



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 202 OF 2019

ALI SALIM DZIHONZA

IDDI SWALEHE MWACHIPONDA

SULEIMAN HASSAN MWAMURYA

MARIAM HAMADI MNJAVI

MOHAMMED SWALEH MWAKUTUNZA.....PLAINTIFF/APPLICANTS

VERSUS

SUDI AMADI MWAKUWEWE

MWAPILISI AMADI MWAKUWEWE.....DEFENDANTS/RESPONDENTS

RULING

1. The application for determination is the plaintiffs' Notice of Motion dated 15th November 2019 brought under Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rule 1, 2, 3, 4 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya and seeks the following orders:-

a. Spent

b. That a temporary injunction do issue to restrain the defendants by themselves, their servants, and/or agents from continued use, transferring, leasing, construction or any other way disposing off or whatsoever dealing with all that parcel of land known as Kwale/Kundutsi B/1381 pending the hearing and determination of this application interparties.

c. That the defendants by themselves, their servants and/or agents be restrained from continued use, transferring, leasing, constructing or in any other way disposing off or whatsoever dealing with all that parcel of land known as Kwale/Kundutsi B/1381 pending the hearing and determination of this suit.

2. The application is supported by the affidavit of Ali Salim Dzihonza, and is based on the ground that the plaintiffs are the registered owners of all parcel of land known as Kwale/Kundutsi B/1381 situated at Tsimba, Kwale County. The plaintiffs stated that they have never allowed the defendants to be on the suit property to construct permanent structures or plant crops. In the affidavit in support of the application, Mr. Salim pleaded that he has authority to make an oath on behalf of the other plaintiffs and annexed a copy of authority marked 'A'. He further pleaded that he is one of the registered owners of the suit property and annexed a Certificate of Title dated 25th February 2019 as well as an Application for official search marked 'B'. Mr. Salim claimed that the defendants have invaded their land to cultivate and are in the process of building permanent structures despite the presence of suit property having their fathers' graves. He annexed and marked 'C' pictures allegedly showing the graves of their father and grandfather. The deponent inter alia stated that the plaintiffs have tried to resolve the issue at the Chief's office but the defendants are adamant. He annexed a letter marked 'D' dated 26th August 2019 from the Chief's office, Diani location. He pleaded with the court to allow the application in order to protect their property rights.

3. The defendants opposed the application and filed a replying affidavit on 5th November 2020 affirmed by Sudi Amadi Mwakuwewe and Mwapilisi Amadi Mkwakuwewe. They both stated inter alia that on or about 4th August 1976 the 1st defendant entered into an agreement with the late Rashid Mwasumbi, to purchase the suit property for Kshs 172,800 and on or about 18th December 1980, the said Rashid Mwasumbi gave vacant possession of the suit property. That the 1st defendant then allocated a portion of the suit property to the 2nd

defendant among others who are in occupation till this date.

4. The deponents further pleaded that the plaintiffs have filed a similar case against them at Kwale Law Courts Civil Suit No. 267 of 2007 which was dismissed on account of the plaintiffs' indolence. They claimed that the title deed to the suit property was fraudulently obtained by the plaintiffs in order to defraud them of their rights despite them coming from the same father. They stated that they have been living on the suit property since 18th December 1980 where they have also farmed and planted trees. They pleaded with court to dismiss the application since the suit property is the only place they call home for over 45 years.

5. The plaintiffs filed a Further supporting affidavit on 1st February 2021 sworn by Ali Salim Dzihonza in which he denied the contents of the replying affidavit and averred inter alia that it's full of falsehoods and that it is malicious and vexatious. He stated that the suit filed in Kwale Law Courts Suit No. 267 of 2007 was withdrawn by the plaintiffs for lack of jurisdiction. The deponent concluded by stating that the title to the suit property was issued in 2019 after the completion of the succession issues that were not contested by the defendants.

6. I have considered the pleadings on record, and the issue for determination is whether the plaintiffs' application has met the threshold to be granted a temporary injunction.

7. Order 40 Rule 1 grants court discretion to grant a temporary injunction to restrain acts for the purpose of preventing, wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit. The plaintiffs herein have to establish that they have a prima facie case, demonstrate irreparable injury if a temporary injunction is not granted, and where court is in doubt will grant on a balance of convenience. The plaintiffs should establish these three conditions separately and distinctly for an order of temporary injunction to be granted.

8. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** discussed the these requirements at length and stated that:-

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

The applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

9. The plaintiffs have produced a title to the suit property to prove ownership to it, and as stated in **Section 26 (1) of the Land Registration Act** a certificate of title issued by the Registrar shall be taken by all courts as prima facie evidence that the person named is proprietor of the land. The defendants allege fraud on part of the plaintiffs while acquiring the certificate of title but have failed to produce any evidence to back up their claim, and that remains as mere allegations. At this interlocutory juncture and in the absence of evidence proving the contrary, the plaintiffs have established a prima facie case as the registered owners of the suit property and as such have the right to have their interest on the suit property protected.

10. The plaintiffs avers that they never allowed the defendants to construct permanent structures on the suit premises and have attached photographs showing a permanent house, a farm with crops as well as mature trees. The defendants on the other avers that they have lived on the suit property for over four decades peacefully without interference from the plaintiffs. The presence of permanent houses is proof that the defendants have been and are still living on the suit property at the full glare of the plaintiffs. The plaintiffs have not adduced compelling evidence of the irreparable damage that they stand to suffer that cannot be adequately compensated by monetary value if the defendants are not restrained from the use of the suit property.

11. A temporary injunction restraining the defendants from the continued use of or dealing with the suit property whatsoever is essentially an eviction order. The court will only issue orders at the interlocutory stage with the sole purpose of preservation of the subject matter for the interest of justice until the case is determined.

12. The upshot of this application is that the plaintiffs have failed to meet all the three requirements for an order of temporary injunction to be issued. Consequently the Notice of Motion dated 15th November 2019 has no merit and is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MAY, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE