



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 91 OF 2018

JOHN OLUOCH OKETCH

(Suing as the administrator as

litem of the estate of **LUDIA**

OKETCH OBUONDE alias

LUDIA W/O GEORGE

OKETCH alias **LUDIA**

OKETCH alias **LYDIA**

OJWANGA OKETCH

alias **JUDIA OKETCH**

alia **LUDIA OJWANG OKETCH**.....**APPLICANT**

VERSUS

1. SHARIF KIPANGA

2. FUAD WANJE KOMBE

3. OMARI IDD

4. KARISA SAFARI DIMA

5. KASENA FOLENI

6. JEY SHIDA BAO

7. JULIUS KATANA MWARINGA

8. CHARO KITSAO MWARINGA

9. KARISA KALAMA

10. KUPATA NGARE

11. JUSTUS CHARO

12. ALBERT KARISA SAFARI.....**DEFENDANTS**

RULING

1. In this Notice of Motion application dated 20th April 2018 and filed herein on 24th April 2018, John Oluoch Oketch (the Plaintiff/Applicant) prays for a temporary order of injunction to issue restraining the twelve Defendants from trespassing, intermeddling, developing, sub-dividing, offering for sale, erecting any structures and/or interfering in any way whatsoever with the Plaintiff's use, occupation, quiet possession and development of all that parcel of land known as Plot No. 59 Malindi. In addition, the Plaintiff prays for an order directing the OCS Malindi Police Station to ensure compliance with the injunction order.

2. The application which is supported by the Plaintiff's affidavit sworn on 20th April 2018 is anchored on the grounds inter alia:-

i) That Ludia Oketch Obuonde (deceased) on behalf of whose estate the Plaintiff brings these proceedings was the registered owner of the said parcel of land;

ii) That the deceased acquired the property way back in 1971 and had occupied the same peacefully without interruption until 25th April 2013 when she passed on;

iii) That sometime in February 2018, the Plaintiff and other beneficiaries of the estate of the deceased discovered that the Respondents as squatters and trespassers had invaded the land and had started sub-dividing the same and erecting structures thereon; and

iv) That unless the Respondents are restrained, they will continue interfering with the land and dispossessing the Plaintiff and other beneficiaries of the suitland.

3. However, in a Replying Affidavit sworn and filed herein on 23rd July 2018, on behalf of the other Respondents, Julius Katana Mwaringa (the 7th Respondent) avers that their occupation of the suit property is lawful as they have resided thereon for more than fifteen years without any claim from anyone.

4. The Respondents further cast aspersions on the Plaintiff's title and aver that the fact that the Plaintiff failed to attach any recent Certificate of Search of the said parcel of land is evidence that the same may have changed hands and is now owned by third parties.

5. The Defendants/Respondents also aver that the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th and 10th Respondents have no interest whatsoever on the suit property and their being enjoined as Defendants herein is without any basis.

6. I have considered the Plaintiff's application and the Defendant's response thereto. I have equally perused and considered the submissions filed by the Learned Advocates for the parties as well as the authorities to which they referred me.

7. In granting injunctive relief, Courts are guided by the principles laid down in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*. Those principles provide that:-

a) The applicant must demonstrate a prima facie case with a probability of success;

b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage which cannot be adequately compensated in any way or by an award of damages; and

c) If the Court is in doubt, it will decide an application on a balance of convenience.

8. Arising from the foregoing, the first inquiry this Court must make is whether on the material placed before me, the Applicant herein has demonstrated that he has a prima facie case with a probability of success. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, the Court of Appeal observed that:-

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case.”

9. In the matter before me, the Applicant is the Administrator ad Litem of the estate of one Ludia Oketch Obuonde who as per the Limited Grant annexed to the Applicant's Affidavit as annexure “JOO 1” passed away on 25th April 2013. The deceased is said to have bought the suit property from one Veilji Manji in 1971. In support of his case the Plaintiff has annexed an extract of the Certificate of Ownership indicating that the property was transferred to the deceased vide an Indenture dated 20th May 1971 which was registered at the Mombasa Lands Registry on 27th May 1971.

10. On their part, the Defendants aver that they have been exclusively occupying the suit property without any interruptions for the past fifteen years. During that period it is their case that they have built their residential houses on the land and have been cultivating the same ever since.

11. Considering the facts and evidence placed before me, it is apparent that the property in dispute is registered in the name of the late Ludia Oketch Obuonde. Despite their protestations, the Defendants did not produce anything before me to evidence their entitlement to the suit property, other than their claim to have lived thereon for some time.

12. I did note however that in their Replying Affidavit, the Defendants have annexed photos of a number of structures and residential houses all of which are said to be spread over the suitland. While the Plaintiff claims to have only learnt of their trespass into the suit property sometime in February 2018, a perusal of some of the photos attached to the Defendants' Replying Affidavit would suggest that some of the structures were built earlier than that.

13. As was stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR:-*

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

14. In the matter before me, it is quite apparent that the act sought to be restrained by the Plaintiff had long occurred and there is no longer any urgent necessity to restrain the Defendants. Given that the Defendants already are admittedly in the property, I think it was imperative that the circumstances under which they entered the property be investigated before any order that are adverse to them are issued.

15. In the circumstances I decline to grant the orders sought in the application dated 24th April 2018. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 11th day of July, 2019

J.O. OLOLA

JUDGE