



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 133 OF 2019

OMAR MOHAMED

ABDALLA OMAR CHAMBA.....PLAINTIFFS

VERSUS

KILUNGU JUSTUS MUI1ST DEFENDANT

GIDEON MUTUNGA NGOI.....2ND DEFENDANT

FRANK KIMEU MULI.....3RD DEFENDANT

GEOFREY MWANGE MULI..... 4TH DEFENDANT

ABEID MWANGAKI MULI..... 5TH DEFENDANT

JOYCE NDUKU NGOI..... 6TH DEFENDANT

THE LAND REGISTRAR, KILIFI..... 7TH DEFENDANT

RULING

(Application for injunction together with prayers for title to the suit land to be registered in favour of the applicants and also prayers for damages; orders for rectification of title and damages can only be determined after hearing the suit on merits; application construed as an application for injunction; principles to be applied; suit being one of adverse possession; applicants seeking an injunction pending hearing of the suit; applicants claiming to have been on the suit land for a very long period of time; respondents filing affidavits inter alia from the father and brother of the applicants which affidavits demonstrate that the applicants have not been on the suit land as they claim; assessment of the affidavit evidence brings court to the finding that the applicants have not demonstrated a prima facie case with a probability of success; application for injunction dismissed)

1. This suit was commenced on 17 July 2019 through an Originating Summons brought pursuant inter alia to the provisions of Sections 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya. The applicants claim that they have acquired title to the and parcel Kilifi/Mtwapa/503 measuring 0.81 Ha (the suit land), through the doctrine of adverse possession. The title to the suit land is under the name of the respondents. Together with the Originating Summons, the applicants filed an application under the provisions inter alia of Order 40 Rules 1, 2 and 3, seeking the principal order that pending the hearing and determination of the Originating Summons, the respondents be restrained from dealing with the suit land or interfering in any manner with it. The applicants also sought an order to have the respondents reconstruct a toilet on the suit property which it is claimed they demolished, reconnect power supply and remove a fence, and also deposit or pay the sum of Kshs. 2,000,000/= for the damage that they caused. There is also a prayer seeking orders to have the title of the respondents cancelled and in place thereof, the applicants be registered as proprietors of the suit land and an order compelling the payment of the sum of Kshs 2,000,000/= by the respondents as damages. It is this application which is the subject of this ruling.

2. The supporting affidavit to the motion is sworn by one Omar Mohamed, the 1st applicant. He has deposed inter alia that they were born on the land and have been in possession and use of the suit land for over 20 years. He deposed that the parties (respondents, I assume), are threatening and trespassing into the suit property and interfering with their quite possession. He further deposed that the respondents have disconnected power from the suit property whereas it is them (the applicants) who applied for the same and have been paying the bills. He stated that the respondents have fenced the property all round and are in the process of disposing off the land. He urged that the services terminated by the respondents such as their free movement, access to power and toilet facilities should be reinstated. He annexed some

photographs of the alleged damage caused by the respondents.

3. The respondents have opposed the application through the replying affidavit of Kilungu Justus Muli, the 1st respondent. He has deposed inter alia that prior to filing this suit, the applicants had filed the suit Mombasa CMCC/ELC No. 73 of 2019 (OS) which case was struck out on 19 July 2019. He gave a history of the suit land as first belonging to one Mustapha Abdalla Kheri who then transferred the land to Omar Abdalla Kheri, the father to the applicants. On 10 December 1991, the suit property became registered in the name of the 1st respondent's parents, Charles Ngoi Muli and Charlote Josephine Gisella who are now deceased. He stated that the family of Omar Abdalla Kheri (Mr. Kheri) live on the adjacent property and Mr. Kheri has been keeping watch over the suit land at times allowing peasant farmers to cultivate it with his permission. He mentioned that there was a suit Mombasa HCCC No. 164 of 1999 where his late parents were among the defendants which suit related to the suit land and was finalized in the year 2017 by a dismissal. He has averred that he was advised that nothing could happen on the suit property until this case was determined. After the case was finalized they followed up on the title. He also averred to other suits being Malindi ELC No. 94 of 2013, and Mombasa CMCC No. 5626 of 1996 and he annexed copies of documents relating to these cases. He has deposed that the applicants only started staying in the suit property in the year 2018. He has annexed a copy of a letter from the Assistant Chief of Shimo La Tewa sub-location which letter states that the two applicants are sons of Omar Abdalla Kheri and that they started living on the suit land in early 2018.

