



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 238 OF 2018

ANCIENT INLAND SEAS.....PLAINTIFF/APPLICANT

-VS-

ROLINS INVESTMENTS LIMITED & 5 OTHERS.....DEFENDANT

RULING

1. By a Notice of Motion dated 9th October, 2018 and brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 rules 2 and 4 and Order 51 of the Civil Procedure Rules and all enabling provisions of the law, the plaintiff/applicant seeks the following orders:

1. That this application be certified as urgent and service of this application be dispensed with in the first instance.
2. That this court do issue eviction orders against the defendants/respondents being that they are trespassing on the plaintiff/applicant land.
3. The court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their agents and/or servants from trespassing on, wasting constructing on, alienating or otherwise interfering or dealing with the plaintiff's property being PLOT NUMBER LR NO.MN/V/1791 pending the hearing and determination of this application.
4. The court be pleased to grant an injunction restraining the respondent whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property being PLOT NUMBER NO. LR NO. MN/V/1791 pending the hearing and determination of this suit.
5. The Officer Commanding Changamwe Police Station do enforce compliance of the orders above.
6. The costs of this application be provided for.
7. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

2. The application is premised on the following grounds:

1. That the plaintiff/applicant is the legal owner of the said parcel known as PLOT NUMBER NO. LR NO. MN/V/1791.
2. That the respondents interfered with the plaintiff's said property by trespassing thereupon and constructing temporary and permanent structures.
3. That unless restrained, the respondents will continue to trespass, interfere and erect permanent structures on the plaintiff/applicant's aforesaid property thereby causing the plaintiff/applicant irreparable damage with the likelihood of a breach of the peace.

3. The application is supported by the affidavit of Abdulkarim Saleh Mohsen sworn on 9th October 2018, and a supplementary affidavit sworn on 30th July, 2019. He depones that he is the legal, lawful and rightful registered proprietor of the PLOT LR NO. MN/V/1791 measuring 0.4500 hectares within Mombasa County having bought it on or about 28/6/2002 from M. A. Salim and S.S. Rashid. That the respondents have invaded the said land without the applicant's permission and authority and purported to assume ownership. That the Respondents have ignored all the applicants protestations to vacate the land and have now started erecting structures on it. The applicant

avers that despite issuing demand letter to the respondents the respondents have ignored the same and refused to vacate from the property. The applicant states the unless the court intervenes, there is likely to be a breach of peace as the respondents have shown an intention not to vacate from the suit property peacefully unless forced to do so and hence the order for police assistance to ensure compliance of the law and order. The applicant avers that unless the respondents are restrained by orders of the court, he is bound to suffer irreparable damage as the respondents will continue erecting permanent structures on the said property. The applicant avers that the respondents have no right to interfere with his enjoyment of the property as the registered and lawful owner. That it is only fair that the court do compel the respondents do vacate the said land and in default issue an eviction order against the respondents. The applicant has attached copies of the agreement, title deed and demand letters and surveyor's report confirming that the suit land does not lie in a road reserve and neither was it obtained from a road reserve and that the plot is occupied by people without the consent of the owner. The applicant beseeched the court to grant the orders sought herein. The 1st respondent did not file any response to the application.

4. In opposing the application, the 2nd respondent filed a replying affidavit sworn by Asiya Yussuf on 14th June 2019 in which he states that she has been using the land which is part of unalienated government land adjacent to PLOT NO. MN/V/276/7 and PLOT NO. MN/V/542 situated in Miritini along Mombasa Nairobi Highway as a vehicle yard since the year 1997. The 2nd respondent avers that she started remitting temporary occupation licences fees in 1997 to the then municipal council of Mombasa. That sometime in 1998, her late husband, Givay Viraj wrote to the Commissioner of Lands seeking allotment of the portion of the suit property to further redevelop it. That again, in November 2002, the Department of Lands Mombasa wrote a letter to the Commissioner of Lands seeking allotment of the portion of the suit property to the 2nd defendant. The 2nd respondent states that to-date no subdivision or allotment of the suit property has been made to any individual or entity and that the applicant is misleading that it has a title. The 2nd respondent avers that PLOT NO. LR MN/V/1791 does not appear on the survey plan for Mombasa Municipality nor does it feature on the registry map sheet number D.60. It is stated that the 2nd respondent has been in operation on the suit property for over 20 years thereby creating constructive trust in her favour and the plaintiff's claim to recover the land goes against the provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. The 2nd respondent avers that under Section 3 of the Government Land Act (now repealed), the power to allocate unalienated government land was a preserve of only the president of the Republic of Kenya and therefore the Commissioner of Lands could not have made any grant nor could he pass any registerable title under the Registration of Titles Act Cap 281 (repealed). It is the 2nd respondent's contention that the application has not met the required threshold for grant of the orders sought. The 2nd Respondent has attached receipts for license and the letter referred to hereinabove.

5. The 3rd respondent filed a replying affidavit sworn on 14th June, 2019 in which he depones inter alia, that vide an agreement dated 8th August 2013, he acquired a piece of land measuring 84ft by 124ft which is part of that unalienated land adjacent to PLOT NO. MN/V /276/7 PLOT NO. MV/V/542. That he developed and set up a scrap metal dealership on the suit property. He has attached copies of the agreement and business permit. He echoed the averments of the 2nd respondent.

