



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE

ELC NO 42 OF 2021 KWALE.

(FORMELY ELC 202 OF 2020 MOMBASA)

KADZOYO CHOMBO MWERO.....PLAINTIFF

VERSUS

AHMED MUHAMMED OSMAN.....1ST DEFENDANT

MGANGA KADZOMBA.....2ND DEFENDANT

ALI BEJA.....3RD DEFENDANT

NDEGWA DUNCAN MUNGUI.....4TH DEFENDANT

ABDALA MBUJA.....5TH DEFENDANT

MUNGUMI CHIVUMBI.....6TH DEFENDANT

NYAMAWI SOMBO KADZANI.....7TH DEFENDANT

JOSPHAT CHIVUMBI MBUU.....8TH DEFENDANT

SAMMY CHITSANGANYO MUNGUMI.....9TH DEFENDANT

SAID MBUU KIVUMBI 10TH DEFENDANT

JUSTUS CHIMONI11TH DEFENDANT

ORANGE TYRES.....12TH DEFENDANT

RULING

INTRODUCTION.

1. The application before Court is the Plaintiffs Notice of Motion dated 5th November 2020 brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rules 1,2,3 and Order 51 of the Civil Procedure Rules and all enabling provisions of the Law. It seeks the following orders; -

1. SPENT

2. That pending the hearing and determination of this application the court be pleased to grant an order of temporary injunction restraining the 1st to 12th Respondents forthwith from constructing houses, selling portions of the land, fencing, clearing bushes, cultivating, cutting trees and or in any manner interfering with the Applicants ancestral land, unsurveyed parcel of land situated at Kibaoni village in Samburu Trading Center within Kwale County containing by measurement one Hundred Acres (100) or

thereabout – the suit property.

3. That pending the hearing and determination of this suit the court be pleased to grant an order of temporary injunction restraining the 1st to 12th Respondents forthwith from constructing houses, selling portions of the land, fencing, clearing bushes, cultivating, cutting trees and or in any manner interfering with the Applicants ancestral land, unsurveyed parcel of land situated at Kibaoni village in Samburu Trading Center within Kwale County containing by measurement one Hundred Acres (100) or thereabout.

4. That the Honorable court be pleased to grant a mandatory injunction to order the 1st to 12th Respondents forthwith to vacate and/or remove their structures and plants from the Applicants ancestral land, unsurveyed parcel of land situated at Kibaoni village in Samburu Trading Center within Kwale County containing by measurement one Hundred Acres (100) or thereabout.

5. That the Officer Commanding Station, Mombasa Police Station do assist in enforcing the order.

6. Costs

7. Such further or other orders as the Court may deem just and expedient in the circumstances of the case.

1.2 The Application is premised on the grounds that; -

1. The Applicant is the legal and/or beneficial owner of the suit land and it is in the interest of justice that the orders sought issue.

2. The Defendants are illegally in occupation of the suit land and were fencing, constructing houses and selling portions of the land without the Applicants prior knowledge or consent hence trespassers.

3. The Applicant has suffered and continues to suffer irreparable loss as a result of the Respondents illegal activities in the suit land.

4. The Respondent's will suffer no prejudice if the sought issue.

5. The Applicant has a prima facie case with high chances of success.

6. It is in the interest of justice the orders sought be granted.

7. The Respondents have refused to stop interfering and/or vacate the said parcel of land.

1.3 The application is supported by the Affidavit of Kadzoyo Chombo Mwero sworn on the 5th November 2020. He has deposed that he is a legal beneficiary of the suit property which belongs to the Kadzoyo family and attached a copy of letter of allotment dated 18/8/21.

1.4 It is stated that the respondents have continued to trespass on the land despite being given notice to vacate and/or stop interfering with the suit property. Copies of demand notices dated 22nd June 2015 and 20th February 2020 were provided.

1.5 It is also stated that the 2nd to 12th respondents were constructing houses, fencing and selling portions of the land to various people such as the 1st Respondent. They continued to do this with full knowledge that the parcel belongs to the Kadzoyo family and denying the Plaintiff and his family to enjoy full rights of the suit property. Photographs taken on the land were provided.

