



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 44 OF 2021

1. NAZI MWASAHA KOLAI

2. TYSON MWASANJU.....PLAINTIFFS

VERSUS

1. KHADIJA ALI AHMED

2. JIRANI MONGO.....DEFENDANTS

RULING

This ruling is in respect of an application dated 6th May 2021 by the Plaintiffs/Applicants seeking the following orders: -

a) SPENT

b) That this Honourable Court be pleased to issue an injunction restraining the Defendants either by themselves, their agents, servants and/or employees from evicting and/or interfering with the Plaintiff's quiet possession of the land known as Plot 23 Kijipwa Settlement Scheme pending the hearing and determination of this suit.

c) That this Honourable Court be pleased to make any other or such orders as it may deem fit and just to grant.

d) That costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

PLAINTIFFS/APPLICANTS' SUBMISSIONS

The Applicant relied on her supporting and further affidavits where she deponed that her family was at all material times the proprietor of Plot No. 23 Kijipwa Settlement Scheme, Kilifi County, measuring approximately 2.5 acres. She further deponed that her family has always lived on the suit property until recently when the 1st Defendant visited the suit land claiming to have purchased the same from the 1st Plaintiff's late husband in the year 2012.

It was the Applicant's case that her consent was never obtained in the alleged transaction and that her late husband never informed her of any transaction regarding the suit property. That her family was at the risk of being rendered destitute if the 1st Defendant is allowed to proceed with her eviction threats and notices.

Counsel submitted that the purported sale of the suit property was null and void for lack of a spousal consent and by virtue of the overriding interests provided for under Section 28 of the Land Registration Act, 2012, on spousal rights over matrimonial property. Further that the legality of the sale was questionable for failure of the 1st Defendant to take possession since 2012.

DEFENDANTS/RESPONDENTS SUBMISSIONS

The 1st Defendant/Respondent filed a Replying Affidavit where she deponed that sometime in 2012, she purchased a portion of land measuring 2.5 acres on a plot formerly referred to as No. 96 Kijipwa, from the 1st Plaintiff's late husband, Jackson Kishushe Masanju, at a

consideration of Kshs. 1,500,000/-. Vide a written agreement dated 14th June 2012, which she signed before the Area Assistant Chief on 9th October 2012 before the area Assistant Chief. That on 21st March 2013, they formalized the agreements before an advocate by signing a 3rd Sale Agreement.

It was the 1st Defendant's case that she was to complete the balance of the purchase price upon securing the title documents to the suit property, and which were to be processed by the deceased. Further that the 1st Plaintiff was all along aware of the transaction and that she even met her while making further payments to the deceased.

The 1st Defendant also stated that upon completion of the purchase price, she fenced the suit property and constructed a cowshed and donated a part thereof for the construction of a mosque and a borehole while the deceased was still alive.

The Respondent stated that she allowed the 1st Plaintiff to continue occupying the suit property as she organized her finances for proper developments. Further, that when the area was declared a Settlement Scheme, and upon investigations and verification the 1st Defendant was registered as the owner of the suit property.

Counsel submitted that the Plaintiff has not established a prima facie case against her, as the claim of the suit land being ancestral land cannot stand as this was government land under a Settlement Scheme.

Counsel submitted that the Plaintiff has no proof of ownership and relied on the case of **Patrick Waweru Mwangi & another –v- Housing Finance Co. of Kenya Limited [2013] eKLR** and **Mrao v First American Bank of Kenya Limited & 2 others [2003] KLR 125**.

On the issue whether the Plaintiff has proved her case on a balance of convenience, counsel submitted that the 1st Defendant and the community members who use the mosque and borehole built on the suit property would suffer more harm if the orders of injunction are issued than the Plaintiff.

On the issue of irreparable damage, counsel submitted that the land has a known value hence the Plaintiff can be compensated by way of damages and cited the cases of **Ruth Kimathi John v Housing Finance Company of Kenya Limited & another [2021] eKLR**

and Caliph properties limited v Barbel Sharma & another [2015] eKLR and urged the court to dismiss the application.

ANALYSIS AND DETERMINATION

The issues for determination in an application for grant of temporary injunction are as per the principles enunciated in the case of **Giella -vs- Cassman Brown Co. Ltd**. An Applicant must establish a prima facie case with a probability of success, Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly if the Court is in doubt, it will decide an application on the balance of convenience.

From the evidence on record, it is clear that the Plaintiffs reside on the suit land and it is also undisputed that the 1st Defendant has built a mosque and a borehole thereon. The Plaintiffs claim that the land is ancestral land and that the deceased husband did not sell the land to the 1st Defendant.

The 1st Defendant claims that she bought the suit land in 2012 but has never taken possession but built a Mosque and a borehole that the community use and further that she had given the Plaintiffs time to move out. The Defendant has exhibited agreements for sale and payments made for the of purchase of land and that the Plaintiff has not explained why the Defendant was allowed to build a mosque and a borehole if she did not have proprietary rights or interest in the property.

On the issue whether the Plaintiff has established a prima facie case, in the case of **Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR** where the court state that where there is a dispute as to who is the rightful owner of the suit land, each party has a duty to explain how they acquired the suit property. Further in the case of **Shiva Carriers Limited v Imperial Bank Limited & another [2018] eKLR** where the court held thus:

“That need for an explanation is enough for a court to say that let the status quo now prevailing be maintained by way of a temporary injunction pending such explanation at the hearing and determination after the explanation.”

Both the Plaintiffs and the Defendants are under a duty to explain their claim to the property and in this case both the Plaintiffs and the Defendants have some ground to hang on the property as earlier stated. The plaintiffs would be suffering if evicted and the issue of ownership is not determined and the defendants will also suffer if their rights to the property are not adjudicated. The Defendants have built a mosque and a borehole which is not disputed.

The Plaintiffs claimed that there was no spousal consent but it is worth noting that spousal rights over matrimonial property are no longer categorized as overriding interests. An overriding interest is an interest to which a registered title is subject, even though they do not appear in the register. Overriding interests are binding on both the registered proprietor and on a person who acquires an interest in the property.

I have considered the pleadings, the application and submission by counsel and find that the order suitable to grant is that the status quo prevailing as the time of filing this suit be maintained pending the hearing and determination of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.