



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 92 OF 2019**

**1. KITSAO MUMBA KATSUKI**

**2. KAZUNGU MUMBA KATSUKI.....PLAINTIFFS**

**VERSUS**

**1. JOHN KITONGO KIMANTHI**

**2. WAMBUA KITONYO KIMATHI.....DEFENDANTS**

**RULING**

1. By this Notice of Motion dated and filed herein on 14<sup>th</sup> November 2019, John Kitongo Kimanathi and Wambua Kitonyo Kimanathi (the Defendants/Applicants) pray for an order of injunction to restrain the two Plaintiffs herein from entering, trespassing upon, cultivating, or interfering in any manner with all that land described as an unregistered parcel of land situated at Zhegoni Village near Mariakani measuring 108.8 acres which is bordered to the North and North East by one Karisa Mwambire and Iha Madaba's parcels of land and to the South and South East by the Kenya Army Barracks.

2. The Defendants also urge the Court to direct the OCS Mariakani Police Station to ensure compliance with the orders of injunction in the event the same are granted.

3. The application which is supported by an Affidavit sworn jointly by the two Applicants is premised on the grounds: -

***i) That the Applicants are the legal and beneficial owners of the said parcel of land lying between two roads leading to Bamba in Kilifi County, the same having been bequeathed to them by their grandfather who had lived thereon since 1910;***

***ii) That the Plaintiff/Respondents have trespassed onto the property with the intention of sub-dividing and selling the same to unsuspecting purchasers and have started surveying the same and valuing it;***

***iii) That since they commenced the said acts, the Plaintiffs have remained on the land thereby denying the Applicants the enjoyment and use thereof and the Applicants are now apprehensive that unless the orders sought herein are issued, the Respondents shall continue their trespass thereby violating their proprietary rights.***

4. The application is opposed by Kitsao Mumba Katsuki and Kazungu Mumba Katsuki (the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein). In a Replying Affidavit sworn and filed herein on their behalf by the 1<sup>st</sup> Plaintiff/Respondent, they deny the Defendants claim and aver that the statements contained in the Supporting Affidavit are entirely false as they (the Plaintiffs) are the beneficial owners of the land.

5. The Plaintiffs/Respondents further aver that their father acquired the suit property way back in 1914 from a grandfather of the Defendants one Kimandi wa Chao who was paid for the land with one black heifer. The Plaintiffs assert that they have since remained in exclusive possession of the suit property.

6. The Plaintiffs aver that sometime in the year 1988, the Defendants/Applicants were evicted from the land they occupied to give way for the construction of the Kenya Army Barracks and that it was only after the said eviction that the Applicants went and settled near the suit property. Later on in the year 2015, the Defendants lodged a case with the Area Chief which was later referred to the National Land Commission. The Commission gave a verdict in favour of the Defendants/Applicants.

7. The Plaintiffs further assert that being dissatisfied with the said decision, they filed a case at the Kilifi Magistrates Court but later

withdrew the same after the Court stated it had no jurisdiction.

8. The Plaintiffs further assert that the suit property is their home and that they have, unlike the Applicant herein, no intention of selling the same to third parties.

9. I have perused and considered the application and the response thereto. I have also perused and considered the rival submissions placed before me by the Learned Advocates for the parties.

10. By their Plaint dated and filed herein on 23<sup>rd</sup> October 2019, the Plaintiffs/Respondents seek an order of injunction to restrain the Defendants/Applicants from surveying, sub-dividing, selling, alienating or in any manner whatsoever interfering with the suit property on the basis that the same belongs to the Plaintiffs.

11. According to the Plaintiffs, the Defendants herein intended to enter onto the suitland and to proceed to sub-divide the same and sell to other parties. That was the basis upon which they filed the suit herein.

12. But in their Joint Statement of Defence dated and filed herein on 14<sup>th</sup> November 2019, the two Defendants deny that the Plaintiffs own the land as described. Instead, they assert that it is their grandfather who occupied the suitland since the year 1910. By their application herein, the Defendants now seek to be granted the very same orders sought by the Plaintiffs against them pending the hearing and determination of the suit.

13. From a perusal of the affidavits filed herein by either side, it was not easily discernible as to who between the rival parties is presently in occupation of the vast suitland said to be measuring some 108.8 acres

14. What was clear is that the Defendants/Applicants have no claim of the land on their own. They have not filed any Counterclaim asserting any rights to the land and neither have they placed before me any cogent evidence from which it can be deduced that either they are in occupation of the suitland and/or that they have a better entitlement thereto as compared to the Plaintiffs.

15. For a temporary order of injunction to be granted pending the hearing and a determination of the suit, the Applicants were required to establish a prima facie case with the likelihood of success as against the Respondents. In ***Nguruman Ltd –vs Jan Bonde Nielsen & 2 Others (2014) eKLR***, the Court of Appeal by way of explanation as to what constitutes a prima facie case held 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...”***

16. Looking at the circumstances before me, I was neither satisfied that the ingredients constituting a prima facie case had been met nor that given the history of the dispute, there was any likely damage to the suitland which this Court was enjoined to act on with alacrity.

17. In the premises, I find no merit in the Defendants application. The same is dismissed.

18. The costs of the application shall be in the cause.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of February, 2021.**

**J.O. OLOLA**

**JUDGE**