1.6 The Plaintiff further points that the 1st Respondent has demolished the Plaintiffs fence and destroyed the family graveyard therefore causing him irreparable loss and damage to his family. He was also using the Police officers to intimidate and harass him in his own ancestral land. That unless the orders are granted, he will suffer irreparable loss and damage as the legal owner of the suit property.

1st Respondent case

1.7 The application is opposed by the 1st Defendant who has filed a Replying Affidavit sworn on the 21st May 2021. He has deposed that he legally bought the property from Mr. Mohamed Ahmed Ali, who bought it from Denis Ngala Chimega. All beneficial occupants over the same issued their consents and were duly compensated by Mohamed Ahmed Ali. Copies of the sale agreements were attached.

1.8 The 1st Respondent also states that he purchased land that lies in Zone 052 and not 043. The Plaintiff claims ownership of plot 16 at Zone 043. A copy of the Development Plan was provided. He then commenced construction which the Plaintiff demolished and was charged in Mariakani MCCR 165 of 2020.

1.9 The 1st Respondent further states that based on information from residents of Kibaoni village, in 2015 an ownership dispute pitting the resident members in the neighborhood was determined by the Assistant County Commissioner and elders. The land was declared to belong to one Mganga Kadzomba but it was directed that the Plaintiffs home and graveyard should not be interfered with. Copies of the decision were annexed.

1.10 In light of the above decision the home and graveyard have remained intact to date. The Plaintiff was thus misleading the court to obtain the orders.

1.11 The 1st Respondent states that the Plaintiff/applicant had not shown a prima facie case over the ownership of the property allegedly being interfered with. That the mandatory injunctive orders sought carry a finality to it and no special circumstances had been raised to warrant granting of the same. Further that the Applicant had not demonstrated to the court that they would suffer any loss that cannot be compensated by an award for damages.

1.12. The 1st Respondent urges that he stood to suffer great financial loss and prejudice if the orders sought were granted.

1.13 The 2nd to 12th Respondents were served and have not responded to the suit and the application herein.

SUBMISSIONS

2.0 Plaintiff/Applicant submissions

2.1 The Applicant filed submissions dated 18th June 2021. The submissions set out the provisions of Order 40 (1) (a) and (b) of the Civil Procedure Rules 2010 upon which the application is grounded and the conditions for consideration in the granting of an injunction as given in the case of *Giella versus Cassman Brown (1973) EA 358*.

It is submitted that; -

2.2 The Plaintiffs documents being letter of allotment, the demand letters, photographs showing interference by the respondents all show the Plaintiffs proprietary interest.

2.3 The 1st Respondent sale agreement was with strangers who were not legal owners of the subject property.

2.4 To establish whether the Applicant has established a prima facie case, is to interrogate the ownership of the disputed property. The suit property is a family property belonging to their late father, unlike the 1st Respondent who purchased from a stranger.

2.4 The Respondents will not suffer any harm since they are illegally in a property that does not belong to them. It is pointed that the letter of allotment provided by the 1st Respondent shows zone 052 Kibaoni/Chirahi T in Samburu and not 043 as alleged by the 1st Respondent.

2.5 Zone 043 is the initial number for the entire land allocated to the Applicants father and the land was therefore one and the same. It was absurd for the 1st Respondent to state otherwise.

2.6 Based on the foregoing the applicant had met the threshold for granting orders for injunction, has established a prima facie case as against the Respondents, provided proof that the suit property was being wasted.

2.7 The applicant urges the court should grant the orders and preserve the property pending the hearing and termination of the application and the suit as prayed.

1st Respondent's submissions

3.0 The 1st Defendant relied on its written submissions dated 9th July 2021 and their Replying affidavit herein. They have identified the following issues for determination; -

1. Whether the Applicant satisfies the conditions to grant an injunction as stipulated under *Giella versus Casman Brown (1973) EA 358*.

