



REPUBLIC OF KENYA

IN THE ENVIROMENT & LAND COURT AT MOMBASA

ELC CASE NO. 45 OF 2017

1. SALIM MWANA JAMILA

2. ALI ISSA CHEMNI

3. MBWANA MWINYIRI BRAMU

4. SHABAN OMAR

5. AMINI SALIM CHAMIRA.....PLAINTIFF

VERSUS

BETTY WANJIKU KIURA.....DEFENDANT

RULING

1. The application under consideration is the Notice of Motion dated 20th February 2017 in which the plaintiffs/applicants are seeking the following orders:

1. Spent

2. Spent

3. That upon hearing and determination of this application inter-parties the court be pleased to grant an injunction against the defendant whether by herself, or her agents, servants, employees or otherwise whatsoever or whomsoever from entering, occupying, trespassing, erecting and or constructing any wall perimeter fence or in any other way interfering with the plaintiff's use, possession, occupation and quiet possession of the plaintiff's land known as Title Number CR. 67802 Land Reference Number 29878 situate in Shimoni Township Kwale County pending the hearing and determination of the suit.

4. That costs of this Application be provided for.

2. The application is based on the grounds that:

i. The plaintiffs are the legal and lawfully registered properties of land known as Title Number CR 67802 land Reference Number 29878.

ii. The defendant has blatantly unlawfully entered onto the plaintiffs' parcel of land known as Title Number CR 67802 Land Reference Number 29878 and is erecting and constructing a wall perimeter fence around the said property.

iii. The defendant is in the process of alienating the plaintiffs' abovementioned parcel of land.

iv. The defendant intends unless restrained by an order of this Honourable court to illegally and unlawfully remain on and acquire the plaintiffs' property and alienate and dispose of it.

3. The application is supported by the affidavit of SALIM MWANA JAMILA, the 1st plaintiff sworn on 20th February 2017 and a further affidavit sworn on 26th May 2017. The 1st plaintiff avers that the plaintiffs are the registered leasehold proprietors from the County Government of Kwale of the land known as Title Number CR 67802 Land Reference Number 29878 and have exhibited a copy of certificate of Title dated 16th June 2016, Deed map and property Rates payment Request dated 5th January 2017. He avers that on or around

14th February 2017, and continuously thereafter, the defendant unlawfully entered upon the suit property and started putting up a perimeter stone wall around the said property without consent or authority from any of the registered owners and that despite several requests and demands by the plaintiffs to the defendant to cease the construction and trespass upon the land, the defendant did not comply and instead intensified the construction. The plaintiffs aver that unless restrained by an order of injunction of this court, the defendant is intent to unlawfully occupy, trespass and evict the plaintiffs from the suit property.

4. The plaintiff in response to the replying affidavit by the defendant state, inter alia, that they do not know that the defendant is the registered proprietor of parcel of land known as LR.13003 (CR 31857) delineated on Land Survey plan No. 90006 and if she is, then it cannot be in reference to Title member 67802 LR. No. 29878 which is registered in the plaintiffs name. It is the plaintiffs' contention that Title Number 67802 LR. No. 29878 was previously trust land which was held by the County Council for the benefit and on behalf of the local occupants of the area and that the land is their ancestral land in which they have customary rights over it. The plaintiffs allege that the defendant is not a local resident of the area where the land is situate and could not have been alienated a portion of trust land to her exclusive use or possession in 1998. They denied that the defendant has been in possession of the property since 2003 and aver that they are the ones who have been in possession and use.

5. It is the plaintiffs case that the defendant has used force and threats of violence to invade their land since 2003 but that they have resisted that defendant's attempts to alienate the property since 2003. According to the plaintiffs, the official survey of Shimoni Township was done in 2013 when LR No. 29878 was registered in their favour and that Title No. 13003 CR 31827 in the defendant's name is invalid and void and was unlawfully obtained and created to dispossess the plaintiffs of their land.

6. The application is opposed by the defendant who filed a replying affidavit sworn by herself on 21st March 2017 in which she deposes inter alia, that the application and the whole suit is misconceived and an abuse of court process as the same is only calculated at furthering fraudulent activities by the plaintiffs with the sole intention of depriving the defendant of her property.

7. The defendant avers that she is the registered proprietor of the property best described as LR. No. 13003 (CR. 31857) and clearly delineated on Land Survey plan No. 90006 and she has exhibited a copy of the Grant dated 26th November 1998 and Deed Plan dated 16th November 1998. The defendant further avers that she acquired the property in the year 1998 from the original allottee, one Joel Mwangi and has annexed the relevant documents. The defendant avers that she has been in possession of the property and had begun construction from as early as the year 2003 contrary to the plaintiffs assertions and that she has been paying land rent without fail.

8. It is the defendant's contention that the plaintiffs alleged ownership is not only fraudulent but also injurious to her interests and that it is not the first time the plaintiffs are attempting to deprive her of the property. The defendant alleges when she started constructions on the property about 13 years ago, the plaintiffs together with others not parties to this suit attempted to stop her claiming ownership of the property. That the matter was reported to the police who, after investigation ordered the plaintiffs to stay away and not interfere with the defendant's occupation and usage of her plot and then since that the defendant has been enjoying peaceful and quiet occupation and use of the property until recently.

