



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

ELC NO. 91 OF 2021

(FORMERLY ELC NO. 60 OF 2021).

STEPHEN MKALLA NGOME.....1ST PLAINTIFFS
DAVID MBAI MUGWA.....2ND PLAINTIFFS
JAMES NGYEMA NYOLO.....3RD PLAINTIFFS
FAITH MUMBI KALISA.....4TH PLAINTIFFS
KEN KIPRONO RING.....5TH PLAINTIFFS
STELLA KABIBI WALTER.....6TH PLAINTIFFS
PATRICK KARANJA WERU (as Administrator of the Estate of ESTHER
WAMBUI GITAH) 7TH PLAINTIFFS
PAULINE MUTHEMBWA KOTI.....8TH PLAINTIFFS
WILLIAM MWANGI GATHUMA.....9TH PLAINTIFFS
MAZERA SAMUEL MWAKUBO.....10TH PLAINTIFFS
MARTINA MALUKI11TH PLAINTIFFS

VERSUS

AGNES MUTINDA NDETEI.....1ST DEFENDANT
ATHMAN JUMA MATAMU..... 2ND DEFENDANT

RULING

INTRODUCTION

1.0 The subject of this ruling is the Plaintiffs Notice of Motion dated 25th March 2021. It is brought under Sec. 152F (1) of the Land Laws (Amendment) Act 2016, Orders 5 Rule 5 (1)(b) and Order 40 of the Civil Procedure Rules 2010 and Sections 3 and 3A of the Civil Procedure Act. It prays for orders that; -

1. SPENT

2. SPENT

3. Pending the hearing and determination of this application, a prohibitory injunction be issued restraining the 1st Defendant /Respondent by herself, servants, agents and or otherwise from evicting the Plaintiffs/Applicants or in any manner whatsoever from

interfering with the Plaintiffs/Applicants enjoyment, quiet possession, indefeasible rights and interests in all that property located in Diani known as Kwale/Diani Beach Block/1450, 1520,, 1703,1806,1403,1807, 1804,1615,1616, 1524,1701 and 1805.

4. Pending the hearing and determination of this suit, a mandatory and permanent injunction be issued restraining the 1st Defendant /Respondent by herself, servants, agents and or otherwise from evicting the Plaintiffs/Applicants or in any manner whatsoever from interfering with the Plaintiffs/Applicants enjoyment, quiet possession, indefeasible rights and interests in all that property located in Diani known as Kwale/Diani Beach Block/1450, 1520,, 1703,1806,1403,1807, 1804,1615,1616, 1524,1701 and 1805.

5. Pending the hearing and determination of this suit, the Court do cancel the Eviction Notices dated 1/4/2021 issued by the 1st Defendant to the Plaintiffs/applicants.

6. Costs of this application be provided for.

1.2 The application has been necessitated by the fact that the 1st Defendants have issued the Plaintiffs with eviction notices giving them 90 days to vacate the properties or be evicted by 3rd April 2021. It is premised on the grounds that the Plaintiffs are the registered proprietors of the land parcels herein, bona fide purchasers for value without notice following purchase of the same from the 2nd Defendant between the years 2004 and 2016. The 1st Defendants were not the registered owners of the suit properties and unless restrained intended to interfere with the Plaintiffs quiet enjoyment of the same by the said eviction.

1.3 The application is supported by the Affidavit of the 3rd Plaintiff with authority of the rest of the Plaintiffs. It is deposed that the 2nd Defendant was the registered proprietor of several plots (these are as listed in Paragraph 2 of the affidavit) following an award of the Kwale Land Disputes Tribunal. He subsequently subdivided some and sold to the plaintiffs. The parcels sold to the Plaintiffs are as set out in the prayers sought in the Motion. Copies of letters of authority, Certificates of Title, Sale agreements and Eviction notices were annexed.

1.4 It is also stated that the 1st Defendant filed JR Application No. 21 of 2010 against Kwale Land Disputes Tribunal which involved the 1st, 2nd, 3rd, 9th, and 10th Plaintiff. The proceedings were withdrawn on 13/10/2010.

1.5 The Plaintiff contends on advice of Counsel, that the eviction notices dated 4/1/2021 are irregular, null and void since the 1st Defendant is not the registered proprietor of the properties. It was the Plaintiffs who were and therefore could not be in illegal or unlawful occupation thereof. Further that the 1st Defendant does not exist and in any case her claim is barred by effluxion of time.