2. Whether the Applicant is entitled to the remedies sought.

3.1 Counsel submitted that for an application seeking injunctive orders to succeed an Applicant must satisfy whether they have a prima facie case with probability of success. The definition of prima facie as highlighted by the Court of Appeal in ***Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others, civil Appeal No.39 of 2002*** was relied upon – ‘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’

3.2 It is contended that while the Plaintiff claims that they are the owners of Plot No. 16 Zone 043, it is **Robert Kadzoyo Chodo** who is required in the letter of Allotment to make payment of Kshs 3600 for the lease title to be processed. That a mere similarity of names cannot suffice as evidence of being beneficiary of and or a son to **Robert Kadzoyo Chodo** more evidence of lineage **with the Kadzoyo family** should have been availed and including the claim that the allotment was issued to his forefathers.

3.3 By law a letter of allotment does not confer ownership rights over property. No evidence was adduced on steps taken towards procuring title to the property and becoming a registered proprietor. The case of ***Joseph Arap Ng'ok Vs. Moiwo Ole Leiwua Nrb Civil Application No. 60 of 1997*** which found that title to such property can only crystalize or issue upon meeting the conditions of the letter of allotment.

It is further submitted; -

3.4 The applicant was only testing still waters and creating chaos among the neighbors as his home and graveyard had remained intact in compliance to the directive of the alternative /traditional dispute resolution forum herein.

3.5 The Applicant had not adduced any evidence to show that initially Zone 043 comprised the zone 052 and that this was the entire land allotted to Robert Kadzoyo Chodo. The 1st Respondent had through the Development plan showed the separate geographical positions of Zone 052 where he acquired his property and the zone 043. The Applicant had thus failed to show the nexus between himself and the letter of allotment and to show that the property in dispute is the property in possession of the 1st Respondent. Moreover, the documentary evidence submitted by the 1st Respondent on purchase of his land had not been controverted by the Plaintiff.

3.6 As to whether the Applicant would suffer irreparable damage incapable of compensation by way of award of damages, the 1st Respondent submission is that there was no iota of doubt that the Applicant failed to demonstrate the irreparable harm they would suffer incapable of compensation by way of damages. Reliance is placed upon the case of **Nguruman Ltd Versus Jan Bonde Nielsen & 2 Others (2014) eKLR** where it was held among others 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'. The Respondent contends that it is not enough to say that the 1st respondent will not suffer any harm since they were on a plot that did not belong to them. Further that there was no evidence produced to show the Applicants graveyard and home were interfered with causing irreparable loss. The photographs displayed do not show any destruction allegedly caused by the 1st Respondent.

3.7 The 1st Responded also urged that the court should consider balance of convenience where it is in doubt as to adequacy of the respective remedies in damages to either party. Citing the case of **Amir Suleiman Vs Amboseli Resort Ltd (2004) eKLR** this court is urged to opt for the lower rather than the higher risk of injustice. It is pointed that the 1st Responded has demonstrated that the property in his possession is not the property in dispute and therefore any orders granted shall be in vain. The confusion was in the assertion that Zone 043 was the initial number for the entire property including Zone 052.

3.8 It is further urged that if the orders are granted the Respondent will be at higher risk of facing injustice as Applicant will wrongly, unfairly and robustly enforce the same on the 1st Defendant property in zone 052 following the above misrepresentation.

3.9 With regard to whether the Applicant is entitled to the remedies sought, it is submitted that; -

1) The Applicant has not satisfied the criteria for grant of the remedies under prayer 2 and 3 of the application.

2) There are no special and exceptional circumstances brought forth by the Applicant to warrant issuance of orders of mandatory injunction. In this regard the case of **Nation Media Group & 2 Others Versus John Harun Mwau (2014) eKLR** is relied upon. It is further contended that if the mandatory injunction orders are issued the damage to the 1st Respondent is trivial and the detriment the order will inflict shall be disproportionate to the benefit it would confer to the Applicant.

3.10 The 1st Respondent urges that the application should be dismissed.

ANALYSIS AND DETERMINATION

4.0 I have considered the application and documents in support thereto, the 1st Respondents responses and documents in support thereto as well as the authorities cited.

4.1 The issues to be determined have already been framed by the 1st Respondent and have also captured the issues framed by the Plaintiff Applicant. I therefore proceed to analyse them seriatim.

Whether the Applicant satisfies the conditions to grant an injunction as stipulated under Giella versus Casman Brown (1973) EA 358.

