



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 195 OF 2018

1. SAID MWINYIKAI TOMAS

2. ALI HAMISI JAMALI

3. BIASHA MWALIMU GANYUMA.....PLAINTIFFS

VERSUS

1. JOHN NJOROGE MUNGAI

2. CHRISTINE MUNGAI.....DEFENDANTS

RULING

1. By a Notice of Motion dated 17th August 2018 and brought under Section 3, 13(1), (2) (3)(7), 18, 19 of the Environment and Land Court Act, order 40 Rule 1, 2, 3, 10, order 51 of the Civil Procedure Rules and Section 63(c) of the Civil Procedure Act, the Plaintiffs/Applicants seek the following orders:

1. Spent

2. Spent

3. Spent

4. That the Defendants by themselves, their agents, employees, representatives or contractors, servants and/or any other person acting and/or claiming through and/or under them be restrained by an order of temporary injunction from undertaking and/or continuing any developments, constructions and erecting any structure on plot known as KWALE/DIANI BEACH BLOCK/1456 MEASURING 0.4460 HA and/or occupying, remaining in occupation and/or undertaking any annexation of the same pending the hearing and determination of this suit.

5. Spent

6. That the Honourable Court be pleased to issue an order of eviction against the Defendants from land known as KWALE/DIANI BEACH BLOCK/1456 measuring 0.4460 Ha and demolition of the perimeter wall erected on the suit land, and such eviction and demolition be supervised by the Officer Commanding Station, Diani Police Station pending the hearing and determination of this suit.

7. That the costs be provided for.

2. The Application is based on the grounds on the face of the motion and is supported by the affidavit of Said Mwinyikai Tomas the 1st plaintiff sworn the 1st on 17th August 2018 and further affidavit sworn on 7th November 2018. The Applicants aver that they are the registered owners of parcel of land known as KWALE/DIANI BEACH BLOCK/1456 MEASURING 0.4460HA. That on 11th July 2018 the Defendants invaded the said land and began constructing a perimeter wall without due regard to the applicants rights to ownership of the property. The Applicants aver that the Defendants have since erected a perimeter wall on the suit property denying the Applicants access. The Applicants contend that the Defendants actions have caused them untold mental torture and suffering and that their quiet and peaceful possession of the land has been infringed. The Applicants want the Defendants evicted from the land and the wall demolished. The

Applicants have attached a copy of title deed of the suit property issued on 7th September 2017 in their names.

3. The Applicants further aver that the suit property being KWALE/DIANI BEACH BLOCK/1456 was acquired after sub-division from TITLE NUMBER KWALE/DIANI BEACH BLOCK/168 measuring 14 Ha which was jointly registered in the names of two brothers, Mwinyikai Bakari Chiriwacho and Juma Said Kwambiriwa (all deceased) and who were related to the Applicants. That after sub-division of the mother title, the suit property was registered in the joint names of the deceased on 31st January 2005 and upon their demise, the suit property was transferred into the Applicants names following orders issued in the Kadhi's court at Kwale in Succession Cause No.209 of 2017. Copies of the title for PARCEL NUMBER KWALE/DIANI BEACH BLOCK/168, and KWALE/DIANI BEACH BLOCK/1456 in the names of the deceased and the order in Kadhi's court at Kwale Succession Cause No.209 of 2017, as well as Application by transmission and transfer by personal representatives are attached.

