



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 44 OF 2020

KIBWANA HAMADI & 291 OTHERS,.....PLAINTIFFS

JOHN KIMOGUT KIPTOO

LAND REGISTRAR MOMBASA COUNTY.....DEFENDANTS

RULING

1. Before me for determination are two applications. By the First application dated 23rd June 2020, the 320 Plaintiffs pray for orders of injunction restraining the two Defendants from entering, trespassing, developing, transferring, charging, leasing or in any way interfering with the Plaintiffs' occupation and use of land Title No. CR 64260 Plot No. 9911/III/MN and the subsequent sub divisions thereof pending the hearing and determination of the instant suit. They also urge the Court to direct the OCS Kijipwa Police Station to ensure compliance with the said Orders if granted.

2. The first application is supported by an affidavit sworn by the 1st Plaintiff-Kibwana Hamadi and is premised on the grounds: -

i) That the Plaintiffs are the lawful owners of the suit property having acquired ownership thereof by prescription;

ii) That in or about the year 2014 the 1st Defendant unprocedurally, illegally and or fraudulently colluded with the 2nd Defendant to have himself registered as the owner of the suit property while knowing very well that the Plaintiffs have been in actual, peaceful and quiet possession thereof since the year 1920;

iii) That the suit property falls within Plot No. MN/III/6224 which the Respondents unlawfully sub-divided to create the suit property before it was subsequently unlawfully transferred and registered in the name of the 1st Defendant;

iv) That the 1st Defendant has since been illegally and forcefully entering the suit property accompanied by several mean looking persons and the Police and has been demolishing the Plaintiffs' houses;

v) That the Defendants are in the process of further subdividing the property and transferring the same to other persons and unless the orders sought are granted the Plaintiffs are likely to suffer irreparable loss and damage;

vi) That despite numerous complaints the Plaintiffs have made with the Police and the Ministry of Lands, the Defendants are determined to dispossess and deprive the Plaintiffs of the suit property by beating them, arresting and even prosecuting some of them; and

vii) That it is just and equitable to grant the Plaintiffs the prayers sought

3. The application is opposed by both Defendants. In his Replying Affidavit filed herein on 29th July 2020, John Kimogut Kiptoo (the 1st Defendant) avers that the Plaintiffs' application is frivolous, vexatious and an abuse of the Court process. The 1st Defendant further asserts that the 1st Plaintiff has deliberately and fraudulently inflated the numbers of the applicants as the 319 Plaintiffs are not in existence and the attached signatures are but forgeries.

4. The 1st Defendant avers that he is the registered proprietor of all that Plot No. 9911/III/MN situated North of Mtwapa Creek in Kilifi and measuring 31.43 Ha having inherited the same from his father who bought the land from the indigenous owners more than 50 years ago.

5. The 1st Defendant further avers that the Plaintiffs have never occupied the property and that the same is in the exclusive possession of his

family. The 1st Defendant asserts that if indeed the Plaintiffs exist, they are just but greedy professional land invaders who have no respect for property rights guaranteed under the Constitution.

6. The 1st Defendant denies that the Plaintiffs or any of them sold him any of the land as alleged or at all. He asserts that granting the orders sought by the Plaintiffs would be tantamount to issuing final orders herein to his grave prejudice as the same would limit his rights to enjoy quiet possession of the land. He accuses some of the Plaintiffs of invading his land and unlawfully burning his properties thereon with a view to arm-twisting him to relinquish his proprietary rights.

7. The 1st Defendant avers that he has been enjoying quiet possession of the suit property until recently when a group of squatters encroached on the same prompting him to lodge a report with the Police. Some of the squatters were arrested and arraigned at Shanzu Law Courts and it is the Plaintiffs who require to be restrained from the land.

8. The Land Registrar Mombasa County (the 2nd Defendant) equally opposes the application. In Grounds of Opposition dated 19th August 2020 as filed on his behalf on 24th August 2020 by the Honourable the Attorney General, the 2nd Defendant states that: -

1. The application is devoid of merit as the applicants have failed to specifically plead the allegations of fraud against the 2nd Respondent.

2. The Application is premised upon speculation, unfounded fears and concealment of material facts thus falls short of the basic criteria for grant of reliefs sought.

3. The Applicants have not furnished sufficient proof to establish ownership or entitlement to the suit property hence the application lacks merit.

4. That the application has not met the threshold for the granting of an injunction as sought by the Applicants.

5. That the Applicants' allegations of fraud against the 2nd Respondent are too vague, ambiguous and unsubstantiated to constitute an arguable case against the 2nd Respondent.

6. That the application is otherwise an abuse of the process of this Honourable Court.

9. The Second Application dated 11th August 2020 has been filed by the 1st Defendant. In the said application filed herein on 19th August 2020, the 1st Defendant prays for orders.

2. That there be a stay of any further proceedings by the Plaintiffs pending the payment of costs in Malindi ELC No. 26 of 2020; Kibwana Hamadi & 471 Others –vs- John Kimogut Kiptoo.

3. That the Plaintiffs be ordered to supply copies of the Plaintiffs Identity Cards within seven days and in default thereof all the non-compliant Plaintiffs be struck out.

4. That the DCIO Kilifi do investigate the signatures annexed in the authority to plead filed in Court.

5. That this being a matter touching an adverse possession this Honourable Court by itself or any officer subordinate do visit the locus in quo and a report of its status be filed in Court before the hearing of the Plaintiffs' application.

