



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 181 OF 2018

1. JONATHAN SAHA

2. JOHA MKUZI

3. TSUMA KANGO

4. JOHA MUKZI KANONO.....PLAINTIFFS

AND

JULIUS TSAMA MKUZI.....DEFENDANT

RULING

1. By this Notice of Motion application, Jonathan Saha, Joha Mkuzi, Tsuma Kango and Joha Mkuzi Kakono (hereinafter “the Plaintiffs”) pray for orders: -

3. That pending the hearing and final disposal of this suit a temporary injunction be issued restraining the Defendant by himself, his servants, agents, workmen and or any other person or otherwise whosoever and whatsoever from disposing of, alienating and/or in any other way interfering with Plot No. Mgumo Patsa/Mazeras/1253 and 1254 which plots were sub-divided from the original title No. Mgumo Patsa/Mazeras/113;

4. That the Officer Commanding Police Rabai Station to ensure compliance of the orders herein.

5. That this Honourable Court be pleased to issue an order that Plot No. Mgumo Patsa/Mazeras/113 which has now been sub-divided into Mgumo Patsa/Mazeras/1253 and 1254 belong to the large Mkuzi family and therefore the same is community land;

6. That this Honourable Court be pleased to issue an order to the effect that title No. Mgumo Patsa/Mazeras/113 and the subsequent subdivisions being Mgumo Pata/Mazeras/1253 and 1254 were fraudulently obtained;

7. That this Honourable Court be pleased to grant leave to the Plaintiffs herein to further amend the Plaintiff herein and the draft further amended Plaintiff be deemed as filed subject to payment of the requisite Court charges;

8. That this Honourable Court at its own discretion be pleased to grant any other order that it deems fit and just to issue for the interest of justice; and

9. That the costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff is premised on the grounds: -

a) That the suit property belongs to the larger Mkuzi family and is therefore co-owned by both the Plaintiffs and the Defendants herein and unless the Court grants the orders sought herein the Plaintiffs stand to suffer irreparable loss and damages;

b) That the defendant fraudulently obtained title for the suit property and its sub-divisions as the Defendant’s father Tsama Mkuzi died in 1984 and was not available on 12th September 2005 to process title for the property;

c) That the Defendant has by a letter dated 7th November 2013 threatened to evict the Plaintiffs from the land and the Plaintiffs are now apprehensive that they stand to lose the same;

d) That the Plaintiffs intend to further amend the Plaint so as to bring on board all issues in controversy for the same to be adjudicated before this Court and a lasting solution be found for the same; and

e) That the Defendant will not be subjected to any prejudice in the event the application is allowed.

3. Julius Mkauma Tsama (the Defendant) is however opposed to the application. In his Replying Affidavit sworn on 16th October 2020 but filed herein on 5th November 2020, the Defendant avers that the application is incompetent, vexatious and an abuse of the Court process.

4. The Defendant avers that the Plaintiffs are his paternal cousins and that they all belong to the Mwajohadzuya Clan. While he admits that their grandfather Mkauma Saha Mudzavundzo had six sons including his own father Tsama Mkuzi Saha, the Defendant denies that his father co-owned the land initially known as Mgumo Patsa/Mazeras/113 together with his brothers.

5. The Defendant asserts that the suit property was exclusively acquired by his father who purchased it from one Mekeka Tukuku and the same is in no way communal land. He further asserts that his father was registered as the proprietor of the land following the land adjudication exercise concluded in the area in 1981 and there were no objections by the Plaintiffs and/or their fathers.

6. The Defendant avers that he followed upon on the title and collected the same in his father's name after his father died. Thereafter, he and his mother obtained Letters of Administration for his father's estate and proceeded to sub-divide the land which they have since disposed of to third parties. The Defendant asserts that only eight acres of the original land has been left for the family's use.

7. I have perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

8. The Plaintiffs have sought an order of injunction to restrain the Defendant from disposing off, alienating or in any other way interfering with the suit property which they assert is their communal land. They also want the Court to declare the suitland their community land and an order to the effect that the title thereto and the sub-divisions emanating therefrom were fraudulently obtained. In addition, the Plaintiffs crave leave of this Court to further amend their Plaint as per a draft they have annexed to their application.

