



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 36 OF 2018

NARRIMAN KHAN BRUNLEHNER.....PLAINTIFF/APPLICANT

AND

HATIB MTEGO.....1ST DEFENDANT/RESPONDENT

SULEIMAN YEYA.....2ND DEFENDANT/RESPONDENT

ALI MWAKUBO.....3RD DEFENDANT/RESPONDENT

HAMIS MWANDARU.....4TH DEFENDANT/RESPONDENT

MSHENGU RUWA.....5TH DEFENDANT/RESPONDENT

RULING

1. The Application for determination is the Notice of Motion dated 15th February, 2018 in which the plaintiff/applicant seeks an order of temporary injunction against the defendants, their agents, representatives, assignees, or anybody claiming through or under them from accessing, visiting, trespassing, building, putting up fences, placing beacons, clearing bushes, selling, disposing, leasing or howsoever interfering with plaintiff's peaceful possession and enjoyment of properties TITLE NUMBERS KWALE/GALU KINONDO/137, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1364, 1363, 1365, 1366, 1367, 1368, 1369, 1370, 885, 611, 612, 613, 615, 628, 422, 178, 105, 557, 2285, 1133, 1146, 782, 367, 698, 643, 101, 856, 855, 854, 816, 2283, 886, 248, 269, 63, 210, 67, 56, 2211, 2212, 2213, 2214, 2215, 2201, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 557, KWALE/DIANI/485, 490, 475, 480, 487, 717, 718, 719, 720, 721, 722, 723, 679, 680, 681, 682, 683, 684, 685, 686, 687, 700, 701, 702, 716, 728, 703, 704, 705, 706, 707, 708, 709, 710, 737, 738, 739, 749, 741, 742, 743, 699, 698, 697, 696, 695, 694, 693, 692, 691, 690, 689, 688, 725, 712, 713, 747, 745, 746, 715, 714, 711, 724, 726, 730, 734, 733, 731, 736, KWALE/DIANI BEACH BLOCK 661, 659, 35, and KWALE/DIANI COMPLEX/21 ("the suit properties"), pending hearing of the suit. The application is supported by the affidavit of Narriman Khan Brunlehner, the applicant sworn on 15th February, 2018 and is premised on the grounds on the face of the motion.

2. Briefly, the applicant's case is that she is the absolute owner of the suit properties which she acquired together with her estranged husband, Mr. Josef Brunlehner and the properties were subsequently registered in her name. The applicant avers that ever since the acquisition of the title and possession, she has been in peaceful occupation and enjoyment of the suit properties without any let or hindrance from anybody by exercising all rights of ownership by effecting all the revenue records in her name and by paying the land rates of the suit properties to the authorities concerned in respect of the suit properties periodically. That in 2016 up to 2017, the plaintiff and her estranged husband had a dispute over the distribution of their matrimonial properties which included the suit properties, which disputes resulted to several cases in the Environment and Land Court in Mombasa, information which the respondents herein have since capitalized on to dispossess the Applicant her suit properties. The applicant avers that the Respondents have invaded the suit properties, placed beacons, erected fences and are currently subdividing among themselves and selling portions to unsuspecting buyers who are now pouring building materials on the suit properties ready for construction. The Applicant states that the respondents have never at any single time, owned the suit properties and have no right or title over the properties. That the Respondents are illegally attempting to interfere with the Applicants peaceful possession and enjoyment of the suit properties. To prove her claim the applicant has exhibited title documents for all the suit properties.

3. On 27th March 2018, the 1st Respondent filed a Replying Affidavit on his own behalf and on behalf of the 2nd and 5th Respondents in which he contends that the Applicant's title documents were obtained through fraud, misrepresentation, corruption and or illegality. He avers that vide a letter dated 26th January 2017, the National Land Commission nullified the titles issued to the Applicant. It is their case that together with hundreds of other squatters, they have been in occupation in PLOT NOS. KWALE/DIANI BEACH BLOCK/661 AND 659 TOGETHER WITH PLOT NOS. KWALE/DIANI SETTLEMENT SCHEMED/495, 475, 480, 485, 487, 488, 490, 676, 677, 678, 679, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, TO 747 for over 30 years doing farming and

have buried their family members thereon. They deny that the Applicant has met the threshold for the grant of injunction.

