



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 84 OF 2019

1. GEORGE KATANA KABATE
2. REHEMA OMAR HAMISI
3. KATANA KAENGO GALO
4. CHENGA YERI BIMALINDI
5. HESBORNE KAI MWASAMBU
6. KAHINDI GALO
7. RICHARD MWASAMBU KAI
8. ESTHER DAMA YERI.....PLAINTIFFS

VERSUS

1. VIJAY RACHOLD MARJORIA
2. LALITA RANCHOLD MARJORIA
3. ROBERT GITHINJI
4. THE NATIONAL LAND COMMISSION
5. COUNTY LAND REGISTRAR- KILIFI
6. THE HON. ATTORNEY GENERAL..DEFENDANTS

RULING

1. By their Notice of Motion dated 7th October 2019, the Eight (8) Plaintiffs herein pray for an order of injunction to restrain the 1st, 2nd and 3rd Defendants either by themselves, their agents or servants from interfering in any manner whatsoever with the suit properties including taking possession, fencing, occupying or evicting the Plaintiffs from Plot Nos. 199 and 299 pending the hearing and determination of the suit.

2. The application which is supported by an affidavit sworn by George Katana Kabate (the 1st Plaintiff) is premised on the grounds that: -

i. The 1st and 2nd Plaintiffs have been in occupation and possession of Plot No. Kilifi/Jimba/199 while the 3rd to 8th Plaintiffs had been in occupation and possession of Plot No. Kilifi/Jimba/299 which fall within Kilifi/Jimba registration Section and in which land adjudication and registration was done between 1974 and 1986;

ii. Sometime in 1986, the Commissioner of Lands issued a circular declaring the area as Government Land and hence not subject to the Land Adjudication Act;

iii. Subsequently, between 8th to 12th October 2018, the National Land Commission (the 4th Defendant) undertook hearings in respect of the said registration section. In findings published in the Kenya Gazette on 15th February 2019, the Commission determined that the owner was one Rose Mumbua Nduya even though it was registered in favour of Robert Githinji the 3rd Defendant and Lalita Ranchord (the 2nd Defendant).

iv. With respect to Plot No. 299 the Commission determined that it was allocated to David Wanjohi Githinji although it was registered in the favour of Vijay Ranchord Morjaria (the 1st Defendant);

v. The Commission proceeded to recommend that Plot No. 199 be regularized in the name of George Katana Kabate (the 1st Plaintiff) while Plot No. 299 was not cleared and is pending further investigations;

vi. Despite those recommendations, the Kilifi County Land Registrar (the 5th Defendant) has failed to effect the recommendations;

vii. On 27th September 2019, Police Officers from Watamu Police Station accompanied by unidentified people descended upon the Plaintiffs in the suit properties and demolished their structures leaving them without shelter. The Officers indicated they were acting on the instructions of the 1st, 2nd and 3rd Defendants whom they claimed were the registered owners of the suit properties;

viii. The 1st, 2nd and 3rd Defendants are not the owners of the suit properties and the said demolition is wrong and illegal; and

ix. It is therefore in the interest of justice that the orders sought are granted.

3. The application is opposed by the 1st and 2nd Defendants. By Grounds of Opposition dated and filed herein on 22nd October 2019, the two assert: -

1. That the application dated 7th October 2019 is incurably defective and is an abuse of the Court process;

2. That the Plaintiff/Applicant is contradictory (sic), in that, on one hand the Plaintiff admits that they have been evicted without notice and on the other hand their seeking (sic) orders to stop evictions;

3. That the prayers sought in the application have been overtaken by events as the Plaintiffs were evicted pursuant to a Court Order (issued) by this Honourable Court in *ELC No. 85 of 2018; Vijay Ranchord & 3 Others –vs- George Katana Kabate & 4 others*.

4. That the application lacks a substantive prayer, that even if the orders are granted, they will only last until the inter-parties hearing;

5. That the order in the Plaint and application are at variance rendering the entire application incompetent and (an) abuse of the Court process;

6. That the Plaintiffs have approached this Court with dirty hands, by failing to disclose material non-disclosure of facts (sic) in that:

a. The existence of ELC Case No. 85 of 2018

b. That despite being served with Court documents they failed to defend the suit

c. That they were served with notices to vacate the suit premises

d. They are guilty of laches in bringing this suit.

4. I have perused and considered the application and the response thereto by the 1st and 2nd Defendants. I have similarly perused and considered the rival written submissions and authorities placed before me by the Learned Advocates for the Plaintiffs on the one part and the 1st and 2nd Defendants on the other. The 3rd, 4th, 5th and 6th Defendants did not file any response to the application.

5. The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose of the property.

6. In the words of Spry V.P in the celebrated case of *Giella –vs- Cassman Brown 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.”

7. Commenting upon the above requirements *in Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR*, the Court of Appeal (Ouko, Kiage and M’noti JJ. A) observed as follows: -

“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.”

8. In the instant matter before me, the Plaintiffs aver that they were the occupants in possession of the two suit properties which have been the subject of a determination by the National Land Commission (the 4th Defendant herein). It is the Plaintiffs’ case that by a determination published in the Kenya Gazette on 15th February 2019, the Commission recommended that Plot No. 199 – Kilifi/Jimba be regularized in the name of the 1st Plaintiff while investigations continue as to the proprietorship of Plot No. 299- Kilifi/Jimba.

9. The Plaintiffs aver that despite the said determination and recommendations, on or about 27th September 2019, Police Officers from Watamu Police Station acting on instructions of the 1st, 2nd and 3rd Defendants descended upon them and demolished their structures on the suit premises thereby leaving them without shelter and or residence.

10. The 1st and 2nd Defendants who are the only parties who responded to the application did not deny that the Plaintiffs structures had been so demolished. However, while the Plaintiffs denied that they were served with any Court orders prior to the demolition, the Defendants in their Grounds of Opposition state that the said demolition arose from Court Orders issued in *Malindi ELC No. 85 of 2018; Vijay Rachold & 3 Others –vs- George Katana Kabate and Others*.

11. While the Defendants neither annexed the Court order nor stated when the same was issued, it was clear to me that this application was brought rather late in the day. While the same sought to restrain the Defendants from taking possession or evicting the Plaintiffs from the suit properties, it was evident from their own Supporting Affidavit that the 1st and 2nd Defendants had already taken possession of the premises and that they had been removed therefrom a few weeks prior to the institution of this suit.

12. And while the Plaintiffs have pegged their claim herein on the findings and determination of the 4th Respondent as published in the Kenya Gazette of 15th February 2019, it was clear to me that no finding had been made by the Commission in regard to Plot No. 299- Kilifi/Jimba to warrant the Plaintiffs claim to entitlement thereof.

13. Similarly, this Court was not persuaded on the material placed before me that the 4th Respondent Commission could revoke titles in the manner it purported to do in regard to Plot No. 199- Kilifi/Jimba even where the same were unlawfully or irregularly acquired.

14. In the premises, I was not persuaded that application before me had met the threshold for the grant of an order of injunction at this stage. I dismiss the same with costs to be in the cause.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE