



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 99 OF 2019

1. MAHMOOD ABDALLA MOHAMED
2. YATHRIBA KHAMIS RASHID SHIKELY
3. NAHYA ABDALLAH MOHAMED
4. NASREEN ABDALLAH
5. NOOR ABDALLAH
6. MAJID ABDALLAH
7. MOHSIN ABDALLAH
8. FATMA ABDALLAH
9. NAIMA ABDALLAH
10. MOHAMED ABDALLAH.....PLAINTIFFS

VERSUS

1. GABRIEL KATANA KAJOJI
2. NEW CENTURY MARINE TRADING EAST AFRICA COMPANY
3. CHI FUNG LAM
4. PATRICK KAVINYA MULWA.....DEFENDANTS

AND

1. KALAMA RIMBA GONA
2. KAJOJI RIMBA GONA
3. CHARO RIMBA GONA .
4. KEA RIMBA GONA .
5. FLORENCE NINGALA CHIMEGA.....INTENDED DEFENDANTS

RULING

1. By this Notice of Motion application dated 2nd September, 2020 as filed herein on 8th September 2020, Kalama Rimba Gona, Kajoji

3. That pending the hearing and determination of this suit, an order of temporary injunction be issued restraining the Plaintiffs, whether by themselves, their agents, servants, or employees from interfering in any manner whether by way of wrongfully entering and/ trespassing or continuing to wrongfully enter and/or demolishing/or constructing of houses in all that property known as LR No. MN/II/783 Kilifi County.

4. That the intended Defendants be enjoined in this suit as the 5th to 9th Defendants;

5. That the Court do order that Malindi ELC Case No. 99 of 2019 be consolidated with Malindi ELC No. 139 of 2015 which was consolidated with Mombasa ELC No. 93 of 2014.

6. That the orders issued on 9th December, 2019 in this suit be set aside to facilitate the hearing of the suit on merits;

7. That costs of the application be provided for.

2. The application which is supported by an affidavit sworn by one of the Applicants, Florence Ningala Chimega is based on the grounds that: -

a) That on 10th December, 2018, the intended Defendants filed a Notice of Motion Application dated 10th December, 2018 under Certificate of Urgency seeking a stay of execution of the interlocutory judgment in Malindi ELC Civil Case No. 139 of 2015 entered against the intended Defendants on 20th May, 2016 following a formal proof hearing. The subject matter of the said suit is a claim of ownership of all that parcel of land known as Sub-Division No. 783 (Original No. C. R 284/570) Section III Mainland North;

b) That on 10th December, 2018, the court granted an order for the maintenance of the status quo of the suit property. The Plaintiffs were notified accordingly of the said order;

c) That the aforesaid application was later heard inter-partes and this court reserved a date for ruling and consequently extended orders of status quo as the intended Defendants were in actual occupation and possession of the suit premises;

d) That while the aforesaid ruling was pending for delivery, the Plaintiffs having taken part in the said hearing surprisingly filed the suit herein but failed to include the intended Defendants as parties in this suit. The Plaintiffs also failed to disclose to the court of the existence of the aforesaid suit;

e) The as a result of the ruling and order dated 9th December, 2019 the intended Defendants have suffered the risk of being evicted from the suit property despite pendency of Malindi ELC Case No. 139 of 2015 as consolidated with Mombasa ELC Civil Case No. 93 of 2014 and the fact that the intended Defendants have not been given a chance to defend and ventilate their case before the court. In fact, the order issued by the court herein is in contravention of the order issued on 19th December, 2018 and the Subsequent setting aside order issued on 16th May 2020. As such it is necessary that the interim orders sought herein be granted so that the issue in dispute be substantively dealt with by the court;

f) That the intended Defendants did not participate in the said proceedings in Malindi ELC Cause No. 99 of 2019 and so should not have been affected by the orders that were issued thereon;

g) That the Plaintiffs evicted the intended Defendants together with others from the suit property following the issuance of the said orders. The said orders were however issued as a result of the Plaintiffs having committed a fraud in the face of the court in that:

a) Plaintiffs failed to disclose to the court that Mombasa ELC Civil Case NO. 93 of 2014 was still pending and that there were injunction orders restraining the Plaintiffs who are Defendants in that case from interfering with the intended Defendants' occupation on the suit property.

b) Further, Plaintiffs failed to disclose to the court that Malindi ELC Case No. 139 of 2015 which had been filed by the Plaintiffs against some of the occupants of the said property was still pending awaiting ruling on regard of a joinder of the Intended Defendants in that suit. Crucially, in the said suit an order of maintenance of the status quo has been issued by the court;

c) Notwithstanding the existence of the above suits the Plaintiffs filed this suit but once again conveniently avoided citing the Intended Defendants as Defendants in this suit. In the process, the Plaintiffs obtained orders for the eviction of the four Defendants in the suit but executed those orders against the five intended Defendants thereby the Intended Defendants were condemned unheard through an act of great trickery by the Plaintiffs;

d) The Plaintiffs have thereby derived an advantage over the Intended Defendants through an act of grave conspiracy, illegality and an abuse of court process and yet under the principle of Ex Turpi Causa Non Oritur Actio, the law does not allow anyone to retain a benefit that has been illegally obtained.

h) That the Intended Defendants have been awaiting the hearing to take place in Malindi ELC Case No. 139 of 2015 which was

consolidated with Mombasa ELC Civil Case No. 93 of 2014 but the intended Defendants have now realized that the Plaintiffs are commencing construction works on the suit property which, if it takes place, will mean as follows;

i. The pending suit being Malindi ELC Case No. 139 of 2015 which was consolidated with Mombasa ELC Civil Case No. 93 of 2014 will be rendered totally nugatory;

ii. The Plaintiffs would have obtained a permanent benefit as against the Intended Defendants through an act of great deceit.

iii. The Intended Defendants would have been permanently condemned (having been evicted from the suit property) when (they) were not heard at all, which is an affront to elementary justice.

i) That this application is well merited.

3. The Plaintiffs Respondents are opposed the Application herein. In a Replying Affidavit sworn on their behalf by the 1st Plaintiff Abdalla Said Abdalla, they assert that since 6th November, 2013 they have been the lawful registered proprietors of the suit property known as LR.No.MN/III/783, Kikambala Maweni, Kilifi County and that they have been in occupation thereof and they have constructed a wall on the same. They have also been paying land rent and rates to date.

4. The Respondents/Plaintiffs further avers that the suit herein and the subsequent orders issued on 9th December, 2019 restraining the Defendants did not involve the Intended Defendants and thus cannot be set aside as it will allow the Defendants and other squatters to re-enter the suit land and erect structures thereon. The Plaintiffs aver that the Applicants are strangers and known professional land grabbers with intentions to invade and defraud the suit property. They further assert that On 27th January, 2017, Florence Ningala Chimega the 5th Intended Defendant trespassed onto their suit property and fraudulently sold a portion thereof to Jefwa Betty a matter which was reported to Mtwapa Police Station. Equally, the 1st Defendant herein, Gabriel Katana Kajoji on 23rd July, 2017 purported to sell another portion of the suit property to one, Benedict Kahindi Munga.

5. The Plaintiffs further aver that contrary to the averments by the Applicants, **Malindi ELC Case No. 139 of 2015** and **Mombasa ELC Case No. 93 of 2014** have neither been consolidated nor is there an order for their consolidation. Accordingly, the Plaintiffs assert that in the absence of any order of consolidation, there is no way in which the Defendants would have been parties in **Mombasa ELC No. 93 of 2014**.

6. The Plaintiffs further aver that they did purely with a view to amicably resolving the squatters issue agree with Gabriel Katane Kajoji, the 1st Defendant in **Malindi ELC No. 99 of 2019** to carry out a sub-division of the suit property with a view to allocating them three acres of the land but the squatters breached the terms requiring them to vacate the land within 30 days.

7. I have perused and considered the application as well as the response thereto. I have similarly considered the rival submissions placed before me by the Learned Advocates for the parties.

8. The Applicants before me want to be enjoined in this suit as the 5th to 9th Defendants. They also urge this Court to set aside the orders issued herein on 9th December 2019 and that instead an order of injunction be issued restraining the Plaintiffs from entering the suit property, demolishing any houses thereon and/or dealing therewith in any manner whatsoever.

9. In respect of joinder of parties, Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows: -

“The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just order that the name of any person who ought to be joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectively and completely adjudicate upon and settle all the questions involved in the suit, be added.”

10. The Plaintiffs herein instituted this suit against the four (4) named Defendants- Gabriel Katana Kajoji, New Century Marine Trading East Africa Company Ltd, Chi Fung Lam and Patrician Kavinya Mulwa seeking inter alia a permanent injunction restraining them from trespassing, charging, selling, alienating or erecting structures on LR No. MN/III/783, Kikambala Maweni, Kilifi County. The Plaintiffs further sought orders directing the Defendants to demolish structures erected on the suit property and for their eviction therefrom.

