



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 3 OF 2019

MOHAMED DADO HATU.....1ST PLAINTIFF

ABAFODHA FAMILY.....2ND PLAINTIFF

ABAFODHA FARM GROUP.....3RD PLAINTIFF

VERSUS

IDRIS MUHUMED KOSAR.....1TH DEFENDANT/RESPONDENT

ABDULAHI FARAH.....2TH DEFENDANT/RESPONDENT

MOHAMED KONE NYACHO.....3RD DEFENDANT/RESPONDENT

MUMINA HARON.....4TH DEFENDANT/RESPONDENT

YAKUB MANSA.....5TH DEFENDANT/RESPONDENT

HUSSEIN WARIDHO.....6TH DEFENDANT/RESPONDENT

SALAD KONE NYACH.....7TH DEFENDANT/RESPONDENT

RULING

Introduction

1. The Plaintiff instituted the instant suit vide a Complaint dated 20th March, 2019 and filed on 22nd March, 2019 seeking prayers among them to restrain, prohibit and compel the respondent from remaining, entering, trespassing and or interfering with their quiet possession of Property Land known as Abafadho farm situate in Tana River County, Tana North Sub County within Saka Location and Kono Ramadha Sub Location, Abadela area along Mlanjo road. In addition, they sought a declaration that they are the lawful owners of the subject land. Contemporaneously with the complaint, the plaintiff filed Notice of Motion of even dates seeking the following orders **THAT:**

1) This application be certified as urgent and heard ex parte in the first instance.

2) The defendants/Respondents whether by themselves, agents, servants or otherwise howsoever be restrained from entering upon, trespassing upon, remaining upon, advertising, offering for sale, constructing, auctioning, transferring, alienating, leasing, offering security, putting up public notices, and /or interfering with the Plaintiff/Applicants quiet possession or otherwise dealing with Abafadho farm situate in Tana River County, Tana North Sub County within Saka Location and Kono Ramadha Sub Location, Abadela area along Mlanjo road pending the inter partes hearing of this application.

3) The defendants/Respondents whether by themselves, agents, servants or otherwise howsoever be restrained from entering upon, trespassing upon, remaining upon, advertising, offering for sale, constructing, auctioning, transferring, alienating, leasing, offering security, putting up public notices, and /or interfering with the Plaintiff/Applicants quiet possession or otherwise dealing with Abafadho farm situate in Tana River County, Tana North Sub County within Saka Location and Kono Ramadha Sub Location, Abadela area along Mlanjo road pending the inter partes hearing of this suit.

4) Pending the hearing and determination of this suit the defendants whether by themselves, himself, agent, servants and

persons claiming from and through them or otherwise howsoever be directed by an order to vacate the suit premises known as County, Tana North Sub County within Saka Location and Kono Ramadha Sub Location, Abadela area along Mlanjo road, pending the hearing and determination of this suit.

5) The officer Commanding Saka Police Station be directed to assist the Court bailiff in the enforcement of orders hereinabove.

6) THAT the costs of this application be provided for.

2. In response to the application, the 2nd, 3rd, 5th and 6th Respondents filed responses vide replying affidavits sworn on 14th June, 2019 and filed on even date. The applicant filed their further affidavit sworn by Mohamed Dado Hatu dated 29th July, 2019 and sworn on 30th July, 2019.

3. The matter came up for directions on 30th July, 2019 where Counsels for both parties agreed to dispense with the application by way of affidavit evidence and written submissions.

Applicants' case

4. The applicant claims that they are the proprietors and in constructive possession and occupation of all that parcel of land known as Abafadho farm situate in Tana River County, Tana North Sub County within Saka Location and Kono Ramadha Sub Location, Abadela area along Mlanjo road (hereinafter known as the Subject parcel of land) claiming the same is their ancestral land.

5. It is their case that the defendants/respondents trespassed on the subject land unlawfully and that despite demand to vacate, they have refused and have continued to be in possession of part of the farm without any color of right or permission from the plaintiffs, which action continues to occasion them substantial loss and damage.

6. It is their apprehension that if this Court doesn't issue the sought orders herein, the respondents will continue to interfere with their right to possession of the subject land and expose them to irreparable loss and injury.

7. They allege that the subject land is owned through group name of Abafodha farm registered as such, and that they have been paying land rates to the municipal council of Tana River and the County Government and attached receipts to that effect.

