



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 82 OF 2019

KADZO KAHINDI

FURAHA KAHINDI KARISA.....PLAINTIFFS

VERSUS

1. FURAHA KATANA DYEKA

2. CHARO KATANA DYEKA

3. KADZO KATANA DYEKA

4. ZAWADI KATANA DYEKA

5. SAFARI KATANA DYEKA

6. KAINGU KATANA DYEKA

7. REHEMA KATANA DYEKA.....DEFENDANTS

RULING

1. By their Notice of Motion dated and filed herein on 3rd October 2019, Kadzo Kahindi Karisa and Furaha Kahindi Karisa (the Plaintiffs) pray for an order of injunction to issue restraining the seven (7) Defendants in person or through their agents or servants from interfering with the suit property pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the 2nd Plaintiff is based on the grounds: -

i) That the Plaintiffs and the late Dama Kahindi Karisa are the registered owners of all that parcel of land known as Kilifi/Ngerenya/19 having inherited the same from their deceased husband Kahindi Karisa;

ii) That the Defendants are the children of the late Katana Dyeka who own an adjacent parcel of land but continue to trespass into the Plaintiffs' land without any colour or right;

iii) That the Defendants have threatened the Plaintiffs with violence and have severally armed with machetes and other crude weapons chased the Plaintiffs from the suit land.

3. The application is opposed. In a Replying Affidavit sworn by Charo Katana Dyeka (the 2nd Defendant) and filed herein on 25th October 2019, the 2nd Defendant avers that together with the rest of the Defendants, they have been in occupation of the suit property ever since they were born.

4. The Defendants assert that the Plaintiffs husband Kahindi Karisa was a blood brother to their father the late Katana Dyeka and that there have been previous proceedings between the Plaintiffs and the late Katana Dyeka being ***Kilifi SPMCC No. 66 of 2015; Dama Kahindi Karisa & Others –vs- Katana Dyeka*** which was later dismissed for want of prosecution in March 2019 after being transferred to Malindi Environment and Land Court as ***ELC Case No. 161 of 2016***.

5. The Defendants therefore assert that this suit is filed in total breach of the settled principles of law and that the same is time-barred.
6. I have perused and considered the application and the response thereto. I have equally perused and considered the written submissions as filed by the Plaintiffs' Learned Advocates. I was however unable to find any submissions filed on the part of the Defendants.
7. The Plaintiffs pray for a temporary order of injunction to issue restraining the Defendants from interfering with their use of the suit property. It is their case that the Defendants have been arming themselves and threatening them with harm whenever they have attempted to use the suit property which is registered in their name.
8. It is trite that an application for injunction must meet the test as set out in the celebrated case of **Giella –vs- Cassman Brown Ltd (1973) EA 358**. That test requires one to demonstrate that he/she has a prima facie case with a probability of success; that he/she stands to suffer irreparable loss unless the orders be granted and finally, where the Court is in doubt, it will consider the balance of convenience.
9. As to what would amount to a “prima facie” case, the Court of Appeal expressed itself as follows in **Mrao –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**: -

“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.”

10. In the matter before me, the Plaintiffs assert that the Defendants are their neighbours occupying an adjacent parcel of land. They aver that without any colour of right, the Defendants have prevented them from utilizing the suit property which is registered in their name.
11. According to the Defendants however, they have a right to use the suit property. While they concede that the property is registered in the Plaintiffs' name they assert that the Plaintiffs registration as such came by dint of the fact that they are the widows of one Kahindi Karisa. The said Kahindi Karisa is said to have been a blood brother of the father to the Defendants one Katana Dyeka who is equally now deceased. The Defendant's assert that the original registration of the late Kahindi Karisa was for him to hold the land in trust for his brother Katana Dyeka and that as a result the Defendants have been on the land ever since they were born.
12. From the material placed before me by the Defendants, it is evident that the Plaintiffs themselves have been aware of the Defendants presence on the suit property from as far back as the year 1995. In a suit the Plaintiffs initially filed before the Principal Magistrates Court at Kilifi on 26th February 2015 against the Defendants' father the late Katana Dyeka, being **Kilifi SPMCC No 66 of 2015; Dama Kahindi Karisa & 2 Others –vs- Katana Dyeka**, the Plaintiffs state as follows at paragraphs 3 to 5 of their Plaint: -

“3. At all material times the 1st, 2nd and 3rd Plaintiffs were and are the registered owners of all that piece of land known as Plot No. Kilifi/Ngerenya/19 having inherited from their husband and obtained a Certificate of Grant;

4. The Defendant has since 1995 been unlawfully and forcefully staying, and cultivating in the Plaintiffs piece and parcel of land known as Plot No. Kilifi/Ngerenya/19;

5. The Defendant has been planting trees and harvesting fruits without the authority and or permission of the (Plaintiffs) despite having been asked not to do so.

13. As it turned out that case was later transferred to Malindi as **ELC Case No. 161 of 2016**. According to the Defendants, that suit was dismissed sometime in March 2019 for Want of Prosecution after which the Plaintiffs filed the present case.
14. This Court was however not provided with any evidence of the dismissal of the said suit. Given the statements by the Plaintiffs that the Defendants' father occupied the land as early as 1995, the Defendants may as well be right that this suit is time-barred. This Court was however unable to make any conclusive determination on those issues given the scant information provided by both parties to the application.

15. What was clear however was that the alleged trespass upon the suit property is not something that happened yesterday. The Defendants have been using the land and in the absence of any other pressing reason, the Plaintiffs cannot purport that there is now any urgent need to restrain the Defendants from using the land before the suit is heard and determined.

16. As the Court of Appeal stated while expounding on the definition of a prima facie case in **Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR**: -

“The party on whom the burden of proving a ‘prima facie’ case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

17. In the circumstances herein, I am not persuaded that there is any urgent necessity to restrain the Defendants from using a parcel of land they have used since 1995.

18. In the premises, I find no merit in the Motion dated 3rd October 2019. I dismiss the same with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE