



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 109 OF 2021

MOSES CHENGO.....1ST PLAINTIFF/APPLICANT

FATUMA SAID CHENGO.....2ND PLAINTIFF/APPLICANT

JUMA SAID CHENGO.....3RD PLAINTIFF/APPLICANT

HASSAN MWERO SAIDI.....4TH PLAINTIFF/APPLICANT

- VERSUS -

NASSIB NGUDO.....1ST DEFENDANT/RESPONDENT

MECHEMUNDA NGUDO.....2ND DEFENDANT/RESPONDENT

RUWA NGUDO.....3RD DEFENDANT/RESPONDENT

RULING

1. For determination before this Honorable Court is the Notice of Motion application dated 7th June, 2021. It is brought by the Plaintiffs/Applicants under the provisions of Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act.

THE APPLICANTS' CASE

2. The Application seeks for the orders of temporary injunction against the 1st, 2nd and 3rd Defendants herein from dealing with the suit property in any way pending the hearing of this application inter parties as well as costs of the application. The Plaintiffs/Applicants claim to be the owners of all that parcel of land located at Mkilo Village, Kalalani Sub County having inherited it from their deceased father Said Chengo. They claimed that the Defendants were threatening to evict them from the suit land through a land conflict resolution committee held on 17th May 2021. The Plaintiffs/Applicants pleaded with court to restrain the actions of the Defendants as they stood to suffer irreparable loss and damage yet they had a prima facie case with a probability of success.

3. The Plaintiffs/Applicants application was opposed by the 3rd Defendant/Respondent on behalf of the Defendants. Ruwa Ngudo affirmed a replying affidavit and filed it in court on 21st July 2021. He claimed that the suit property belonged to himself and the Ngudo Muryani Habo family indeed he held the Assistant County Commissioner had on 17th May 2021 ruled that the land belonged to the Ngudo family after conducting a site visit and hearing all witnesses. That the continued occupation of the Plaintiffs on the suit property tantamounted to trespass and illegal as per the said ruling. He claimed the suit property to be community land and that one could only acquire ownership through membership which the Plaintiff were not. He urged court to dismiss the application as the Applicants had not approached the court with clean hands having failed to disclose the ruling by Assistant County Commissioner Officer DO). Additionally, they contended the application never met the threshold for a granting of temporary injunction.

4. On 26th July 2021 Court directed that the application be canvassed by way of written submissions.

ANALYSIS AND DETERMINATION.

5. I have carefully read and considered the pleadings herein. The injunctive orders sought herein 'pending the hearing of this application inter parties'. The Learned Counsel for some reasons or other not very clear to me, for the Plaintiffs/Applicants omitted the prayer of injunctive

orders pending the hearing and determination of the suit. Essentially, the application having been fixed for inter parte hearing and directions taken, prayer number 1 and 2 were spend and were overtaken by events. I cannot make a determination on orders that are no longer alive. As the Plaintiffs/Applicants is urging me to do. I have not been requested to do anything in the interviewing period between now and the hearing of the suit. The Plaintiffs/Applicants cannot hold this court at ransom and in abeyance as it were.

6. For this reason therefore, I am only left with prayer number 3, which is on costs for this application. Section 27 of Civil Procedure Act provides that costs of and incidental to all suits shall be in the discretion of the court and that the costs of any action shall follow the event unless the court has a good reason to determine otherwise. Since court ordered status quo to be maintained on 14th June 2021 and the Plaintiff/Applicant obtained the relief sought and both parties have been involved in the application, the costs of this application ought to be in the cause.

7. Notwithstanding the provisions of Article 159 (2) (d) of the Constitution of Kenya, justice shall be administered without undue regard to procedural technicalities, and for expediency sake of the subject matter, I do order as follows:-

- a. THAT the Notice of Motion application dated 7th June 2021 has been overtaken by events and thus it is dismissed hereof;**
- b. THAT to avoid causing any void, the matter to be fixed for hearing and final determination within the next 90 days from this day.**
- c. THAT the matter to be mentioned on 18th January, 2022 for pre trial directions pursuant to the provisions of Order 11 of the Civil Procedure Rules.**
- d. THAT each party to bear its own costs.**

IT IS ORDERED accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF DECEMBER, 2021

NAIKUNI J

JUDGE

ENVIROMNENT AND LAND COURT

In the presence of:-

M/s. Yumna, Court Assistant

Non Appearance for the Advocate for the Plaintiffs/Applicants.

Non Appearance for the Advocates for the Defendants/Respondents.