



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 77 OF 2020**

**1. KHAMIS ATHMAN MWANJIRA**

**2. SAUMU JUMAA HEMEDI.....PLAINTIFFS**

**VERSUS**

**ATHMAN NGOVI**

**(REP of the ESTATE OF OMAR RAJIMBO) & 7 OTHERS.....DEFENDANTS**

**RULING**

1. This ruling is in respect to the Notice of Motion application dated 8<sup>th</sup> July 2020 by the plaintiffs/applicants. The application is grounded on the contents of a supporting affidavit of Khamis Athman Mwanjira sworn on 8<sup>th</sup> July 2020 and supplementary affidavit sworn on 23<sup>rd</sup> October, 2020. The application seeks the following orders:

- a. That this Honourable Court may stop, bar, discontinue, halt the 1<sup>st</sup> defendant his agents, assigns or servants for in in way using or claiming that PLOT NO. KWALE/TSUNZA/1165 belongs to him.**
- b. That this Honourable Court to stop, bar or restrain the 5<sup>th</sup> defendant his agents, assigns or servants through issuing or giving out any money to anyone whosoever in form of compensation in respect OF PLOT NO.KWALE/TSUNZA/1165 until the court decides on the rightful owner.**
- c. That the Honourable Court to stop, bar, or in any way not to allow the defendants No.3 and 4 their agents, assigns or servants from holding the person non registered as proprietor of PLOT NO. KWALE/TSUNZA /1165 until the decision of this Honourable Court.**

2. The plaintiff's case is that the suit land belonged to their deceased father, but after their father's death, the plaintiffs' cousin Omar Rajimbo (also deceased) who was the 1<sup>st</sup> defendant's father, surreptitiously caused the land to be secretly surveyed and caused the same to be registered in his name. That upon the demise of the 1<sup>st</sup> defendant's father in the year 2018, the 1<sup>st</sup> defendant took over the suit land. That when the plaintiffs went to the suit land to do some cultivation, the 1<sup>st</sup> defendant attempted to stop them from doing so and reported them to the police who threatened to arrest the plaintiff. That when the plaintiffs reported the matter to the 6<sup>th</sup> defendant, a meeting was called to solve the dispute between the parties, but the 1<sup>st</sup> defendant declined to attend. That the land has now been compulsorily acquired by the Government to build a road through it and compensation is to be awarded to the owners, but the 1<sup>st</sup> defendant intends to take that award pretending to be owner of the said land. That unless the order of injunction is given, the 1<sup>st</sup> defendant will wrongly and unfairly receive compensation payment for the suit land.

3. In their written submission filed on 23<sup>rd</sup> October, 2020, the plaintiffs submitted that in exercising its discretion under the Civil Procedure Act, or in determining whether or not to grant the injunction sought, the court should consider what has become the principle of proportionality under the overriding objective, which objective the court is enjoined to give effect to in the exercise of its power under the Act or the interpretation of any of its provisions. The plaintiffs cited the principles for the grant of interim injunction as stated in the case of **Giella –v- Cassman Brown & CO. Ltd (1973) EA.358** which are; that the applicant must demonstrate that he has a prima facie case against the respondent with high chances of success; that the applicant will suffer irreparable loss that cannot be compensated in damages if the orders sought are not granted; and, when in doubt, the court determines the matter on a balance of convenience. The plaintiffs also relied on the case of **New Ocean Transport Limited & Another –v-Anwar Mohammed Bayusuf Limited CA 16 of 2014; Felix Construction Solutions Ltd –v- Vernadel Court Limited (2012) eKLR; Suleiman –v- Amboseli Resort Limited (2004)2 KLR; Nguruman Limited –v- Jan Bonde Nielsen & 2 Others (2014)eKLR; and, Mrao Limited –v- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125.**

The plaintiffs submitted that they have met the threshold for grant of the orders sought, arguing that the 1<sup>st</sup> defendant's ownership of the suit land is unlawful and/or illegal and that the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents ought to cancel the 1<sup>st</sup> respondent's title to which the applicants are challenging its validity. The plaintiffs also relied on the case of Court of Appeal at Kisumu, Civil Appeal No.160 of 1995. The applicants aver that it came to their attention that the 1<sup>st</sup> respondent has now sold the suit land to a third party and that unless the orders sought are granted, the applicants will suffer irreparable loss and damage and the suit herein will be rendered nugatory.