11. Filed contemporaneously with the suit was a Notice of Motion application dated 22nd November 2019 seeking temporary orders of injunction to restrain the Defendants from interfering with the property as well as an order directing them to demolish the structures on the suit property. As a prayer in the alternative, the Plaintiffs sought to be allowed to demolish the structures and for the Defendants to be compelled to reimburse them for the costs thereof.

12. When that Motion came up for hearing inter-partes on 9th December 2019, none of the Defendants though served had filed any response thereto. In the absence of any objection to the application, this Court allowed the same as prayed.

13. Subsequently on 10th December 2019, the 2nd, 3rd and 4th Defendants filed an application herein seeking a stay of the orders issued on 9th December 2019 on grounds inter alia that their houses would be demolished on account of the orders granted. Having considered the said application ex-parte, this Court stayed execution of Prayers 4 to 7 of the Plaintiff's Motion dated 22nd November 2019 which prayers would have led to the demolition of the 2nd, 3rd and 4th Defendants' houses as aforesaid.

14. However, when the said application came up for hearing inter-partes on 19th December 2019, the 2nd, 3rd and 4th Defendants withdrew the same with the result that the orders barring the demolition of the houses were vacated.

15. In the instant application before me now dated 2nd September 2020, the Intended Defendants aver that on or about 10th October 2018, about a year before this case was filed, they had filed an application seeking a stay of execution of an interlocutory Judgment granted against them on the application of the Plaintiffs in **Malindi ELC Case No. 139 of 2015** wherein the subject matter was the same suit property herein being sub-division No. 783 (Original No. CR 284/57) Section III Mainland North.

16. It is further the applicants case that on the same 10th December 2018, an order of maintenance of status quo had been granted in view of the fact that the applicants herein were in actual occupation and possession of the suit premises. They accuse the Plaintiffs who are parties to the suit of mischievously filing the present suit and leaving out their names in order to steal a march on the Intended Defendants.

17. The Court's power in considering whether or not to enjoin a party to proceedings is discretionary. That discretion must however be exercised judiciously. As was stated by the Supreme Court in **Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others (2014) eKLR**: -

“.....an Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his/her interests will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her own cause.”

18. At paragraph 23 of their own Replying Affidavit, the Plaintiffs aver that they filed the said suit being **Malindi ELC Case No. 139 of 2015** in order to protect their rights as the owners of the suit property and that Judgment was indeed entered against the Intended Defendants whom they describe (at paragraph 7 thereof) as a group of vicious land grabbers who invade property and quickly sell the same when they succeed in their effort.

19. It was not clear why the Plaintiffs then resorted to filing this suit against the Defendants who quickly conceded to their claim leaving out the Intended Defendants/Applicants whose presence they were aware of and had filed another suit against. There was also no explanation rendered why the Plaintiffs would proceed with eviction of the Intended Defendants herein under the guise of the orders issued by this Court when already they had Judgment against the Intended Defendants.

20. The inescapable conclusion can only be as submitted by the Applicants that the Plaintiffs intend to obtain a permanent benefit against the Applicants and to have them condemned unheard over the property which they also claim to be their own.

21. In the foregoing circumstances, I find and hold that the Intended Defendants/Applicants have an interest in the suit property and that they are necessary parties in these proceedings to enable the Court to completely and effectively determine the issues in dispute herein.

22. It was also clear to me that there exists common questions of law or fact in both this suit and the said **Malindi ELC No. 139 of 2015** whose existence has not been denied by the Plaintiffs. The rights or relief claimed in the two matters are in respect of the same transaction. The prime purpose of consolidation of suits is to save costs, time and efforts and to make the conduct of several actions more convenient by treating them as one action.

23. In the circumstances herein, I think it will serve the interest of justice where this suit were consolidated with the said **Malindi ELC No. 139 of 2015**.

24. Arising from the fact that the Plaintiffs obtained the orders of 9th December 2019 without making full disclosure as to the existence of the applicants with whom they had another dispute pending in Court, this Court has not the slightest hesitation in setting aside those orders. But while the applicants had sought an order of injunction against the Plaintiffs, this Court will instead order for maintenance of the status quo prevailing ante the orders of 9th December 2019 to be restored and maintained pending the hearing and determination of the consolidated suits.

25. In the result, the Intended Defendants application succeeds in the substance and otherwise than as stated above, the application is allowed in terms of prayers 3, 4, 5 and 6.

26. The Intended Defendants shall also have the costs of this application.

Dated, signed and delivered at Malindi this 23rd day of March, 2021.

J.O. OLOLA

JUDGE