



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 134 OF 2018

1. MZEE ADSAM MAKINJA

2. MUGANGA TSUMA

3. ALI JUM KAHINDI.....PLAINTIFFS

VERSUS

1. LIVINGSTONE NDUNGU WAITHAKA

2. ELLEN PROPERTIES

3. OCS BAMBURI POLICE STATION

4. DISTRICT COMMISSIONER KISAUNI

5. OCS KIEMBENI POLICE STATION

6. OCPD KISAUNI.....DEFENDANTS

RULING

1. The application for determination is the Notice of Motion dated 8th May, 2019 by the 2nd defendant/applicant seeking orders of eviction against the plaintiffs/respondents from PLOT NO. 264/1/MN and to give vacant possession to Margaret Muthoni Ndugu. The Application is brought under Section 1A, and 3A of the Civil Procedure Act and order 51 of the Civil Procedure Rules. The application is supported by the affidavit of Margaret Muthoni Ndugu and is premised on the grounds that the 2nd Defendant is the registered owner of the property known as PLOT NO.264/1/MN and that the plaintiffs/respondents are trespassers thereon.

2. Margaret Muthoni Ndugu has deponed that she is the director of the 2nd defendant and duly authorized and competent to swear the affidavit in support of the application. That the 2nd defendant is the registered owner of the suit property and has attached a copy of the TITLE FOR SUBDIVISION NO 16636 (ORIGINAL NO. 16635/2). That sometime in 2018, she was served with summons to enter appearance, plaint together with application which was heard and ruling delivered on 6th May, 2019 and the injunction orders which were issued on 23rd July, 2018 were set aside, vacated and discharged and therefore the plaintiffs have no claim in the suit land or any orders against the 2nd defendant. That it is in the interest of justice that the eviction orders be granted urgently so that the said property can be salvaged from further intrusion. She urged the court to allow the application.

3. In opposing the application, the plaintiffs filed a replying affidavit sworn by Mzee Adam Makinja, the 1st plaintiff on 27th May 2019 in which he deposes that the application is fatally defective. That eviction orders can only be granted after full hearing, not at an interlocutory stage, adding that the applicant should file a defence and may be a counter claim for eviction in the matter.

4. The application was canvassed by way of written submissions. In their submissions filed on 5th November 2019, M/s Obara and Obara Advocates for the 2nd defendant submitted that the title deed exhibited by the applicant is a proof that the applicant is the registered owner of the suit plot. That the respondents have invaded the suit land without consent of the applicant. That the respondents have not shown any legal right to applicant's land and that as trespassers, they have no right over that of the registered owner of the property and therefore should be evicted.

5. On their part, M/s Angelo Owino & CO. Advocates for the plaintiffs filed their submissions on 4th November 2019 in which they reiterated the averments in the replying affidavit. That the applicant has not put up as defence with a counter-claim for eviction orders. The plaintiff's advocates submitted that the application is seeking eviction against the plaintiff from NO. 264/1/MN whereas the title annexed to the application is in respect of SUBDIVISIONS NO.16636 (ORIGINAL NO. 16635/2) SECTION 1 MAINLAND NORTH. They urged the court to dismiss the application with costs.

6. I have considered the application and the rival submissions. The applicant seeks orders of eviction against the plaintiffs from PLOT NO.264/1/MN. The essence of the applicant's case is that it is the registered owner of the suit land. I have perused the amended plaint dated 10th May, 2019. The respondents have pleaded that they have been staying on PLOT NO. 264/1/MN for over 20 years. The applicant is yet to respond to the respondents' claim as no defence has been filed. I also note that the title annexed to the application herein is in respect of SUBDIVISION NO.16636(ORIGINAL NO.16635/2) SECTION I MAINLAND NORTH. It is therefore clear that the applicant is seeking for final orders in respect to a different parcel from that which it claims to own.

7. In the case of **Olive Mwhaki Mugenda & Another –v- Okiya Omtat Okoiti & 4 Others (2016)eKLR**, the Court of Appeal considered a persuasive decision of India in issuance of final orders at interlocutory stage and stated:

“.....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.”

8. In this case, it's not clear what the applicant's case is founded on. The applicant has not only relied on a title of a different parcel to seek the eviction orders, but has also not answered the respondents' claim by filing defence and/or counter-claim. In my view the applicant's application is not based on any pleading and there is no justification to insist on seeking eviction orders when its case vis-à-vis the respondents' case is unknown.

9. Having carefully considered the material before me, in my view a case of eviction at this stage has not been made out. I cannot consider this a clear case that can be decided at once or in a summary manner in favour of the applicant. The applicant is yet to make a case that the court can consider strong and clear to enable the court grant the orders sought.

10. The upshot is that the Notice of Motion dated 8th May, 2019 lacks merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kinyua holding brief for Owino for plaintiff/respondent

Okanga holding brief for Mkan for 2nd defendant/applicant

Makuto for 3rd - 6th defendants

No appearance for 1st defendant

Yumna Court Assistant

C.K. YANO

JUDGE