4. The 4th Respondent filed a Replying Affidavit on 9th April 2018 where he denies having known the Applicant. He avers that he does not have any beneficial interest in the suit properties. According to him, he only occupies PLOT NO. KWALE/UKUNDA/219 which property, he avers is not in dispute herein. The 4th Respondent contends that the suit does not disclose any cause of action against him for which reasons he states it should be dismissed.

5. The Application was canvassed by way of written submissions. The Applicant filed her submission on 17th September 2019 while the 1st, 2nd and 5th Respondents filed theirs on 8th October 2019 and the 4th Respondent filed his on 28th October 2019.

6. I have considered the Application, the affidavits in support and against and the rival submissions made as well as the authorities relied on. The principles to be applied when considering an application for temporary injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co Ltd (1973) EA 358**, the plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage which would not be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

7. In the case of **Mr Rao Ltd –v First American Bank of Kenya Limited (2003) eKLR**, a *prima facie* case was said to be one in which on the material presented to the court or 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 from the latter. The suit properties are registered in the Applicant's name. Section 26 of the Land Registration Act provides that the Certificate of Title issued by the Registrar shall be taken by the courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, and not subject to challenge except on ground of fraud or misrepresentation or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. The 1st, 2nd and 5th Respondents contend that the Applicant's title documents were obtained through fraud, misrepresentation and corruption. According to the 1st, 2nd and 5th Respondents, the said titles have been nullified by the National Land Commission. However, besides the letter dated 20th January, 2017, there is no evidence availed to confirm that the Applicant's titles have been nullified or cancelled. The issue of the propriety of titles therefore has to await the trial of the main suit. The 1st, 2nd and 5th Respondents have stated that they have stayed on the suit properties for over 30 years. Indeed they have filed a counter-claim claiming the properties by dint of the doctrine of adverse possession. The issue of whether or not the 1st, 2nd and 5th Respondents are entitled to the stated properties through adverse possession can only be dealt with at the trial. I note however, that the Applicant has attached photographs showing people clearing bushes as well as sand and other building materials which the Applicant avers have been brought by the Respondents with view of carrying out constructions on the suit properties. On their part, the 1st, 2nd and 5th Respondents have exhibited photographs allegedly showing the Applicant, either by herself or agents cutting down trees and setting the plantation on fire. While the 1st, 2nd and 5th Respondents allege that they have been in occupation of the suit properties for over 30 years doing farming and even buried their family members thereon the photographs attached are of recently cut down trees.

8. On his part, the 4th Respondent's case is that he resides in a different parcel of land which does not form part of the suit properties. The 4th Respondent has stated that he resides in his own property known as KWALE/UKUNDA/219. The 4th Respondent tendered evidence in the form of a title Deed which is annexed to his Replying Affidavit. The 4th Respondent has not laid claim to the suit properties. I note that the Applicant has not challenged the 4th Respondent's assertion that he resides on a different parcel of land that does not form part of the suit properties.

9. From the evidence on record, I find that the Applicant has established a *prima facie* case with a probability of success against the 1st, 2nd, 3rd and 5th Respondents. No doubt if the said Respondents went ahead and put up buildings, fences, beacons, clearing bushes, selling or disposing of the suit properties, the Applicant stands to suffer irreparable harm not compensable in damages as not only will the properties be alienated, but their status will also change.

10. The upshot is that the Notice of Motion dated 15th February, 2018 is merited and the same is allowed as against the 1st, 2nd, 3rd and 5th Respondents. The Application against the 4th Respondent is dismissed. The Applicant will have costs of the Application to be borne by the 1st, 2nd, and 5th Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF MARCH 2020.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mukoya holding brief for Koja 1st, 2nd and 5th Respondents

Ondieki holding brief for Bwire for Plaintiff

Kariuki holding brief for Ngoya for 4th Respondent

Yumna Court Assistant

C.K. YANO

JUDGE