



Tsuma & another v Said (Sued on his own behalf And on behalf of the Estate of Zeyana Binti Azzan) & another (Environment & Land Case 23 of 2021) [2022] KEELC 2585 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 23 OF 2021**

**MAO ODENY, J
JULY 7, 2022**

BETWEEN

PAUL CHAI TSUMA 1ST PLAINTIFF

EMMANUEL CHAI KALAMA 2ND PLAINTIFF

AND

SEIF MOHAMED SAID (SUED ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF ZEYANA BINTI AZZAN) 1ST DEFENDANT

THE BOARD OF DIRECTORS TAWFIQ MUSLIM ACADEMY 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated December 2, 2021 by the plaintiff/applicants seeking the following orders:
 1. Spent.
 2. That temporary injunction orders do issue as against the Defendants jointly and severally, their agents, servants, attorneys, assigns or representatives from entering, remaining, encroaching into, developing, constructing or in any other way whatsoever interfering with the plot owned and occupied by the Plaintiffs/ Applicants exercised from the larger plot LR No. 159A in Malindi pending the hearing and determination of this application.
 3. That an order of injunction do issue against the Defendants/ Respondents jointly and severally, their agents, servants, attorneys, assigns or representatives from entering, remaining, encroaching into, developing, constructing or in any other way whatsoever interfering with



the plot owned and occupied by the Plaintiffs/ Applicants exercised from the larger plot LR No. 159A in Malindi pending the hearing and determination of this suit.

4. Costs of this Application.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.

Plaintiff/applicant's Submissions

3. The application was supported by the annexed affidavit of Paul Chai Tsuma sworn on the December 2, 2021 who deponed that they have been living constructively and continuously on the suit land and have developed the land without interruption for a period of over 15 years hence have acquired the same by adverse possession.
4. The applicant further deponed that they found the suit property unoccupied and with the full knowledge of Mr. Seif Moh'd whom they had all reasons to believe that he was the owner of the suit property. That they discovered that the owner of the suit land was deceased and that the 1st Defendant intends to forcefully evict them with the help of the 2nd Defendant and the police.
5. Counsel relied on the principles for grant of injunctions as per the case of *Giella -v- Cassman Brown & Company Ltd* (1973) EA 358 and submitted that the applicants have met the threshold for grant of temporary injunction. That the applicants have been on the suit land for over 15 years.

Defendant/respondents' submissions

6. The 1st Defendant filed a Replying Affidavit sworn by Seif Mohamed Said on February 18, 2022 and deponed that the applicant's father, one Stephen Kalama Nzaro came to live on the suit land on the mutual understanding that he was to take care of the farm as a caretaker. That the applicant's father was put in possession of half an acre of the suit property as a caretaker which portion, he had already built a house on for him to stay with his family including his two children who have now sued him.
7. He further deponed that over the years, the proprietors of Portion Number 159A Malindi unanimously agreed to gift the land to the 2nd Defendant school for charitable purposes in the effort to expand its territory owing to the increased number of students. That the plaintiff was to move out of the suit property with an alternative offer which they withdrew upon the plaintiff making unreasonable demands.
8. That the applicant's father was arrested and charged with forcible detainer in Malindi Chief Magistrate's Court Criminal Case No. E656 of 2021 and urged the court to dismiss the application as they will suffer irreparable loss and damage if the application is allowed.
9. Mr Otara submitted that the Applicants who claim ownership of a portion of the suit property by adverse possession are seeking to have the Respondents who are the title holders to be restrained from entering their own property. Similarly, it was counsel's submission that the applicants have not told the court what kind of loss they will suffer if the Respondent proceeds with construction on the suit property. He submitted that the balance of convenience in the instant case tilts in favour of the Respondents since they are the registered owners of the suit property.
10. It was counsel's submission that one cannot be an intermeddler on his own property and therefore the allegations by the Plaintiffs are false. According to the Defendants, the Plaintiffs only came to the suit property when their father was employed as the farm caretaker in 2011 as deponed in the affidavit.



Analysis And Determination

11. This is an application for injunction against the defendants who are the title holders of the suit land. The plaintiffs filed an Originating Summons dated December 2, 2021 where the applicant prayed for a declaratory order that the Plaintiff has acquired title by adverse possession over plot No 159A Malindi and is therefore entitled to be issued with certificates of titles thereto. The applicant annexed a certificate of official search of the suit property together with photographs of the structures thereon.
12. The law governing the grant of interlocutory injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules](#) 2010 which provides that: -

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 [Rev. 2012] [Civil Procedure](#) Cap. 21 [Subsidiary] C17 – 165;
 - (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."
13. In an application for injunction, an applicant must meet the threshold for grant of injunctions as was laid down in the Cassman Brown case (*supra*) where the court held that:

Firstly, 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."
14. The applicant must prove that the suit land in dispute is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property. If such is proved, then the court can grant such orders of injunction to preserve the substratum of the suit property and the case. The applicants have not shown what loss they will suffer if the orders sought for injunction are not issued. The defendants are in control and occupation of the suit land as they are the registered owners. It seems that the plaintiffs want to fortify their claim on adverse possession with this application.
15. From the pleadings, the application and submissions by counsel, there is no real danger that the applicants will suffer and there would be no need to interfere with the substratum of the suit property. The plaintiff can comply with order 11 of the [Civil Procedure Rules](#) and fastrack the hearing of this suit.
16. I find that the plaintiff has not established a *prima facie* case with a probability of success and therefore the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF JULY, 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.

