



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC NO.196 OF 2015

CAMPUS CITY LIMITED.....1ST PLAINTIFF
DAVID SLATER.....2ND PLAINTIFF
CHRIS GONTIER.....3RD PLAINTIFF
ANTHONY HEWITT-STUBBS & 45 OTHERS.....4TH PLAINTIFF

VERSUS

GABRIEL BARAKA THOYA.....1ST DEFENDANT
JOHN MUTAZA.....2ND DEFENDANT
JOEL KAZUNGU YAA MANGI.....3RD DEFENDANT
NAYENI MIBUYUNI SQUATTERS.....4TH DEFENDANT

RULING

1. When this matter came up for hearing before me on 2nd October 2017, the parties expressed themselves to be arguing an application dated 15th September 2017. The application dated 15th September 2017 is among a myriad of applications filed herein by the parties since this matter was instituted. The said application seeks for orders:-

2. THAT this court be pleased to stay the Order given on the 31st day of August 2017 requiring the Defendants to pay costs in the sum of Kshs 3,000,000/= by the Defendants herein to the Plaintiff.

3. THAT the costs of the application be in the cause.

2. It is however evident that the multiplicity of the applications filed herein has brought great confusion in the matter. Thus while the Applicant referred to the application dated 15th September 2017, the actual submissions and even the response thereto by the Respondents were based on an earlier Amended Notice of Motion dated 22nd August 2017. The reasons for this may lie in the fact that the Defendant/Applicants had been denied audience when they had earlier refused to meet the costs they had been ordered to pay

pending the hearing of the application dated 15th September 2017. Having complied with the orders, they made another application dated 29th September 2017 seeking to have the application dated 15th September 2017 heard as a matter of urgency on 2nd October 2017.

3. As it were, the two applications having been overtaken by events appear to have been abandoned and the Defendant/Applicants based their submissions instead on the earlier application dated 22nd August 2017. In the Amended Notice of Motion, the Defendant/Applicants pray for Orders:-

1. *Spent*

2. *Spent*

3. *That this Honourable Court be inclined to issue a restraining order directed at the Respondents either by themselves, their servants, agents, employees or any other (person) acting for or on (their) behalf or so delegated to do (sic) from entering upon, remaining thereon, evicting, interfering with the use and enjoyment of all those properties more particularly known and described as LR No. 1705/233 and LR No. 1705/50 Kilifi pending the hearing and determination of this suit or further Orders of this Honourable Court.*

4. *That the costs be in the cause.*

4. The application which is filed in Court on 22nd August 2017 is said to be supported by the annexed affidavit of John Mutaza, the 2nd Defendant/Applicant herein. In actual sense, no Affidavit was attached in support thereof. Instead on 5th September 2017, a document titled "Supplementary Affidavit" was filed in Court. The said Affidavit is sworn by the said John Mutaza on 5th September 2017 and is expressed to support the averments contained in the Supporting Affidavit to the application dated 16th August 2017 prior to its being amended on 22nd August 2017.

5. A reading of the two applications reveals the grounds upon which the Amended Motion was filed which are that:-

(a) *The applicants have resided on and carried out farming activities on the suitland for a long period of time and it is their only source of livelihood.*

(b) *The Respondents have on occasions evicted members of the Nayeni Community from the suitland by using the police who have preferred criminal charges of trespass as against them.*

(c) *That on 17th July 2017, the 3rd Respondent (which is described as the National Land Commission) did publish in the Kenya Gazette that the Respondents are the sole and absolute owners of the suit property.*

(d) *It is imminent that the Plaintiff/Respondents will cause the Applicant to be evicted from the suitland as the said Gazette Notice has constructively caused their ouster from the suit property. Such an eviction would cause the Applicants grave and irreparable harm and loss.*

(e) *The Applicants therefore implore the Court to intervene and issue a restraining order forthwith until the issues in controversy are heard and determined.*

6. The said application is opposed. In Grounds of Opposition filed herein on 29th August 2017, the Plaintiff/Respondents contend that:-

1. *The application is vexatious and an abuse of the Court Process having been brought in bad faith and in complete ignorance of this Court's orders dated 23rd February 2016 with a view to circumvent those orders which have neither been appealed against and/or reviewed.*