8. They averred that they know the 3rd, 4th, 5th and 6th respondents as members of Nyacho family, which owns a farm situate at Kuruso, neighbouring their subject farm at Abadela. It is their contention that the 4th, 5th and 6th Respondent's sold part of their subject land to the 2nd Respondent who had knowledge that the applicants owned the land. This was in the year 2011.

9. It is their averment that on 3rd January, 2012 they wrote to the area chief complaining of encroachment of the 2nd Defendant on the subject land, and subsequently, the area chief wrote to the 2nd Respondent vide a letter dated 2nd February, 2012 requesting him to cease any activity on the land pending establishment of boundaries. And on 17th November, 2012 they applied for registration, setting apart and allotment letter of the subject land to the County Council of Tana River. It is their averment that the 2nd Defendant disappeared until mid-February 2019 when he started creating boundaries on the subject parcel of land with the intention to sell it, which action has caused panic and loss of peace by the Plaintiffs who have been enjoying quite possession of the property.

10. In support of the application, the applicant produced the following documents; by laws for Abafodha farm self-help group, minutes, certificate of registration, rate payment receipts to Tana River county council, correspondences and a sale agreement between Abdulahi Farah and Idris Muhumed Kosar.

2nd Respondent case

11. In opposition to the plaintiff's application the 2nd Respondent averred that his claim over the applicants claim in the subject land is superior and that the petitioners are not the bonafide owners. It is his case that he bought the subject parcel of land on 18th June, 2011 from the 3rd, 5th, 6th and 7th Defendant and produced a sale agreement to that effect.

12. He averred that since the land was ancestral and unregistered land he commenced verification exercise to establish the owners prior to the purchase. The process being that on 16th June, 2011 a sub location committee meeting was held to establish the location of the land he intended to purchase and the owners. This was followed by locational development committee meeting held on 18th June, 2011 chaired by the chief one Muhammed Mulisho which adopted the findings of the sub location committee meeting. He produced the said minutes to back his allegations.

13. Additionally, he averred that the 3rd, 5th, 6th and 7th Respondents through one abdulkarim Hussein had made a request for registration of a farmland on 5th July, 2011. And that on 29th June, 2011 the District Officer Madogo wrote to the Clerk County Council of Tana River notifying that they were aware the 3rd and 7th Respondents were selling the subject parcel of land to him and that vide a meeting on 18th July, 2011 the County Council approved the sale.

14. Further, he avers that since he bought the subject parcel of land prior to application for registration, the same came out under his name vide a letter dated 16th August, 2011 titled Baraka Farm, which farm has clearly demarcated boundaries and beacon and that there is a Part

Development Plan pending certification and approval by the Director Physical Planning and Cabinet secretary for lands.

15. It is the 2nd Respondent position that pursuant to the said sale he took possession of the land and cleared bushes and began farming and at no time during his possession did the applicants raise any issues. He also avers that he sold the farm to the 1st Respondent who is in actual possession and has since commenced agricultural activities and would be greatly affected if the orders sought in the application are granted.

16. Furthermore, he alleges that the plaintiffs have never been in possession and occupation of the subject land and that their claim is amorphous as they are not clear as to whether they are claiming Baraka farm or Obelesa farm.

17. In sum the 1st Respondents avers that the applicants have not established a prima facie case with a chance of success, and that in any event they won't suffer irreparable loss as their claim can be compensated by damages and therefore urged the court not to allow the application.

3rd Respondent case

18. In response to the application, the 3rd Respondent averred that he was born in the year 1935 and that in 1992 his family started Tana Umoja Irrigation scheme with approximately 300 acres, which farm exists to date without any dispute. He avers that in 1994 they started Obelesa farm in order to benefit from Government assistance.

19. He alleges that on 27th August, 1996 the Abafodha sought to establish a farm and since they did not have land in the area they attempted to invade on their land, where they filed a complaint on 27th August 1996 with the Chief Muhamed Mulisho, where the chief after consultation and a meeting between Abafodha and Nyacho Family requested them to give land to the Abafodha, and they conceded and gave them 50 acres and boundaries set by the chief.

