



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 136 OF 2020**

**MKUZI TSAMA MWENYE & 5 OTHERS.....PLAINTIFFS**

**VERSUS**

**JULIUS MKAUMA TSAMA & 3 OTHERS.....DEFENDANTS**

**RULING**

*(Application seeking orders of injunction; mandatory orders and orders to have investigation of title; applicants claiming that the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently obtaining title to two parcels of land; evidence displayed showing that one title is jointly owned by the parties whereas the other is exclusively owned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants; no evidence that title was acquired fraudulently; no prima facie case established; application dismissed)*

1. The application before me is that dated 21 September 2020 which was filed contemporaneously with the plaint. It is an application seeking orders of injunction to stop the defendants from evicting the plaintiffs from the disputed properties or dealing with the same pending hearing of the suit; mandatory injunction to stop the defendants from demolishing or evicting the plaintiffs; cancellation of the registration of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as owners of the disputed properties; conservatory orders stopping any dealings on the land until the National Land Commission (NLC) investigates how title was issued to the 1<sup>st</sup> defendant; and an order directing the NLC and the an anti-corruption officer to investigate transactions in the disputed properties being Mgumopatsa/Mazeras/130 and 135. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 3<sup>rd</sup> defendant is the Kilifi Land Registrar, whereas the 4<sup>th</sup> defendant is the Kilifi District Land Adjudication Officer.

2. In the plaint, the plaintiffs aver that they are the bona fide owners of the land parcels Mgumopatsa/Mazeras/130 and Mgumopatsa/Mazeras/135 (hereinafter “the suit lands”) measuring 11.44 Ha and 5.29 Ha respectively. They claim to have been on the suit lands for over 70 years and that their ancestors also lived on the suit lands. It is alleged that in September 2020, the 1<sup>st</sup> defendant moved into the suit lands and issued notice to the plaintiffs to vacate, after he had fraudulently obtained title in his name. In the suit, the plaintiffs wish to have a declaration that they are the rightful owners of the suit lands; an order to register the plaintiffs as owners of the suit lands; and a permanent injunction to restrain the defendants from dealing with the suit lands.

3. The supporting affidavit to the application is sworn by Salim Abdalla Tsama (Salim), the 2<sup>nd</sup> plaintiff. He has claimed inter alia that during the process of demarcation, the adjudication officer who was registering the land fraudulently wrote the name of Tsama Mkuzi Saha (Tsama) as the land owner instead of Saha Mkuzi Kango (Saha) yet Tsama had died in the year 1984, and it was Saha who was on the land. He has proceeded to try and give a family tree. In nutshell he claims that the land parcel No. 135 belongs to the family of Mkuzi Kango (his descendants) yet the 1<sup>st</sup> defendant is not from this family. He has averred that the registration of this land in the name of the 1<sup>st</sup> defendant is therefore fraudulent. He claims that despite this registration, it is him and his family members who are in possession. He has stated that on 11 August 2020, the 1<sup>st</sup> defendant issued them and their 83 families on the suit lands, with a notice to vacate.

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendant entered appearance and filed defence and counterclaim, and a reply to the application. They have denied that the plaintiffs are the rightful owners of the suit lands. In the counterclaim, they aver to be the owners of the suit lands by virtue of being beneficiaries of the late Tsama, who was the registered proprietor of the suit lands. It is averred that Tsama (deceased) owned the land exclusively until Abdalla Tsama Mkuzi (Abdalla) requested the deceased to occupy a portion of the land because he had differed with his brothers who were occupying the Plot No. Mgumopatsa/Mazeras/130 which was the communal land. It is pleaded that after the death of Abdalla, his family relocated back to the Plot No. 130. It is further pleaded that subsequently the area was declared a settlement scheme and in 1981, during adjudication, his father (late Tsama) was registered as the legal owner without any objection. It is pleaded that it was after his death in the year 1984 that the plaintiffs invaded the plot making baseless claims of ownership. In the counterclaim, they ask for orders of vacant possession, costs and interest.