2. *The applicant has not placed any material before the Court justifying the intended orders to guide the Court to exercise its discretion in this matter in their favour and is based on material non-disclosure of facts and therefore ought to be dismissed.*

3. *The application does not meet the injunction principles laid down in our jurisprudence and more specifically it does not disclose a prima facie case with any likelihood of success as the Applicants have no proprietary rights on the suit property.*

7. I have considered the Amended Notice of Motion dated 22nd August 2017 and the Grounds of Opposition thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

8. A perusal of the Court record reveals that by an application dated 28th October 2015, the Plaintiff/Respondents had sought various injunctive orders against the Defendant/Applicants herein. After the said application came up for hearing inter partes before the Honourable Justice Angote on 23rd February 2016, the Court issued orders as follows:-

1. *That a temporary injunction be and is hereby issued restraining the Defendants, its agents, employees or servants from interfering with the quiet enjoyment of the various parcels sub-divided in the larger land reference No. 1705/233(CR 27007) situated within Kilifi County, Mbuyuni Bofa Area and the OCPD Kilifi Police Division to provide for security to oversee the peace and security to all Plaintiffs/Applicants during this period pending the hearing and determination of this suit.*

2. *That the costs of this Application is provided for.*

3. *That the matter be mentioned before the Deputy Registrar on 22nd March 2016 for pre-trial directions.*

9. Those orders remain in place to-date and have neither been set aside nor reviewed. Instead the Defendants/Applicants are now seeking their own counter-injunction against the Plaintiffs to have them restrained from entering upon or remaining on the suit property. In my mind that is not a path that this Court can take. We cannot have a situation where both the Plaintiffs and the Defendants are armed with an order of injunction against each other over the same parcel of land.

10. The present application appears to have been triggered by a Gazette Notice said to have been issued by the National Land Commission which is referred to in the body of the application as the 3rd Respondent. From the pleadings before me, the National Land Commission is neither a party nor is their purported Gazette Notice exhibited in the application before me. All that is attached to the application is some announcement headed as “notice” printed on an un-headed and unsigned paper dated 8th September 2017. The same states in full as follows:-

NOTICE

LR NO. 1705/233(CR 27007) SITUATED WITHIN KILIFI COUNTY, MBUYUNI BOJA AREA

TAKE NOTICE:

1. That as a consequence of recent illegal and criminal incursions into various properties on LR No. 1705/233 (CR 27007) the Owners of those lands jointly and severally issue notices as follows:-

(a) All individuals currently trespassing on properties on LR No. 1705/233(CR 27007) are hereby ordered to vacate the various Portions forming part of LR No. 1705/233(CR 27007) within next three (3) months.

(b) Any semi-permanent and/or permanent structures, crops and/or development erected by all trespassers shall be brought down, uprooted and carted away to be destroyed/disposed of at the expiry of this notice.

(c) During this notice period, the owners of the land shall seek the assistance of the police to maintain peace and quiet on the property and all individuals who voluntarily vacate the subject land shall be assisted to bring down their structures humanely and in a manner to avoid any losses.

(d) Any persons found on the land at the expiry of the notice shall be evicted and the owners shall reserve the right to file criminal complaints against them.”

11. As it were the Notice is neither signed by the Plaintiffs nor does it make any direct reference to the Defendants/Applicants. More importantly, it does not make any reference to any Gazette Notice issued by the National Land Commission which notice is said to have “constructively caused the ouster of the Defendants from the suit property.” On the material placed before me therefore the Plaintiffs have not shown that they have a prima facie case to warrant the grant of injunctive orders.

12. A perusal of the Orders granted by the Honourable Justice Angote on 23rd February 2016 however appear to suggest that parties were to maintain some sort of status quo pending the hearing and determination of the suit. Thus while I do find no merit in the application before me, in the interest of justice, all parties are directed to maintain the status quo pending as at 23rd February 2016 until such a time that this matter shall be heard and determined.

13. Otherwise the application dated 22nd August 2017 is dismissed. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 1st day of November, 2017.

J.O. OLOLA

JUDGE