4.2 This court is guided by the principles set out in the case of Giella Vs. Cassman Brown. These are; -

1. An applicant must show a prima facie case with a probability of success.

2. An interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

3. If the court is in doubt of 1) and 2) above principles it will decide an application on the balance of convenience.

4.3 I have considered the application and submissions of counsel to the Applicant that the Plaintiff Applicant is the legal and/or beneficial owner of the suit land which belongs to the Kadzoyo family. Counsel pointed that the letter of Allotment dated 18/8/21, the demand letters, photographs showing interference by the respondents all show the Plaintiffs propriety interest. The 1st Respondent denies that these documents suffice to demonstrate such interest. Specifically, that a letter of allotment does not confer ownership rights over property and ownership can only crystalize or title issue upon meeting the conditions of the letter of allotment. It is further argued that the Applicant had not placed any documents before this court to show steps commenced towards complying to the conditions of the letter of allotment to enable registration as proprietors.

4.4 It has been established in the Nguruman Ltd case also cited by the 1st Respondent that at this stage the court should not delve in the merits of either party case or hold a minitrial. The Applicant needs only show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. However, this court cannot close its eyes to the fact that a letter of allotment is just but an intention to allocate the land upon fulfilment of certain conditions. This court is further persuaded by the findings in **Kaseve Welfare Society Vs. Harp Housing Ltd.** (2020) eKLR in this regard. Indeed, no material has been placed before this court to show any step towards meeting these conditions. It is further compounded by the facts brought with regard to the dispute before the elders and the Commissioner which found against the Applicant. I have looked at the letter of allotment availed by the Applicant I note there is no indication on its face as to the size of the said parcel 16 for residential purpose, yet the Plaintiff alleges it is 100 acres and includes zone 052. Could it be a smaller plot considering that a further condition therein states that the building should not exceed 75% of the plot? Based on the material placed before the Court I find that the plaintiff has not established a prima facies case with a likelihood of success.

Noting that all the three tests must be met I will proceed to address on whether the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

4.4 The Applicants case is that the suit property was being wasted, that the 1st Respondent had interfered with the home and grave yard and further that the Respondents were disposing of the land to other people including the 1st Respondent. No efforts have been made by the Applicant to show the graveyard which has been interfered with. The 1st Respondent contends that he legally bought the land from Mohamed Ahmed Ali in Zone 052 and not 043 and furnished sale agreements, consents and letters from the Chief pertaining to the same. I have perused the initial agreement between Denis Ngala Chimega and Mohamed Ahmed Ali and have noted that, the said vendor is not among the Defendants Respondent named in the suit who are alleged to be disposing the suit land. Based on the material before me wastage has not been proved including sale by the 2nd to 12th Defendants. Even if the same were to be proved the same is capable of being assessed for compensation including vacant possession.

4.5 The last criteria is to decide on a balance of convenience if in doubt. I have considered the Respondents submission on this limb noting that the Applicant did not submit on the same. In my view to issue injunctive orders in circumstances where the identity of the land is in question will in my view amount to great injustice. The matter is best left to hearing on merit. The balance of convenience tilts against issuance of any interim orders herein.

4.6 With regard to the mandatory orders of injunction which the 1st Respondent has submitted on at length, I note that the Applicant has not emphasized on these in their submissions probably because clearly the same are the subject of the substantive prayers in the main suit. I however agree with the Defendants submission that granting an order for Mandatory injunction at this stage would be amounting to determining the main suit.

4.7 The upshot of the foregoing is that the Notice of motion dated 5th November 2020 is dismissed.

4.8. I'm inclined to invoke paragraphs 28 (k) and 32 of the Practice Directions on proceedings in the ELC Court and direct that the status quo with regard to the Plaintiff/Applicants home and graveyard shall be maintained and there shall be no interference from the Defendants pending the hearing and determination of this suit on merit.

4.9 Costs to the 1st Respondent.

The Ruling is typed and is available to the parties subject to the relevant court charges

DELIVERED VIRTUALLY, DATED AND SIGNED ON THIS 11TH DAY OF NOVEMBER, 2021

HON. LADY JUSTICE A.E DENA

JUDGE, ENVIRONMENT AND LAND COURT

AT KWALE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Birir for the Applicant

No appearance for the rest of the parties

Court Assistant – Mr. Dennis Mwakina