



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 34 OF 2019

IN THE MATTER OF: VIOLATION OF PETITIONERS' RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: ARTICLES 19, 20, 21, 22(1) (2) & (3), 23(1) & (3), 25(C), 27, 28, 40, 42, 47, 48, 50(1), 60 AND 162(2) (B) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 13(1), (2) (B), (D) & (E), (3) & (7) OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: ADJ SECTION KADZONZO/MADZIMBANI PLOT NOS. 176

BETWEEN

JAMBO FONDO GONA.....1ST PETITIONER

GEORGE KIRATU GITHINJI.....2ND PETITIONER

AND

- 1. THE MINISTER OF LANDS & SETTLEMENT**
- 2. THE DISTRICT LAND ADJUDICATION AND SETTLEMENT**
- 3. THE DISTRICT LAND REGISTRAR KILIFI**
- 4. THE CHIEF LAND REGISTRAR**
- 5. KADENGE KENGA KOI**
- 6. CHARO CHULA KIDHONGO**
- 7. THE HONOURABLE ATTORNEY GENERALRESPONDENTS**

RULING

1. By their Notice of Motion dated and filed herein on 27th July 2020, Jambo Fondo Gona and George Kiratu Githinji (the Petitioners) pray for an order of injunction to issue restraining the Respondents, their servants and or agents from selling, disposing, farming, entering,

remaining upon or otherwise dealing with all that property known as Plot Number Kilifi/Kadzonzo/Madzimbani/176 pending the hearing and determination of this case.

2. The application which is supported by an affidavit sworn by the 2nd Petitioner- George Kiratu Githinji is based on the grounds inter alia: -

i) That the 5th and 6th Respondents have jointly and severally attempted sale of the suit property and the Petitioners are reliably informed that the two may have received a deposit for the illegal sale;

ii) That the Petitioners have learnt that the 5th Respondents holds a title for the suit property issued to him by the 3rd Respondent and attempts to place a restriction on the said title have been unsuccessful;

iii) That it is apparent that both the Petitioners and the 5th Respondent have in their possession title deeds issued over the same property, an anomaly that ought to be corrected; and

iv) That if the sale by the Respondents proceeds, the Petitioners stand to suffer irreparably and it is in the interest of justice that the application be allowed.

3. Kadenge Kenga Koi- the 5th Respondent is opposed to the application. In a Replying Affidavit sworn and filed herein on 2nd September 2020, the 5th Respondent asserts that this Court lacks the jurisdiction to entertain this matter on the grounds that: -

a) This matter having been determined by the Ministerial Panel, it could only come to this Court by way of Judicial review to quash the decision; and

b) The suit has been disguised as a Constitutional Petition and yet the issues raised fall within parameters of an ordinary suit.

4. The 5th Respondent further avers that the Petitioners' averments in the Supporting Affidavit are merely hearsay as the source of information has not been disclosed and the said intended sale is but a figment of the Petitioners' imagination. The 5th Respondent denies that the Petitioners are in occupation of the premises and asserts that the Registrar has already placed a restriction on the title and hence this suit does not serve any purpose.

5. I have perused and considered the application as well as the response thereto by the 5th Respondent. I have similarly perused and considered the rival submissions as placed before me by the Learned Advocates for the two parties. The other Respondents did not file any response to the application.

6. As to the grant of interlocutory injunctions, Rule 1 of Order 40 of the Civil Procedure Rules provides as follows: -

“Where in any suit it is proved by affidavit or otherwise-

a) 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

b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit;

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further order.”

7. The conditions for consideration in granting such orders were set out in the case of ***Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*** where the Court held thus: -

“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.”

8. Describing what constitutes a prima facie case in ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, the Court of Appeal delivered itself as follows: -

“A prima facie case in a civil application includes but it not confined to a genuine and arguable case. It is a case 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 as to call for an explanation or rebuttal from the latter.”

9. In the matter before me, the Petitioners contend that both themselves as well as the 5th and 6th Respondents are in possession of titles to the self-same suit property. The Petitioners accuse the said Respondents of trying to sell and or dispose of the property to third parties in

order to wrongfully deny the Petitioners of their entitlements thereto.

10. I have looked at the two titles exhibited by the Petitioners. While the same appear to refer to the same property, I note that the Petitioners' title was issued on 16th May 2018 and that the same refers to the property said to measure approximately 2.60 Ha. On the other hand, the title in the name of the 5th Respondent was issued on 28th November 2019 and refers to a parcel of land said to be measuring 4.78 Ha.

11. From a perusal of the 2nd Petitioners Supporting Affidavit, it is apparent that he purchased the property from the 1st Petitioner after confirming with the Kilifi District Land Adjudication and Settlement Office (the 2nd Respondent) that the land had been adjudicated to the 1st Petitioner.

12. It is however apparent that upon the said purchase, the Petitioners quickly proceeded to process title for the suit property in their name. It was not however clear to me if the adjudication process had been completed in the area by the time they obtained their title. From their own Supporting Affidavit, it is apparent that the 5th and 6th Respondent successfully objected to the Adjudication Committee's findings in favour of the 1st Petitioner.

13. Following a hearing by the Ministerial Panel pursuant to Section 29 of the Land Adjudication Act held on 8th August 2018, the Panel allowed the Appeal and ordered that the Parcel be registered in the name of the 5th Respondent. At paragraph 9 of its findings, the Panel expressed its surprise at the Petitioners' title and stated as follows: -

“9. This Panel is in doubt as to why the title deed was released and change of the acreage effected before the appeal is heard and decided contrary to the normal procedure whereby all appealed parcels are restricted until the appeals are heard and determined.”

14. Arising from the foregoing, it was apparent to me that the Petitioners' title to the suit property may be of dubious origins. As it were, the Land Adjudication Act provides an elaborate procedure to be followed from the time an area is declared an adjudication section until such a time that the Adjudication Register is closed. The Petitioners who were represented by the same Advocate as in these proceedings have not explained how they acquired their title when the Appeal to the Minister was still pending before the Panel.

15. As it were, under Section 29 of the said Cap 284, the decision of the Panel is final and an aggrieved party could only come to this Court for Judicial Review if some procedural impropriety was alleged. I did not see any evidence of the same in the matter before me.

16. It follows that the Motion before me does not meet the threshold for the grant of an interlocutory injunction and I hereby proceed to dismiss the same with costs to the 5th Respondent.

Dated, signed and delivered at Malindi this 30th day of April, 2021.

J.O. OLOLA

JUDGE