 6 of their applications. Those prayers are clearly spurious and this Court will not delve into a consideration thereof at this stage.

19. Their prayer for injunction is however properly before the Court and it is to that prayer that I now turn my attention. As *Spy V.P* stated in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

20. Taking the above into consideration, the Plaintiffs must first and foremost demonstrate that they have a prima facie case with a probability of success. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR*, the Court of Appeal fashioned a definition for “prima facie case’ in civil cases in the following words: -

“In civil cases, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

21. Expounding on that decision recently in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR*, The Court of Appeal held thus: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

22. In the instant matter, the Plaintiffs aver that they are the rightful beneficial owners of the suit property on the purport that some of them arrived therein in the early 1950s and settled as squatters on the land. It is further their case that those who arrived earlier on the land sold various portions thereof to other subsequent squatters and that they have continuously occupied and been in possession of the land to-date.

23. The Plaintiffs further aver that during their occupation of the suit property, they have built and put up family homes where they now

reside and practice garden farming. They accuse the 1st Defendant whom they say has no known rights over the land of constantly invading the property and attempting to fence it off on various occasions with the intention of selling the same to third parties.

24. The Plaintiffs asset that by virtue of their long stay on the suitland, they have acquired beneficial rights thereto and are now entitled to the same under the doctrine of adverse possession. It is therefore their case that if the 1st Defendant forcibly takes their land as he has threatened to do, they will suffer irreparable loss and damage.

25. Arising from the foregoing, it was clear to me that the Plaintiffs claim to the land arises either from the doctrine of adverse possession and/or purchase from those claiming to have acquired the land by way of adverse possession.

26. As the Court of Appeal stated in *Kasuve –vs- Mwaani Investment Ltd & 4 Others (2004) 1KLR 184*: -

“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.”

27. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. It was however curious that while the Plaintiffs claim to be entitled to the land by virtue of adverse possession, they also deny that the 1st Defendant is the rightful owner thereof. Who then have they dispossessed of the land?

28. The Plaintiffs are certainly seeking the issuance of orders of their registration of title in their favour in terms of Section 38(2) of the Limitation of Actions Act. On that account Order 37 Rule 7 of the Civil Procedure Rules provides as follows: -

(1) An application under Section 38 of the Limitation of Actions Act shall be made by way of Originating Summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

29. Rather than file an Originating Summons as required by the Rules, the Plaintiffs have approached this Court by way of an ordinary Plaint. Those Rules require the Summons to be supported by an extract of the Certificate of Title so that it is not in doubt the property being claimed and from whom the Claimants want the orders of adverse possession to issue. In the proceedings before me, the Plaintiffs dispute the 1st Defendant’s title and have failed to annex an extract of the title they claim.

30. Arising from the foregoing, I am not persuaded that the Plaintiff have made out a prima facie case with a probability of success. The Motion dated 20th June 2019 is thus without merit and is also hereby dismissed.

31. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 29th day of January, 2021.

J.O. OLOLA

JUDGE