



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ELC NO. 199 OF 2015

MWAMUNGA NYANJE & 27 OTHERS.....PLAINTIFFS

-VERSUS-

GEORGE GATHECA KINYANJUI.....DEFENDANT

RULING

1. By a notice of motion application dated 27th August 2015, the plaintiffs asked the Court to grant them the following;

1. Spent

2. Spent

3. That the defendant by himself, his workmen, employees or otherwise howsoever be restrained by temporary injunction from transferring, dealing or selling all that piece of land known as plot No Kwale/Kiweguaego/15 and or damaging the plaintiffs' properties therein or evicting the plaintiff therefrom pending the hearing and determination of this suit.

4. That the costs of the application be provided for.

2. The application is supported by nine grounds listed on the face of it and the affidavit of Mwamunga Nyanje, the 1st plaintiff. The plaintiffs' case in summary is that they are claiming the suit property having lived on it peacefully and continuously for more than twenty (20) years. The plaintiffs were on 25.7.2015 duped into signing documents which exposed them to eviction anytime hence the need to restrain the defendant.

3. The application is opposed by the defendant through his replying affidavit deposed on 9th October 2015 which adopted the averments of the affidavit filed in response to the originating summons. In paragraph 6, the defendant deposed that the persons who invaded his land vacated on their own and currently there is no squatter on the land. In the reply to the originating summons, the defendant deposed that after the invaders were paid compensation, they left on their own.

4. In response to the replying affidavit, the 1st plaintiff swore a further affidavit. He denied there were any negotiations and if any monies were paid and documents signed, the same were concealed in an envelope. He also denied that the plaintiffs have left the suit land.

5. The parties orally submitted which submissions I have taken into consideration while writing this ruling. The Court directed the executive officer to visit the suit land to determine who was in occupation and file his report. The visit was made on 21st October 2015 in the presence of counsels on record and the

parties or their representatives.

6. The executive officer filed his report in Court on 3rd November 2015 and he made an observation that there were no houses/structures on the land owned by the plaintiffs except for plaintiffs Nos 3, 4, 19th and 26th. He stated that the rest of the plaintiffs' houses had been demolished and they had moved out of the land. He also observed that there is a category of the plaintiffs who did not have homes on the land but claimed they were farming it.

7. In analysing the pleadings filed and comparing it with observation made by the executive officer on his site visit, it comes out that the plaintiffs physical occupation of the suit land is in doubt. The plaintiffs admitted signing some documents and receiving some money from the defendant. Their qualm is that they were duped into signing these documents. They are also questioning the criteria used in reaching at the amount of compensation payable.

8. Since the plaintiffs admit payment was made, whether the compensation was less is a question that can be determined and the defendant ordered to pay the difference. The loss if any suffered by the plaintiffs is thus quantifiable. Although the defendant's loss is also quantifiable considering that the amount of loan he has taken is stated. His loss is greater and the plaintiffs have not given undertaking as to damages.

9. The balance of convenience tilts in favour of the defendant. The defendant pleaded that the plaintiffs after payment of the compensation demolished their structures and voluntarily moved out of the land. The site visit report confirmed that save for two plaintiffs, the others had moved out of the land and their structures demolished. If the orders sought are granted, the result would be to re-instate the plaintiffs back to the suit premises which is not the purpose the orders of temporary order of injunction ought to serve. The applicants have thus come to Court with unclean hands.

10. In conclusion, the plaintiffs may have a prima facie case but their application fails to meet the other principles or irreparable loss and balance of convenience. For those reasons, I find the application as unmerited and dismiss it with costs.

Ruling dated and delivered in Mombasa this 12th day of February 2016

A. OMOLLO

JUDGE