4. In addition, the respondents filed affidavits of Chamba Aweso Omar (Mr. Aweso), Omar Abdalla Kheri and Derrick Tsuma Kasumari. Mr. Aweso has deposed that the applicants are his younger brothers but from another mother who lives in Nairobi and that they are sons of Omar Abdalla Kheri. He has deposed that the 2nd applicant came to Mombasa in the year 1994 when he was about 6 years old and since then, he has been living in Majengo where the deponent rented a house for him and supported him even by paying school fees. He has further deposed that the 1st applicant came to Mombasa in the year 2018 and joined the 2nd applicant in Majengo. As far as Mr. Aweso is concerned, the 1st applicant has been a resident of Nairobi all his life. He has deposed that the suit land was being farmed by small scale peasant farmers who were allowed to do so by his uncle one Abdulrahman Abdalla Kheri. During this period, there were several court cases relating to the property. He has averred that on the suit property was an old building belonging to one Naran Lalji Pindoria (Naran). He has mentioned that he is aware of all this because he has been residing next to the suit property.

5. Mr. Omar Mohamed Kheri on his part deposed that he is the father to the applicants. He deposed that for a long time the suit land remained fallow and had an abandoned building erected by Mr. Naran by mistake without him knowing the boundaries of his farm. This led to a suit being filed against Mr. Naran who later died. He has deposed that during the rainy season, his brother, Abdulrahman, would let out the land to small scale farmers to plant maize. He has deposed that the applicants entered the suit land in the year 2018 and that he allowed them to occupy the abandoned house because they were having problems paying rent. According to him, none of the applicants has lived on the land for more than 3 years.

6. Derrick Tsuma Kasumari, on his part deposed inter alia that he is a son in law of Omar Abdalla Heri having married his daughter, one Sharifa. He has deposed that he has been living in Mtwapa, and knows the history of the suit land. He has confirmed the contents of the affidavit of Mr. Aweso. He has affirmed that the applicants have not been on the property before the year 2018 and that the land used to be let out by Abdulrahman to peasant farmers.

7. To respond to the allegations of the respondents, the applicants filed two supplementary affidavits sworn by Omar Mohamed the 1st applicant. In his supplementary affidavit, the 1st applicant inter alia contended that the three affidavits of Mr. Aweso, Mr. Kheri and Mr. Kasumari are false. He asserted that they live on the suit property and that the respondents were not in contact with them until sometimes in May, 2019. He has however affirmed that the suit land has been in court over several disputes. He has stated that Mr. Kheri was sickly when his affidavit was sworn and that the respondents have taken advantage of his health. He also deposed that the Assistant Chief is new and only came into office in the year 2018 and is therefore not privy to the facts of their residency. He believes that the replying affidavits are contradictory. On the affidavit of Mr. Kasumari, he averred that Mr. Kasumari does not know the history of the suit land as he only came and married their sister. He has stated that Mr. Kasumari has been interfering with the suit land and was warned to desist by a letter of the Public Trustee dated 29 August 2019. He denied that he has been living in Majengo and stated that he took his NHIF and NSSF cards while living on the suit property in the year 2012. He has further deposed that the 2nd applicant has been on the suit property all his life and he annexed copies of school certificates of the 2nd applicant.

8. I invited both counsel for the applicants and the respondents to make oral submissions and I have taken note of these. I take the following view of the matter.

9. First, I do note that the application seeks various orders, and my view is that any other order other than that of interlocutory injunction must await the full hearing of the suit. I cannot therefore make an order, at this stage of the proceedings, for the title to the suit land to be registered in the name of the applicants, or for the respondents to pay damages of Kshs. 2,000,000/=. If I make those orders at this stage of the proceedings, I will be making final orders in a suit that has yet to be heard and there is really no need to belabour the point. I will thus turn to the prayers for an interlocutory injunction.