1.6. It is averred that the Plaintiffs were bona fide purchasers for value without notice and being registered proprietors will suffer irreparable loss and damages if the eviction is undertaken.

Defendants Case.

2.0 The 1st Defendant filed a replying affidavit sworn on 26th May 2021 and filed on 31st May 2021. I will caution at this stage that this court has had difficulty processing the contents of the reply but has nonetheless tried its best to summarize the same. This has however not impeded the rendition of this ruling.

2.1 It is averred that the allegations of 'ownership', 'Occupancy', the area occupied and the identity of the people in occupation can only be verified during hearing of the case. There were hidden matters that can only come out during the hearing when all parties will be before court. The Plaintiffs had failed to provide crucial documents like the Surveyors report or assessment report to confirm the status quo on extend of occupation including the properties values. The 3rd Plaintiffs narration of the history of the Plaintiffs acquisition point to the fact that the titles were created upon the subdivision of Kwale/Diani Beach Block/1522. Kwale/Diani Beach Block/1522 was therefore suit property and the Plaintiffs were in occupation illegally thus the Eviction Notices.

2.2 It is further argued that the Judicial Review proceedings having been withdrawn had no relevancy to the Eviction Notices. The proceedings at the Land Dispute Tribunal were ex parte and not true. That adoption of the award by the Resident Magistrate Kwale should have resulted into a nullification of the Plaintiffs titles and not transfer. There was no reason for cancellation/nullification of the 1st Defendants title was nullified when it was clear that she was the owner. Copies of transfer from the Settlement Fund Trustees, original title deed before subdivision and official searches were attached.

2.3 The 1st Defendant points that if the allegations are to go by then the 2nd Defendant should have been named as one of the Plaintiffs and not a defendant. The 2nd Defendant lacked locus standi to sue the 1st Defendant. She further urges that the Settlement Fund Trustees should be joined as party to this suit to enable all parties to be heard. Allegations of subdivision do not nullify the initial registration. If there was any title to be nullified, it should be the titles that were issued by dint of the subdivision.

2.4 The Defendant urges that the Plaintiffs application should be dismissed since it is a waste of the Courts time and that there will be no loss and or irreparable damage to the Plaintiffs.

Submissions

3.0 This application was heard by way of written submissions. The Plaintiffs filed submissions dated 15th June 2021 with a list of authorities. The 1st Defendant did not file submissions. The 2nd Defendant neither filed a replying affidavit nor submissions despite their advocates on

record being duly notified via email. Ms. Jane Umara advocate filed an affidavit of service in this regard sworn on the 4th August 2021.

3.1 Ms. Umara for the Plaintiffs/Applicant relied upon the grounds set out in the application and the supporting affidavit sworn by the 3rd Plaintiff James Ngyema Nyolo and annexures thereto. Based on the principles for grant of an injunction as set out in the case of Giella Vs. Cassman Brown & Co. Limited (1973) EA 358, Counsel contends as follows; -

Whether the Applicants have established a prima facie case with a probability of case

3.2 The Plaintiffs have demonstrated a prima facie case against the defendants with a likelihood of success at the trial. They are the registered proprietors of the suit property following purchase from the 2nd Defendants, have developed and were in occupation of the same to date.

3.3 Counsel further relied on the following extract from **Mrao Vs First American Bank Kenya Limited & 2 Others (CA No. 39 of 2002)** as to what will comprise a prima facie case; -

...a case which on the material presented to the court a tribunal properly directed 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'

According to counsel, the Plaintiffs right on quiet enjoyment and possession of the suit property has been infringed upon by the issuance of the Eviction Notices herein. The applicants were not in illegal possession and occupation of the 1st Defendants land to warrant the issuance of the notices.

Whether the applicants will suffer irreparable loss

3.4 Learned Counsel further argued the Plaintiffs stood to suffer irreparable loss or injury that cannot be adequately compensated by an award of damages if an injunction is not issued. This is because this will be an eviction from a place the Plaintiffs have called home and attached sentimental value to and will be rendered them homeless.

Balance of convenience

3.5 It is also contended that by dint of the Plaintiff's occupation the balance of convenience tilts in the Plaintiffs favor. According to Counsel Eviction from ones' property is a serious matter that deprives one of their right recognized in law and should not be allowed to proceed on doubtful circumstances. Greater hardship will be inflicted upon the Plaintiffs should the orders not be granted. Reliance was placed on the case of **Moi Education Center Co. Ltd Vs. William Musembi & 13 Others Civ. Nrb. Appeal No. 363 of 2014** to emphasize the right to human dignity and security of the persons to be evicted.