5. The replying affidavit is sworn by Julius Mkauma Tsama, the 1<sup>st</sup> defendant. He has deposed inter alia that the plaintiffs are his cousins as they come from the same clan. He has displayed a title to the Plot No. 135 issued to Tsama Mkuzi Saha on 31 October 2005, and title to the Plot No. 130 issued on 5 March 2005 in the joint names of Tsama Mkuzi Saha, Kango Mkuzi Mdzavudzo and Mkuzi Saha Panga each with a 1/3<sup>rd</sup> undivided share. He has further displayed letters of administration in respect of the estate of Tsama Mkuzi Saha issued to him on 21 February 2012 and a confirmed grant issued on 30 October 2012. In the confirmed grant, the Plots No. 113, 130 and 135 are shared out to the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the ratio of 40:60 respectively. He has explained that it is the Plot No. 130 which is communal land and each beneficiary occupies their respective portion. He deposed that the dispute over the Plot No. 135 was adjudicated by the Land Disputes Tribunal and the judgment was adopted by the Magistrate’s Court in Kaloleni where it was held that his late father was the owner of the Plot No. 135. He has annexed copies of the proceedings. He has deposed that in the year 2013, he filed the suit Malindi ELC No. 163 of 2013, over the plot No. 135, where he sued Juma Mohamed Magongo, the plaintiffs’ cousin, who was representing the Mkuzi Kango family, and the case was determined in his favour. He has deposed that the plaintiffs are aware of that case as they were being represented by Juma Mohamed Magongo who was their spokesperson. He avers that the plaintiffs are instituting different suits in different courts to wear him

down.

6. Counsel for the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed submissions in respect to the application which submissions I have taken into consideration while arriving at my decision.

7. The plaintiffs claim ownership of the Plots No. 130 and 135. In the reply, the 1<sup>st</sup> defendant has stated that the Plot No. 130 is communal land and is owned by three persons. He holds the share of his late father in this plot and he has averred that each person resides on his 1/3 or so portion of this land. I have seen a copy of the title deed which indeed shows that the Plot No. 130 is owned by three persons. That title has been in existence since the year 2005. The title to the Plot No. 135 is in the sole name of the father to the 1<sup>st</sup> defendant and the defendant has displayed a grant of letters of administration showing that this land has been distributed to himself and to the 2<sup>nd</sup> defendant. The plaintiffs allege that the 1<sup>st</sup> and 2<sup>nd</sup> defendants obtained title fraudulently. Firstly, this claim is doubtful in so far as the Plot No. 130 is concerned, because the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not the sole owners of that land. It is in the names of three persons including the fathers of the plaintiffs. I do not therefore see, at least at this stage of the proceedings, any proof of the claim that title is with the 1<sup>st</sup> defendant and that the said title was fraudulently acquired. In so far as the Plot No. 135 is concerned, it appears as if the issue of ownership of it had gone to the Land Disputes Tribunal and was also the subject of the decision in the case Malindi ELC No. 163 of 2013. In both of the said litigation, the Tribunal and the Court did not find anything untoward about the ownership by the father of the 1<sup>st</sup> defendant of the Plot No. 135. The plaintiffs herein only allege orally, without any documentary support, that this land is supposed to be owned by them because their fathers had a claim in it. At this moment in time, there is little evidence presented which supports the allegations of the plaintiffs.

8. Moreover, as pointed out by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, there is doubt whether the case of the plaintiffs is within time. The titles to the suit lands were issued in the year 2005 which is more than 12 years ago. Thus apart from there being little, if any, evidence in support of the allegations of the plaintiffs, there is an issue to be tried as to whether the case of the plaintiffs is time barred by dint of Section 7 of the Limitation of Actions Act, which requires claims over ownership of land to be filed within 12 years. My assessment of the material before me, at this stage, make me conclude that the plaintiffs have NOT displayed a prima facie case with a probability of success. The plaintiffs have not thus demonstrated any entitlement to an interlocutory order of injunction pending suit. I am also in the same vein unable to grant any orders of mandatory injunction or cancellation of title of the 1st and 2nd defendants as sought by the plaintiffs within this application. There is a prayer to refer the matter to the National Land Commission or the Anti-Corruption Commission for investigation. I see no basis for referring the matter to the National Land Commission as what is in issue is private land and the mandate of the National Land Commission is on public land. If the applicants believe that there is a question that requires reference to the Anti-Corruption Commission, nothing stops them from making such reference and one does not need an order of court for such. On my part however, I have not seen any material that would make me refer the issue to any anti-corruption body.

9. With the above findings, I have little option but to proceed to dismiss this application with costs. The result is that the plaintiffs will need to prove their claims without the benefit of an injunction or any of the orders that they have asked for in this application. Orders accordingly.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF MAY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**