10. The principles upon which the court assesses whether or not to grant an interlocutory injunction were well laid out in the case of *Giella vs Cassman Brown (1973) EA 358*. The applicant needs to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss if the order of injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

11. In order to assess whether or not a prima facie case has been demonstrated, inevitably, the court will need to make a preliminary assessment of the case of the applicants. Where a reply has been filed, this assessment will be made in light of the response of the respondent/s. The assessment is only preliminary, for purposes of determining the application for injunction, and the court, after hearing the suit on merits, can very well arrive at a different determination.

12. In this suit, the applicants claim that they have been residing on the suit land for a period of over 12 years, which then would be a period

on or before the year 2007. It would mean that as at the year 2007, the applicants were at the very least adults or at least were people who were able to fend for themselves, for I do not see any other way that they would have developed the requisite intention to claim the land for themselves. I have seen the NHIF card of the 1st applicant and it shows that he was born in the year 1990, meaning that as at the year 2007, he was only 17 years of age. I have seen that his NSSF card shows that he was born in Kajiado. This lends some credence to the affidavit of Mr. Aweso who deposed that the 1st applicant has been in Nairobi all his life and only came to the suit land in the year 2018. The 1st applicant has not annexed anything to contradict this deposition by Mr. Aweso, who is his older brother. I have gone through the documents that he annexed and these only support the depositions of Mr. Aweso. The documents he annexed in his supplementary affidavit are school certificates of the 2nd applicant, which show that he left primary school in the year 2004 in Mtwapa. The 1st applicant has not given any history of where he went to school, which years, and in which town. I feel that he has deliberately opted to conceal this evidence and the only conclusion I can reach is that this evidence would have been adverse to him. The only document he has annexed that may be in his favour is a contract of employment with Umoja Rubber Products Limited, which shows that he was employed with them in the year 2014. Apart from this, the 1st applicant has not accounted for the period before the year 2014, save for the mere oral statement that he has been residing on the suit land. I think, given the depositions of the respondents and their witnesses, it was incumbent upon the applicants to furnish this court with some concrete evidence, in form of documentation, which would account for their life from the year 2007. Nothing has been provided in this instance and I am unable to dispel the wealth of evidence adduced at this stage of the proceedings by the respondents.

13. I cannot also give little credence to the letter from the Assistant Chief which states that the applicants only came to the suit land in the year 2018. I am aware that the applicants contend that the Assistant Chief is new and not conversant with the facts of their stay. Well, if this is the position, the applicants could have arranged for a letter of their own from the Chief, or other administrator, or even contemplate filing an affidavit sworn by a neighbour to support their assertions that they have been in occupation of the suit land for a long period of time. Without there being anything to controvert the letter from the Assistant Chief, I find it difficult, at least from the documentation that has been provided at this stage of the proceedings, to believe that the applicants have been in possession of the suit land for a period in excess of 12 years.

14. The applicants' suit is premised on the claim that the respondents though being registered as proprietors, have had no interest in the suit land, and they (the applicants) have been resident in it. This assertion is however contradicted by the applicants themselves, who in the supplementary affidavit, admit that there have been various cases over the suit land. It infers that the applicants have been aware of the respondents have been fighting court cases and I do not see how they can allege that the respondents have not had any interest in the suit land.

15. The long and short of it, as can be seen from my analysis above, is that I am not persuaded that the applicants have demonstrated a prima facie case with a probability of success. Not having been so persuaded, it is not necessary for me to consider the other principles as laid down in the case of *Giella vs Cassman Brown*. I therefore proceed to dismiss this application with costs. The effect is that the applicants will need to prove their case on merits without the benefit of an interlocutory injunction against the respondents. I do note that there were some interim orders issued. They are hereby vacated.

16. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 3rd day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Shimaka for the applicants.

Mr Mkomba for the 1st respondent.

Court Assistant; David Koitamet.