



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 110 OF 2017

OMAR MARO BARISA.....PLAINTIFF

VERSUS

MURAMBA BAKARI OMAR

HUSSEIN MORAWA.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion application dated 11th May 2017. The Plaintiff Omar Maro Barisa prays for a temporary Order of injunction to restrain the two defendants from trespassing and entering onto a parcel of land measuring about 12 acres situated at Tana Delta until this suit is heard and determined.

2. The said application is premised on the grounds inter alia, that:-

i. The Plaintiff is the owner of the said parcel of land having settled thereon since 1972;

ii. The Defendants together with other persons acting under them have trespassed and entered onto the Plaintiff's land and are interfering with the agricultural activities and threatening to evict the Plaintiff and his family; and

iii. The Defendants have no right over the land and it is only fair and just that the orders sought herein be granted.

3. In a Replying Affidavit sworn by the 1st Defendant Muramba Bakari Omar and filed herein on 29th June 2017, the Defendants aver that the land in question is owned by their clan known as Kina Maziwani Clan of the Pokomo tribe. It is their case that the Plaintiff belongs to a different clan known as Kina Mbare and that he has no right claiming land that belongs to Kina Maziwani Clan.

4. The Defendants further aver that their relative, one Haji Said aka Mayowe granted a licence to the Plaintiff's father one Barisa Dhidha to occupy the land for subsistence farming many years ago and the Plaintiff was only allowed temporary use of the 12 acres after his said father died. It is further their case that under Pokomo traditions, clan land cannot be sold or leased but such land can be given under a licence subject to its being repossessed anytime upon demand by the clan.

5. The Defendants aver that the Plaintiff understands the Pokomo traditions well and hence his refusal to have the case decided by the Pokomo Council of Elders known as The 'Gasa', which normally arbitrates on Pokomo cultural matters.

6. It is the Defendant's case that this claim is a ploy by the Plaintiff to disinherit them from their ancestral land and the same is bad in law as the Plaintiff does not have any ownership documents to demonstrate his ownership of the land.

7. I have considered the application and the response thereto. I have equally considered the written submissions filed herein by the Learned Advocate's for the parties.

8. The Court's discretion to grant an injunction at this stage is premised on the well-established principles; that is, an applicant must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and when the Court is in doubt, it will decide the application on a balance of convenience.

9. The Plaintiff's claim is that the 1st and 2nd defendants who are a father and his son respectively have been trespassing onto his parcel of land measuring 12 acres and situated at Kitere village in Ndera Location in the Tana Delta. According to the Plaintiff, the Defendants have

told him and his family that the land they occupy belongs to the Defendants and that they should vacate the land immediately. As a result, the Plaintiff fears that the Defendants are bent on dispossessing him of the land which he claims to have settled on and has been using since 1972.

10. The Defendants do not deny that they have asked the Plaintiff to vacate the land. Instead they aver that the land belongs to their Kina Maziwani Clan and that the Plaintiff's father was granted a licence to operate the same on a temporary basis by one of their relatives known as Haji Said a.k.a. Mayowe many years back. It is the Defendant's position that under the traditions of the Pokomo, land can be given under a licence but the clan can take it back whenever they deem appropriate.

11. At it were, it is not contested that the Plaintiff is in possession of the land and that he has occupied and used the same for a considerable period of time. Indeed while they do not state when the land was given under the alleged licence to the Plaintiff's father, the Defendants themselves state at paragraph 5 of the Replying Affidavit that the Plaintiff's father was granted a licence to occupy the land "many years ago" and that when he died, the portion measuring 12 acres was given to his son who is the Plaintiff under the said licence.

12. The Plaintiff denies by a further affidavit that the land was given to him as purported by the Defendants. Whatever the case, while it may as well be true that the land was given to the Plaintiff under Pokomo traditions, as claimed by the Defendants, nothing was placed before me by the two defendants who are father and son, on what authority they were claiming the land from the Plaintiff. The two defendants did not exhibit any authority they have from their said Kina Maziwani Clan nor did they show any special connection they have with the land to entitle them to the same.

13. In my view, while the relevant traditions in regard to the ownership of the land may require to be proved at the trial hereof, the Plaintiff is entitled to the protection of this Court pending any such proof and/or determination. Accordingly I am satisfied that the Plaintiff has established a prima facie case with a probability of success.

14. The upshot is that the application dated 11th May 2017 is allowed. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 3rd day of May, 2018.

J.O. OLOLA

JUDGE