10. The Second application is supported by an affidavit sworn by the 1st Defendant and is premised on the grounds: -

a) That the Plaintiffs are intent on harassing the Defendant by filing a multiplicity of suits without any basis;

b) That the Defendant has incurred expenses in retaining Counsel and the Plaintiffs' should pay costs before proceeding with this frivolous action;

c) That it is clear and apparent that the names of the Plaintiffs and signatures to the authority to plead are cooked up and this Honourable Court and the Defendant ought to know the true status and existence of the Plaintiffs;

d) That the Defendants allege to occupy the property and this Honourable Court should confirm the position as the land has been in sole possession of the Defendant; and

e) That proceeding in the manner proposed will be in the best interest of justice to avoid delay and undue hardship.

11. The Plaintiffs are opposed to the 1st Defendant's application. By their Grounds of Opposition dated 2nd September 2020 and filed herein on 14th September 2020, the Plaintiffs state: -

1. That the instant application is incompetent and (a) non-starter for reasons that the 1st Defendant was not awarded costs in Malindi ELC No. 26 of 2020 which was withdrawn under Order 25 Rule 1 of the Civil Procedure Rules, 2010.

2. *That the instant application is premature and amounts to an abuse of the Court process as the 1st Defendant has not placed before this Honourable Court any Certificate of costs as per law required.*

3. *That the prayers sought in the instant application cannot be granted in the interlocutory stage as they are only intended to prejudice and intimidate the Plaintiffs.*

4. *That the instant application is only intended to delay the expeditious disposal of the instant suit and amounts to an abuse of the process of this Honourable Court.*

5. *That the Plaintiffs stand and continue to be greatly prejudiced due to the delay in the prosecution and conclusion of this suit.*

6. *That the prayer for examination of the Plaintiffs' Kenya National Identification Cards can only be legally canvassed during the hearing of the main Originating Summons when the Plaintiffs will attend Court and respond to the allegations raised by the 1st Defendant.*

7. *That it is in the interest of justice and fairness that this application be dismissed with costs.*

12. I have perused and considered the two applications together with the respective responses thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Counsels appearing for the parties herein.

13. By the Second application, the 1st Defendant urges this Court to stay any further proceedings by the Plaintiffs herein pending the payment of costs in *Malindi ELC No. 26 of 2020* which was instituted against himself by the Plaintiffs before it was withdrawn. The 1st Defendant equally urges this Court to direct the Plaintiffs to supply copies of their identity cards.

14. While it was true that the Plaintiffs and other people had filed the said suit before filing a notice of withdrawal thereof, the 1st Defendant did not provide any evidence to show that he was awarded costs for the said suit and or that he had taken any steps to tax the same. That being the case I did not find any basis for the application for stay of these proceedings.

15. The prayer for the Plaintiff to supply their Identification Cards is certainly informed by the 1st Defendant's claim that those listed as the Plaintiffs are not people residing on the suit property. That prayer including the request for the Court to visit the locus in quo are however matters that ought to be dealt with in the course of the discoveries at the pre-trial stage and/or when the suit has been listed for hearing. I did not find any compelling reason why the Court should order for the same to be done at this stage and I accordingly find no basis for the 1st Defendant's application dated 11th August 2020.

16. In their application for injunction, the Plaintiffs contend that they are the lawful owners of the suit property having acquired the ownership thereof by prescription. The Plaintiffs aver that sometime in the year 2014, the 1st Defendant unprocedurally, illegally and fraudulently colluded with the 2nd Defendant to have himself registered as the owner of the suit property while knowing that the Plaintiffs have been on the land since the year 1920.

17. As Spry V.P. Stated in the celebrated case of *Giella –vs- Cassman Brown Ltd (1973) EA 358*: -

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

18. As to what would amount to a prima facie case, the Court of Appeal offered guidance in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 123*, where the Court observed that: -

“.....a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. The Plaintiffs before me claim to have acquired the suit property by virtue of adverse possession having occupied the suit property continuously for an uninterrupted period extending back to 1920. It was however evident to me that none of them is registered as proprietor of the suit property and that no Court has as yet made a determination that their rights have crystallised by dint of prescription in order for them to be issued with titles for the property.

20. From the material placed before me, the suit property measuring some 31.43 Ha was registered in the name of the 1st Defendant on 20th November 2014. It was not clear if as at the time of the said registration the Plaintiffs were on the land. It is however apparent that at least since 2016 the Plaintiffs and the Defendants have been embroiled in a dispute over the rights of occupation over the suit property with some of the Plaintiffs being arrested and charged with criminal offences.

21. While the 1st Defendant maintains that the Plaintiffs do not occupy the suit property, it is apparent that some of them may be on the land. That much is clear from a perusal of the 1st Defendant's own Replying Affidavit in which he states as follows at paragraph 20: -

“That I have been enjoying quiet possession of the said parcel of land until recently when a group of Squatters encroached on the said property which prompted me to lodge report (sic) the matter to the Police and some of the squatters were arrested and arraigned at Shanzu Law Courts. Indeed, it is the Plaintiffs/Applicants who should be restrained from harassing me.”

22. That being the case, it is evident both the Plaintiffs and the 1st Defendant are in occupation of parts of the suit property and have both made some developments thereon. In the circumstances I decline to grant the orders of injunction in the manner sought by the Plaintiffs. Instead, I am of the view and I hereby order that pending the hearing and determination of this suit the status quo obtaining as of today be maintained by each party remaining on the respective portions of the land they currently occupy. There should be no sale and/or further subdivision of the land until the suit is heard and determined.

23. The costs of the two applications shall be in the cause.

Dated, signed and delivered at Malindi this 3rd day of June, 2021.

J.O. OLOLA

JUDGE