20. He avers that in 2011 they sold the neighboring land from the boundary created in 1996 to the 2nd Respondent and that there has been no complaint until the instant suit. It is his case that if the sought orders are issued, he would be rendered homeless with his wife and 10 children.

6th Respondent

21. In his response to the application, the 6th Respondents averred that he has a farm land in the subject parcel of land where he lives with his wife and 9 children, and six of his sons are married, with children living on the parcel of land. In addition, he alleges that he undertakes farming and has over 50 goats on the farm and that he has nowhere to go if the orders sought are issued.

7th Respondent

22. In his response he reiterated the contents of the 2nd Respondent affidavit and averred that he is the chairman of Tana Umoja Farm with over 200 members who rely on farming and livestock rearing and that if the Court issues the sought orders in the application they would suffer irreparably.

23. The Applicants in response to the Respondents averments in their affidavits swore a further affidavit dated 29th July, 2019 and filed on 30th July, 2019 reiterating their case and denying the Respondents allegations. It is their position that the 3rd, 4th, 5th, 6th and 7th Respondents mischievously sold their land without any color of rights to the 1st and 2nd Respondents.

24. Additionally, they attached affidavits from the former Chief saka location Mohamed Mulicho denying ever witnessing a sale agreement nor attending any development meetings alleged by the 2nd Respondents and affidavits of Wedo Abadiba Guyo and Abdikarim Bacho who denied attending such meetings where deliberations on the alleged sale of the subject parcel of land were undertaken.

Issues and Determination

25. It is clear from the foregoing that the applicants herein are seeking temporary injunctions to stop the Respondents from further dealing with their parcel of Land known as Abafodha farm. In **Giella –vs- Cassman Brown & Company Ltd(1973)EA 358 at 360** the Conditions for grant of a temporary Injunction were stated thus:-

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. 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 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 a balance of convenience.”

26. Additionally, the Court of Appeal in the case of **Kenya Commercial Finance Co. Limited vs. Afraha Education Society (2001) 1 E.A 86**, held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not

normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the Application on a balance of convenience... These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

27. Further, in **Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125**, the Court of Appeal defined a prima face case as follows:

“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 letter.”

28. In this case, the applicant is claiming that the Respondents are interfering with their quite possession and ownership of the subject parcel of Land known as Abafodha farm. It is their case that the 3rd, 4th, 5th, 6th and 7th Respondents illegally sold part of their land to the 1st and 2nd Respondent.

29. In support of their claim, the Applicants produced their registration as a group under the name Abafodha farm with the department of social services and receipts allegedly for payment of rates to the defunct Tana River County Council, all attesting to their ownership of the subject land.

30. On the other hand the 2nd Respondents has given a genesis of how he acquired the disputed parcel of land. He alleges that he bought the same from the 3rd,5th,6th and 7th Respondents after complying with the process existing then on purchase of unregistered parcel of land.

31. The applicants have alleged that the 3rd, 4th, 5th and 6th respondents are members of Nyacho family, which owns a farm situate at Kuruso, neighboring their subject farm at Abadela. Considering the parties pleadings herein, it is apparent in my view that the applicants and the Respondents both own lands that border each other and that the main claim by the applicant is that the Respondents encroached on their land without respecting the existing boundaries.

32. At this stage of the proceedings the court ought to make a determination as to whether the ground for the grant of the sought temporary injunction has been established. In respect to the first limb in *Giella vs Cassman brown* case, which is prima facie case, it is clear that none has a registered title to the property. Therefore in the circumstances, the other two limbs being irreparable harm and balance of convenience come into play.

33. As to the questions as whether the Applicants will suffer irreparably if the injunction is not granted, my view is in the negative. The evidence on records points to the Respondents being in occupation and possession of the disputed parcels of land and therefore in the event that the applicants are successful, damages in my view would be an adequate compensation.

34. On the third limb enunciated in *Giella vs Cassman* above which is the balance of convenience, I have no doubt in my mind that the balance of convenience does not tilt in favour of the Applicants. The Respondents are in possession and occupation of the subject property, and therefore the application equally fails in this regard.

Decision

35. In view of the foregoing, it is my finding that the instant application lacks merit and is therefore dismissed with costs to be in cause.

Read, delivered and signed in the Open Court this 27th day of January, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Mugwe for Defendants/Respondents
2. Applicant/Advocate; Absent
3. Fardowsa: Court Assistant present