Whether a mandatory injunction ought to be granted at an interlocutory stage

3.6 It is the Plaintiffs view that since the Plaintiffs have both legal and equitable rights over their registered portions of land they are entitled to protection by way of injunction. Counsel outlined the principles for granting of a mandatory injunction at an interlocutory stage. She urged that since it is the Plaintiffs submission that they are not in occupation of plot No. Kwale/Diani Beach Block/651, the subject matter of the eviction notice, this was a very clear case to warrant issuance of mandatory injunction.

Further submissions were argued as follows; -

Whether the 1st Defendant has locus standi to issue the notices

4.0 The Plaintiffs have pointed further that the notices relate to plot No. Kwale/Diani Beach Block/651. On the other hand, the Plaintiffs deposed that they are registered proprietors of Kwale/Diani Beach Block/1450, 1520,1703,1806,1403,1807, 1804,1615,1616, 1524,1701 and 1805. Counsel relied on annexures 'JNN-2' of the 3rd Plaintiffs affidavit in this regard. It is the Plaintiffs submission therefore that the 1st Defendant does not have locus standi to issue the Eviction notices since the Plaintiffs were not occupying Kwale/Diani Beach Block/651.

Whether eviction can issue without a court order

5.0 According to Learned Counsel Section 152F (1) envisages existence of a judgement and decree against the person occupying the decree holders land. This is then followed by notice of eviction under Section 152 E (1). In the instant case, there is no judgement or decree of the court. Counsel relied on the case of **Moi Education Center Co. Ltd Vs. William Musembi & 13 Others** earlier cited where the court stated that; -

'No one can be evicted from their home or have their home demolished without an order of the Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'

There is a prerequisite before the evictions and therefore the Eviction notices are illegal.

ANALYSIS AND DETERMINATION.

6.0 I have considered the application, supporting documents, submissions as well as the replying affidavit by the 1st Defendant. The issues for determination are whether the Plaintiffs have met the criteria for the grant of an injunction and whether an order of mandatory injunction should issue at this stage and whether the Eviction Notices should be cancelled.

Whether the Applicants have established a prima facie case with a probability of case

6.1 The Plaintiffs have produced in their affidavit the copies of the sale agreements, transfers and the various titles given out to the Plaintiffs pursuant to the sale. It has also been deponed that the applicants have developed the plots are in occupation therein which has not been controverted by the Defendants. It is noted that the copies of 1st Defendant documents marked 'AMN-1' AMN-2' and AMN-3' refer to KWALE/DIANI BEACH BLOCK /651, including the eviction notice. What is in issue is whether the Plaintiffs should be in occupation in the first instance and if the 2nd defendants had capacity to legally transfer title. This can only be answered from a full hearing. I'm guided by the Court of Appeal views in the Mrao case cited by Counsel that a prima facie case is not confined to genuine and arguable case. I'm satisfied that based on the material placed before this court, the Plaintiffs have established there exists a right which has apparently been infringed upon which clearly calls for an explanation from the 1st Defendant. I find that a prima facie case has been established.

Whether the applicants will suffer irreparable loss

6.2 I have noted the deposition that the Plaintiffs have developed the properties, live thereon and the sentimental value attached to a home. I have considered the holding in the case of **Nguruman Ltd Versus Jan Bonde Nielsen & 2 Others (2014) eKLR** that *'...an injury is irreparable where there is no standard by which their amount can be measured with the reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate.* 'Indeed the value of the plots and the developments thereon can be established by way of valuation. However, to measure sentimental value with precision will in my view pose some difficulty.

Balance of convenience

6.3 The principles as to 'balance of convenience' have been well elucidated by my brother Mativo J. in the case of **Cyclo Systems (K) Ltd Vs Kibuwa Enterprises Ltd HCCOMMISC/E151/2021**. In point is the following extract; -

'The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant. The court makes a determination as to which party will suffer the greater harm with the outcome of the motion. ... If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a prima facie case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction.'