9. The defendant further contends that sometime on or about 18th December, 2016, the plaintiffs herein approached her and informed her that they had conducted a search of the defendant's plot and the search indicated that there was a new plot number for the same and that the plaintiffs are the owners of the land known as LR. No. 13003 (CR. 31857), and presented the defendant with a copy of certificate of Title CR. 67802, Land Reference Number 29878 and asked the defendant to handover possession of her goat farm to the plaintiffs. The defendant further contends that She noted that the description of the plot in her name did not match the description in the plot claimed by the plaintiffs as the Title numbers and size were different. The defendant states that she applied for a postal search and confirmed that she was the owner of the plot and because of the plaintiff's intentions and to secure her interests, the defendant lodged a Restriction which was registered on 19th December 2016. That although the Registrar of Titles wrote to the plaintiffs through a letter dated 13th January 2017 informing the plaintiffs of the Restriction lodged against their title and requiring the plaintiffs to explain their interest in the property, the plaintiffs never responded but instead filed this suit.

10. It is the defendant's contention that faced with the threat of being alienated from her property, she decided to increase the height of her perimeter wall and continued with the shelter construction she had started before. The defendant further contends that she has been making developments on her land in phases since 2003 and used the water from the borehole she constructed in 2003 for her goats.

11. Relying on advice from her advocate, the defendant states that the plaintiffs have not made out a case for grant of the orders of injunction being sought as she has a title to the property and has been in possession of it for over twenty years. The defendant therefore urged the court to dismiss the application with costs.

12. Both parties filed written submissions which I have read and I need not reproduce their contents here.

13. I have considered the application, affidavits in support and against and the rival submissions made. This court is tasked to determine whether this application meets the principles for granting injunctions. The principles to be applied when considering an application for temporary injunctions are well settled. In the famous case of *Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358*, it was held that i) an applicant must show a prima facie case with a probability of success; ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and iii) When the court is in doubt, it will decide the application on balance of convenience. An injunction is an equitable remedy and therefore it behooves an application to come to court with clean hands. He or she must also make full disclosure of all material facts to enable the court make an informed decision.

14. In their application, the applicants have stated that on or about 14th February 2017, the defendant unlawfully entered upon the suit property and started putting up a perimeter wall around the suit property without their consent or authority. The respondent has however, placed before the court overwhelming evidence which shows that she has been in occupation of the suit property for several years and that it is the applicant's whose have been making forceful attempts to enter into the suit property. There is also overwhelming evidence and which

is supported by the applicants in the averments in paragraph 13 of their further affidavit, showing that the activities complained of by the applicants started way back in 2003. It is clear that the dispute herein started several years before the suit was filed and has been ongoing.

15. The defendant has demonstrated that she has a genuine interest in the suit property and is not a mere trespasser as claimed by the applicants. It is the defendant who is in occupation and has been in occupation for several years. I am in agreement with the submission of the respondent that the applicants are guilty of non-disclosure. The applicants presented the respondent as a stranger who only entered the suit property around February 2017 and commenced the activities complained of. The applicants failed to disclose that the respondent has been in occupation for several years and that there have been disputes over the subject matter between the parties. The applicants only conceded after the respondent had filed her response.

16. There is no dispute that both the plaintiffs and the defendant have titles in their respective names over the suit property. Whereas the plaintiffs are registered as the proprietors of Title Number CR. 67802 Land Reference Number 29878, the defendant is the registered owner of LR. No. 13003 CR. 31857. It is apparent that both the plaintiffs and the defendant have an interest in the same land and are both claiming ownership over it. The plaintiffs have in my view, failed to show that they have a better right in the suit property than the defendant. The main dispute as to which party is entitled to the suit property is an issue that can only be ascertained at the trial. I do not wish to pretend to determine the issue of ownership at this interlocutory application without full facts. The crucial issue for determination is whether the plaintiffs should be granted the orders sought given the circumstances of this case.

17. In my considered view, if the court were inclined to grant the orders sought, it would mean that the defendant who I have found to be in possession and has been in occupation for some years, is restrained from what she also regards as her property. This may well mean the defendant is evicted before the matter goes to trial. In my view this may result in hardship on the part of the defendant. In my view, it is only after a proper trial has been conducted that the issue of ownership can be determined.

18. Having considered the plaintiffs' application, I am not satisfied on the material before me that the plaintiffs' have established a prima facie case against the defendant with a probability of success. In any event, the plaintiffs have not shown that damages will not adequately compensate them in the event of their case succeeding in the end.

I am also of the view that the balance of convenience tilts in favour of the defendant who is and has been in occupation and use of the suit property for several years.

19. The upshot of the foregoing is that the plaintiffs have failed to satisfy the conditions for granting the orders sought. In the circumstances, I find no merit in the Notice of Motion dated 20th February 2017 and the same is hereby dismissed with costs to the Respondent.

Delivered dated and signed at Mombasa this 2nd day of May 2018.

C. YANO

JUDGE