4. In opposing the application, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 14<sup>th</sup> September, 2020. It is his contention that Omar Ali Majimbo (deceased) was at all material times living on and cultivating the suit land which was trust land under the trusteeship of the then Kwale County Council. The 1<sup>st</sup> defendant avers that he assisted his late father to apply to Kwale County Council seeking approval to set apart the subject land and the application was approved on and a letter of allotment dated 15<sup>th</sup> July, 1998 was issued in the name of the 1<sup>st</sup> defendant's deceased father. That before the setting apart process, the area where the suit land is situate was declared an adjudication area and was demarcated, surveyed and demarcation map drawn. The subject land was mapped out to measure 6.8 hectares. That a three – month notice was published by the adjudication officer for any person who claimed an interest in the parcels of land recorded in the adjudication register to lodge their claim and and the plaintiffs registered their claim in which after arbitration, the subject land was divided into two parcels, PLOT KWALE/TSUNZA/1165 measuring 3.94 hectares and PLOT NO KWALE/TSUNZA/1663 measuring 2.86 hectares which went to and were registered in the names of the 1<sup>st</sup> defendant's father and the plaintiffs' father respectively. That the National Land Commission in the Kenya Gazette published on 7<sup>th</sup> April 2017 listed both parcels for compulsory acquisition for the construction of Dongo Kundu bypass. That the 1<sup>st</sup> defendant delivered all the necessary documents pertaining to claim for compensation for compulsory acquisition of PLOT KWALE/TSUNZA/1165. That the deceased sold and transferred the suit land to Tasna Investments Limited, the 8<sup>th</sup> defendant herein. The 1<sup>st</sup> defendant argues that he no longer has any interest in the suit land as ownership has already passed to a third party. That the plaintiffs are set to receive Kshs.16,335, 288.74 for their PLOT NO. KWALE/TSUNZA/1663. It is the 1<sup>st</sup> defendant's contention that the application is fatally defective and is filed contrary to the requirements of the Land Adjudication Act and the Land Registration Act. That to the extent that the plaintiffs filed adjudication objection proceedings which were subsequently determined, the court does not have jurisdiction to determine the matter. That the application is misconceived and ought to be struck out or dismissed.

5. The 8<sup>th</sup> defendant opposed the application through grounds of objection dated 26<sup>th</sup> November 2020. The 8<sup>th</sup> defendant also filed written submission dated 16<sup>th</sup> December, 2020. It is the 8<sup>th</sup> defendant's submission that the plaintiffs do not implicate the 8<sup>th</sup> defendant who is the registered owner of the suit property in any fraudulent acts. That in this case, it is clear that the suit property was sold to the 8<sup>th</sup> defendant for valuable consideration. Counsel for the 8<sup>th</sup> defendant cited the provisions of Section 26 of the Land Registration Act and submitted that the plaintiffs have not established prima facie case with high chances of success, adding that the plaintiffs remedy is damages. The 8<sup>th</sup> defendant relied on the case of **Giella (supra); Samuel D. Omwenga Angwenyi –v- National Land Commission & 2 Others (2019) eKLR;** and **Charles Karathe Kiarie & 2 Others –v- Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others (2013)eKLR.**

6. I have considered the application and the submissions made. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicants are deserving of injunctive orders.

7. The principles upon which an interlocutory injunction may be granted are well settled. An applicant has to establish a prima facie case with a probability of success and 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. And if in doubt, the court will decide that matter on a balance of convenience.

8. In this case, it is not in dispute that the suit property is registered in the 8<sup>th</sup> defendant's name. From the material on record, the 8<sup>th</sup> defendant purchased the property from the 1<sup>st</sup> defendant who in turn had inherited the same from his deceased father. There is also evidence that the plaintiffs and the 1<sup>st</sup> defendant have had disputes over the suit property during adjudication process which it is apparent was determined in favour of the 1<sup>st</sup> defendant or his late father.

9. Section 26 of the Land Registration Act provides that:

**“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima face evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –**

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”**

10. Whereas in the amended plaint, the plaintiffs have sought an order that the sale or acquisition of the suit land by the 8<sup>th</sup> defendant be revoked, I note that there are no allegations that the 8<sup>th</sup> defendant was party to any fraud or misrepresentation in obtaining its title. Moreover, the dispute is over compensation, the suit property having been compulsorily acquired by the Government for the construction of a road. The compensation award is known and therefore the plaintiffs can be adequately compensated in damages if at the end of the trial it is found that the defendants are on the wrong.

11. Looking at the material placed before me, I find the plaintiffs have not established a prima facie case with a probability of success. I am also not persuaded that the plaintiffs stand to suffer any irreparable harm that cannot be compensated in damages if the interim injunction sought is not granted.

12. Given the above discourse, I do find that the notice of motion dated 8<sup>th</sup> July 2020 has no merit and the same is hereby dismissed with costs to the 1<sup>st</sup> and 8<sup>th</sup> Defendants.

13. It so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF MAY, 2021**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**