6.4 It is trite that the Courts in Kenya as well as internationally have treated evictions as a very serious matter owing to the rights at stake. One case in point is Const. Petition No. 65 of 2010 between Satrose Ayuma & 11 Others and Registered Trustees of Kenya Railway Retirement Benefits Scheme, Kenya Railways Corp. It is also clear from the pleadings that both the Plaintiffs and the 1st Defendant are claiming interest in the suit property. From the Plaintiffs submissions in this regard and in my view greater detriment will be suffered by the Plaintiff as opposed to the 1st Defendant if the orders are not granted. The balance of convenience tilts in favor of maintaining the status quo on the ground in view of the Plaintiffs occupation herein.

Whether a mandatory injunction ought to be granted at an interlocutory stage

6.5 The Plaintiffs have prayed for an order that 'Pending the hearing and determination of this suit, a mandatory and permanent injunction be issued restraining the 1st Defendant /Respondent by herself, servants, agents and or otherwise from evicting the Plaintiffs/Applicants or in any manner whatsoever from interfering with the Plaintiffs/Applicants enjoyment, quiet possession, indefeasible rights and interests in all that property located in Diani known as Kwale/Diani Beach Block/1450, 1520,, 1703,1806,1403,1807, 1804,1615,1616, 1524,1701 and 1805.

6.6 In considering this prayer I'm guided by the following principles set by the Court in **Cyclo Systems (K) Ltd Vs Kibuwa Enterprises Ltd HCCOMMISC/E151/2021**

'.....A permanent injunction can only be granted by a decree made at the hearing and upon the merits of the suit. A Permanent injunction finally determines the rights of the parties and forms part of the decree made at the hearing. It can only be granted at final stage/hearing of the suit. A permanent injunction can only be granted upon the merits of the case and at final hearing of the suit.'

6.7 I have looked at the Prayers sought in the Plaint dated 25th March 2021 and, in my view, granting this order will amount to a determination of the main suit without hearing the parties on merit. It is in the interest of justice that the rival claims herein are subjected to full hearing for the ends of justice to be fully met.

Whether the 1st Defendant has locus standi to issue the notices

7.0 It is the Plaintiffs submission that the 1st Defendant does not have locus standi to issue the Eviction notices since the Plaintiffs were not occupying Kwale/Diani Beach Block/651. I have already noted that both parties are raising a claim and at this juncture the court should refrain from looking at the merits of the case. This issue is best addressed at the full trial on merit.

Whether eviction can issue without a court order

8.0 I have considered counsel's submissions herein that the notices are illegal for want of a court order obtained before issuance as envisaged by Section 152F (1) of the Land Laws Amendment Act 2016. This stipulates as follows; -

Application to Court for relief.

- (1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.
- (2) The Court, after considering the matters set out in sections 152C, 152D and 152E may-
 - (a) confirm the notice and order the person to vacate;
 - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - (c) suspend the operation of the notice for any period which the court shall determine; or
 - (d) order for compensation.

8.1 In my view no court order or judgement/decree of the Court is required for eviction undertaken under the provisions of Section 152E. The only requirement is that the land is private land, the owner thereof forms the opinion that a person is in occupation of his or her land without consent. The Act has set out what should be contained in the notice and the steps to be taken by the owner of the private property before undertaking the said eviction. Section 152B is to the effect that an unlawful occupant of private, community or public land shall be evicted in accordance with this Act. Guided by Section 152F and having considered the matters under section 152E I make a finding that the notice is inadequate and since this matter shall be decided on merit the order that suffices will be to cancel the same under Section 152F (2) (b) pending the hearing and determination of this case.

Determination

8.2 Based on the foregoing I hereby make the following orders; -

1. Pending the hearing and determination of this case a prohibitory injunction be issued restraining the 1st Defendant /Respondent by herself, servants, agents and or otherwise from evicting the Plaintiffs/Applicants or in any manner whatsoever from interfering with the Plaintiffs/Applicants enjoyment, quiet possession, indefeasible rights and interests in all that property located in Diani known as Kwale/Diani Beach Block/1450, 1520, 1703,1806,1403,1807, 1804,1615,1616, 1524,1701 and 1805.
2. The Eviction Notices dated 1/4/2021 issued by the 1st Defendant to the Plaintiffs/applicants are hereby cancelled.
3. Costs shall follow the event.

DELIVERED VIRTUALLY, DATED and SIGNED on this 15TH day of November, 2021.

HON. LADY JUSTICE A.E DENA

FOR PLAINTIFFS: Ms Umara.

FOR 1st DEFENDANTS: N/A

2nd DEFENDANTS: N/A

COURT ASSISTANT: Mwakina.