9. The conditions required to be met for the grant of an order of temporary injunction were long set in the celebrated case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** where the Court stated as follows: -

“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.”

10. As to what amounts to a prima facie case, the Court of Appeal had this to say in **Mrao Ltd –vs- First American Bank Ltd & 2 Others (2003) eKLR**: -

“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.”

11. The Plaintiffs claim is that the original land parcel No. Mgumo Patsa/Mazeras/113 measuring some 5.67 Ha originally belonged to their grandfather one Mkauma Saha Mudzavudzo who is now deceased. According to the Plaintiffs, their grandfather who is also the grandfather of the Defendant herein bequeathed the land to his sons, including the Defendant's father.

12. The Plaintiffs have told the Court that their fathers then decided to entrust their brother Tsama Mkuzi Saha who happens to be the Defendant's father, to process a title deed for the whole parcel of land on behalf of his brothers. It is the Plaintiffs case that unfortunately, the Defendant's father passed away in 1984 before he could process the anticipated title deed. They have now learnt that some 21 years after their uncle died, the Defendant herein proceeded to fraudulently obtain title in the name of his father on 12th September 2005 and has now proceeded to sub-divide the land into parcel numbers Mgumo Patsa/Mazeras/1253 and 1254.

13. On that account, the Plaintiffs have asked the Court to proceed to cancel the title and to order the issuance of a proper one that will reflect the names of their larger Mkuzi family.

14. The Defendant on the other hand denies that the suit property was their ancestral land. It is his case that his father purchased the same from one Mekeka Tututu and that when subsequently land adjudication was done in the area, his father was registered as the proprietor of the land.

15. As it were, the Plaintiffs have not produced any agreement or memorandum to demonstrate that their fathers entrusted the parcel of land to their brother for registration as contended. Nor have they told the Court why no further action was taken to process the titles after their uncle's death way back in 1984.

16. The Plaintiffs have not denied that the suit property was adjudicated to the Defendant's father during land adjudication and or that they or

their predecessors in title did not object to the said adjudication. In my view, the contention that the Defendant processed title from the suitland in his father's name some 21 years after his death does not amount to much. Having been adjudicated as the proprietor of the land, his death would not change the ownership details as captured in the Government's records.

17. The Defendant has annexed a copy of the original title before and after sub-division thereof. It is apparent that he and his mother inherited the property originally registered in the name of his father. This Court is enjoined under Section 26 of the Land Registration Act to consider as prima facie evidence that the person named as proprietor of land in a certificate of title issued by the Land Registrar upon registration is the absolute and indefeasible owner thereof.

18. While the Plaintiffs have alleged fraud in the manner in which the Defendant's title was obtained, I was unable to find on the face of the application any proof of fraud to warrant an impeachment of the Defendant's title at this stage.

19. It follows therefore that I did not find anything to even remotely suggest that the Plaintiffs have a prima facie case with a probability of success. The prayer for a temporary injunction fails on that score.

20. Consequent on that finding, it follows that the Plaintiffs' prayers that this Court finds the suitland to be community land and that the title thereto were obtained fraudulently are premature and must await the full trial.

21. I did not however find any difficulty in allowing the prayer for amendment of the Plaintiff. As was stated in **Central Kenya Ltd –vs- Trust Bank Ltd (2000) EALR 365: -**

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expenses, delay or bother occasioned to him. The main concern of the Court is that it will be in the interest of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”

22. In the circumstances herein it is apparent that the suit has not proceeded to hearing. That being the case, the Defendant shall have an opportunity to respond to any other issues that may be brought forth in the amendments before the matter proceeds to hearing.

23. In the premises, the Plaintiffs' application only succeeds partially. I allow the same in terms of Prayer No. 7 on condition that the Amended Plaintiff is filed and served upon the Defendants within 21 days from the date hereof. The Defendant shall in turn have 14 days to file and serve any amended Statement of Defence if need be.

24. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2021.

J.O. OLOLA

JUDGE