4. The application is opposed by the Defendants through a replying affidavit sworn by John Njoroge Mungai, the 1st Respondent on 17th October, 2018. It is the Respondents case that land known as KWALE/DIANI BEACH BLOCK/1456 measuring 0.43ha is registered in the name of the 2nd Respondent who is a wife to the 1st respondent. A copy of the title deed in her name issued on 17th February 2011 has been attached. The respondents deny that the suit property belongs to the Applicants since the same was not sold or transferred to them by the 2nd Defendant. The Respondents have also attached letter of consent from the Land Control Board and transfer from Beach Properties Limited to the 2nd Respondent. The Respondents state that they have been in possession of the suit property since its acquisition and have cleaned and developed the same by erecting a perimeter wall sometime in July 2018 and a borehole dug in the year 2012. Copies of photographs indicating the said developments have been attached. The Respondents aver that the Applicants have no legal right and/or interest whatsoever over the suit property and have since March 2018 interrupted the Respondents quiet and peaceful possession and enjoyment of the property including the filing of this suit and application and urged the court to dismiss the application.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties who also ably highlighted the same. I have considered the application. The principles to be applied when considering an application for temporary injunction are well settled. In the famous case of **Giella –v- Cassman Brown & Co (1973)EA 358** the plaintiff must show that he has a prima facie case with a probability of Success; that he stands to suffer irreparable damage not compensable by damages; and if the court is in doubt, it will decide the matter on a balance of convenience.

6. The Plaintiffs besides seeking an order for temporary injunction are also seeking interlocutory mandatory injunction to evict the Defendants from the suit property and for demolition of the perimeter wall erected on the property. The law as regards the principles to be applied when considering the prayer for eviction and demolition is different from the principles set out in the Giella case for the standard of approach when considering whether or not to grant an interlocutory mandatory injunction is higher than that of prohibitory injunction.

7. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) 1 ALL ER 901**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of Special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction has rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

8. The courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

9. In this case both the Plaintiffs and the Defendants claim ownership of the suit property. Each has exhibited title deeds in their respective names. It is common ground that the Defendants have taken possession and are in occupation of the property and have undertaken some development thereon including erecting a perimeter wall and digging a borehole. The Plaintiffs now want the Defendants evicted and the wall demolished. It is clear that by their application the plaintiffs seek for final orders as sought in the plaint.

10. In the case of case of **Olive Mwhaki Mugenda & Another –v- Okiya Omtata Okoiti & 4 Others (2016)eKLR**, the Court of Appeal considered a persuasive decision of India in issuance of final orders at interlocutory stage and stated:

“2. Ashok Kumar Bajpai –v- Dr. (Smt) Ramjama Bajpai, AIR 204, ALL 107, 2004 (1) AWC 88 at paragraph 17 of the decision the Indian Court expressed as follows:

i.....it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the Petitioner is bound to succeed and fact-situation warrants granting such a relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party.”

11. In the case of Olive Mwhaki Mugenda (supra), the Court of Appeal held:

“a. Applying the decisions of this court in Vivo Energy Kenya Limited –V- Maloba Petrol Station Limited and 3 Others (2015)eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms –v- Naftali Ogola (2019)eKLR it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage....”

12. Before this court, it has been established that the Defendants are in occupation of the suit property which both the plaintiffs and the Defendants claim ownership. There are developments undertaken by the Defendants based on their claim of ownership. Both parties hold titles of the property in their respective names. There is clearly a dispute as to who between the Plaintiffs and the Defendants is the rightful owner of the property. This is a dispute that has to be determined at the main trial. In my considered view, there is nothing to justify the issuance of final orders at interlocutory stage in view of the claim of ownership by both parties who also hold titles in their respective names. In my view, the issue as to who amongst the parties is holding a genuine title and is entitled to the suit property is a matter for determination at the full hearing.

13. Having carefully considered the material before me, in my view a case of mandatory injunction has not been made out. Further, I am not satisfied that the plaintiffs have established a prima facie case with a probability of success to warrant the injunction orders sought. The plaintiffs have also not shown what irreparable injury they will suffer in the event the injunction is not granted. The demolition and eviction can still be undertaken in the event the plaintiffs succeed at last. The balance of convenience, if I had doubt, rests with the Defendants who, it is not denied, are in possession and occupation.

14. The upshot is that the Notice of Motion dated 17th August 2018 lacks merit and the same is hereby dismissed. Considering the circumstances of this case, I order that each party to bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 1st day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mathare for Plaintiffs/Applicants

Ms. Ngure for Defendants/Respondents

Yumna Court Assistant

C.K. YANO

JUDGE