6. The 4th respondent filed a replying affidavit sworn by Martin Mugambi on 14th June 2019 in which he depones that he is the proprietor of the 4th respondent and that on 25th April 2012, he acquired a piece of land which is part of unalienated government land adjacent to PLOT NO. MN/V/276/7 and PLOT NO. MN/V/542. That he has since developed the property and set up a bar and restaurant and has attached copies of the agreement, photographs and other documents. He also reiterated what the 2nd and 3rd respondents have stated, adding that on in January 2015, he received a notice dated 15th January 2015 from Kenya National Highways Authority informing him of their intention to demolish the bar for encroaching a classified road reserve.

7. The 5th respondent filed a replying affidavit sworn by Bernard Otieno Ojwang. He deponed that vide an agreement for sale dated 18th December, 2013, he acquired a piece of unalienated government land adjacent to PLOT NO. MN/V/542 which he has since developed and set up a church. Copies of the agreement and photographs are attached. The 6th respondent also reiterated the averments of the other respondents.

8. On his part, the 5th respondent filed a replying affidavit sworn on 14th June 2019 in which he depones that he has been in occupation of parcel of land which is part of unalienated government land adjacent to PLOT NO.MN/V/276/7 and PLOT NO. MN/V/542 since the year 2015. That he applied to set up filing station and has attached copies of approvals form the County Government of Mombasa and other government agencies, as well as photographs. The 6th respondent also reiterated the averments of the other respondents.

9. The application was canvassed by way of written submissions. The applicant filed its submissions on 13th August 2019 while the respondents filed theirs on 8th October 2019.

10. I have considered the application, the affidavits in support and against and the rival submissions. The essence of the applicant's case is firstly that at all material times, it was and still is the registered owner of the parcel of land known PLOT LR. NO. MN/V/1791, secondly, that the respondents have trespassed on the suit property and erected structures thereon; thirdly that the respondents actions are illegal as they were undertaken without the consent and or permission of the applicant. These facts emerge from the specific prayers in the suit by amended plaint dated 30th July 2019. A close consideration of the prayers sought in the amended plaint and the prayers sought in the notice of motion dated 9th October, 2018 will reveal a remarkable similarity. It is therefore clear that the applicant, by the notice of motion herein is seeking for final orders as sought in the plaint.

11. The Court of Appeal in the case of **Olive Mwhiki Mugenga & Another –v Okiya Omtata Okoiti & 4 Others (2016)eKLR** considered a persuasive decision of India in issuance of final orders at interlocutory stage and stated:

“2. Ashok Kumar Bajpai –v- Dr (Smt) Ranjama Bajpai, Air 2004, ALL 107, 2004 (1) AWC 88 at paragraph 17 of the decision of the India court expressed as follows:it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact situation warrants granting such a relief but it must record reasons for passing such an order to make it clear

as what are the special circumstances for which such a relief is being granted to a party.”

12. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) 1 ALL ER 901**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

13. The courts have been reluctant to grant mandatory injunction or final orders at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in the law as stated above that the party against whom the orders are sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

14. In this case, there is no dispute that the suit property known as LR NO. MN/V/1791 is registered in the name of the applicant. From the evidence on record, I find that the applicant has established a prima facie case with a probability of success. No doubt if the suit property is alienated or its status changed through developments, the applicant stands to suffer irreparable harm not compensable in damages.

15. As already stated, the suit property is the property of the applicant. The respondents claim they acquired parcels of land which is part of unalienated government land adjacent to PLOT NO. MN/V/276/7 and PLOT NO. MN/V/542. None of the respondents is laying claim on the applicant’s PLOT LR NO. MN/V/1791. Where the respondents’ occupation have extended to the applicant’s plot their actions certainly amounts to trespass, is illegal and unlawful. Section 24 of the Land Registration Act provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 25 (1) of the said Act provides:

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section. ”

Further, Section 26 provides as follows:

“The certificate of title issued by the Registrar upon the registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a) On grounds of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

16. As the holder of title over PLOT LR NO. MN/V/1791, the applicant is vested with absolute ownership of the suit property together with all rights and privileges belonging and appurtenant thereto, including enjoyment of quiet, vacant possession and occupation. In my view, the respondents have no justification to insist on occupying the applicant’s parcel of land when it is clear their interests are over an unalienated government land adjacent to PLOT NO. MN/V/276/7 and PLOT NO. MN/V/542 and not PLOT LR. NO. MN/V/1791 which belongs to the applicant. Having carefully considered the material before me, in my view a case of a mandatory injunction and eviction has been made out. I can safely consider this a clear case that can be decided at once or in a summary manner. In my view, the applicant’s case is strong and clear to enable this court grant the orders. I am therefore satisfied that the prayers sought can be granted.

17. The upshot of this is that the notice of motion dated 9th October, 2018 is merited and the same is allowed as prayed. The applicant shall have costs of the application to be borne by respondents jointly and severally.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 28th day of January 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Ondego holding brief Mrs. Mutua for Plaintiff

Awino for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE