



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 13 OF 2020

REMMY MWANZO MWANDZOMARI.....PETITIONER/APPLICANT

AND

RISHARD HELA MKUVA.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE DIRECTOR LAND ADJUDICATION

AND SETTLEMENT OFFICE.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

RULING

(Petitioner claiming that he has been illegally removed from the disputed land; petitioner also filing application seeking orders some of which are final and some interlocutory; final orders cannot be granted at this stage of the proceedings without first hearing the petition; application construed as one for injunction; prima facie case; petitioner claiming that he has been illegally evicted from the suit land; evidence presented demonstrating that suit land is owned by the 1st respondent; 1st respondent having filed a previous suit wherein she obtained an order of injunction against the petitioner; in light of the order of injunction petitioner not having any right to be on the suit land; court not persuaded that applicant has demonstrated a prima facie case; application dismissed with costs)

1. What is before me is an application dated 5 June 2020 filed by the petitioner contemporaneously with this petition. The application seeks the following orders :-

(i) Spent (certification of urgency)

(ii) Spent (interim orders)

(iii) That an order/declaration be issued restraining the respondent (sic) herein jointly and severally by themselves, agents/employees and third parties from developing, subdividing, selling and/or interfering with the subject property Plot Mombasa/Majaoni Scheme/909 and the quiet possession of the same and enjoyment of the subject property by the Petitioner pending hearing and determination of this Petition.

(iv) That a declaration that the Respondents (sic) actions jointly and severally was a toto (sic) violation of the Petitioners (sic) rights as enshrined under the Constitution of Kenya 2010.

(v) That an order/declaration be issued to the Chief Lands Register (sic) through the Land Registrar Mombasa cancelling/revoking the Title deed/document issued on the 5/7/2018 to Rishard Heri Mkuva forthwith and in the alternative the same be registered in the name of the Petitioner accordingly forthwith.

(vi) That an order/declaration that the process of adjudicating/allocating the land to Rishard Makuva be and is hereby declared null and void as the same was in toto (sic) violation of the Adjudication Act Cap 284.

(vii) That an order/declaration that the title document issued to the 1st respondent on the 19th April 2018 was irregular and malicious and therefore cannot/does not have any proprietary interest accordingly.

(viii) That an order/declaration that the interest of the 1st respondent is only entitled to a portion of the subject property measuring 50 X 100 ft which is equivalent to the sum of KShs. 52,000/= he paid as the purchase price.

(ix) That an order/declaration do issue that the demolition of the subject property were illegal and therefore the petitioner be awarded the sum of KShs. 2 million for exemplary damages respectively.

(x) That an order/declaration do issue that the County Police Commander Mombasa through the OCS Bamburi Police Station do ensure that the Petitioner is restored on the subject property and enjoy the same without any interference whatsoever.

(xi) That an order/declaration do issue that the adjudication records at the Lands Register/green card be rectified accordingly without gazettelement and ensure that the name of the petitioner(s) (sic) reflected/registered accordingly.

(xii) That an order/declaration do issue that the petitioner has acquired proprietary interests as beneficiaries and must be registered and issued with title document (sic) forthwith without gazettelement.

(xiii) Costs of the petition be provided for.

2. The application is supported by various grounds. It is the case of the petitioner/applicant that he resides in the Plot Mombasa/Majaoni Scheme/90 (the suit land) and that he is a beneficial owner of the same. He avers that the 1st respondent bought a portion measuring 50 X 100 ft. He has pleaded in the petition that sometimes in the year 2008, the 1st respondent began constructing on the larger portion of the land without his authority and the matter was reported to the area chief, but the 1st respondent declined to cooperate. It is averred that the 1st respondent then filed suit against the petitioner, being the case *Mombasa CMCC No. 2343 of 2008 Rishard Hela Mkuva vs Uchi Charo Chaleo & Others* which case is still pending before court. He has pleaded that adjudication of the land was done sometimes in the year 2018; that he informed the committee that he resides on the suit property, and that the 1st respondent owns only 50 X 100 ft of the same, and further that the matter was pending before court. He has stated that on 23 July 2018, his children were arrested for allegedly causing malicious damage to the property of the 1st respondent but the complaint was dismissed. On 20 April 2020, the OCPD Kisauni called him to the police station and instructed him to vacate the property. He states that despite explaining himself, the OCPD Kisauni Police Station, together with the 1st respondent, forcefully demolished the petitioner's house on 24 April 2020, without any orders from court. The applicant is surprised that the 1st respondent has title to the entire land. It is the assertion of the applicant that the 1st respondent is only entitled to a 50 X 100 portion of the land. He claims that his constitutional rights have been infringed. He wants various orders in the petition including orders that the 1st respondent is only entitled to a 50 X 100 portion of the land and that he be registered as proprietor of the suit land.

3. The 1st respondent filed a replying affidavit to oppose the application. She has deposed inter alia that on 16 February 2000, she purchased the suit land measuring about 3 acres from one Uchi Charo Chaleo for the sum of KShs. 52,000/= and that the petitioner was a witness to the agreement. She had challenges taking possession as the vendor's nephews, Hussein Tanga and Tune Hanga, kept harassing her. She complained through letter dated 11 March 2002 to the area Chief who called for a reconciliatory meeting. It was resolved that the vendor would retain a life interest in half the property on the western side, until her death, upon which the same would vest in the 1st respondent, while the eastern side would remain unaffected. She annexed the letter and minutes of the Chief's meeting. The vendor also wrote a will bequeathing her this half share. She has deposed that she was aware that the vendor did not have to bequeath her the property, because it was rightfully hers, but she took this extra step to protect her proprietary rights due to the nuisance brought about by her relatives. Despite all this, the vendor's relatives persisted in their interference and the vendor filed suit against them, being *Mombasa CMCC No. 105 of 2001*. Interim orders of injunction were issued pending hearing of the suit and subsequently the relatives of the vendor vacated the premises. In the year 2001, she fenced the property and undertook some developments but these were demolished by the petitioner. She deposed that in the year 2010, the adjudication process commenced in the area and she was allocated the property which was now renumbered Plot No. 909. Whilst all this was going on, the vendor died in the year 2014 meaning that the western side of the property vested in her. She was issued with a title deed on 2 July 2018. She has contended that owing to the connivance of the petitioner, a fake title deed was also drawn over the property in the name of one Mbuhe Charo Chaleo and that through this fake title, the petitioner and his friends, have tried to sell the suit land. She is aware of the suit *Mombasa CMCC No. 2343 of 2008* where she sued the petitioner and the matter is still in abeyance as there was an order for proceedings to be typed and later the court file got lost. She has deposed that the truth of the matter is that the petitioner has never resided in the suit land. She has deposed that in April 2020 she went to the police station at Kisauni where she met the petitioner, and the OCPD asked them to produce their title documents, of which the petitioner had none. He was then informed to leave the property alone. She denied that he was evicted from the land as he has claimed. She deposed that the petitioner lives in another location.

4. I invited counsel to file written submissions which they did and I have taken note of the same.

5. I have considered the various prayers sought in the application. Prayers 3 to 13 cannot be considered at this stage of the proceedings for they are more or less the final prayers sought in the petition. Those will have to await the final outcome of the petition. I will only consider this application as an application for injunction pending hearing of the suit. In order to succeed in such an application, one needs to demonstrate a prima facie case with a probability of success, show that he stands to suffer irreparable loss if the injunction is not granted, and where the court is in doubt, it will decide the case on a balance of convenience.

6. So has the petitioner demonstrated a prima facie case with a probability of success? I do not think so. First, in as much as the petitioner claims that he is entitled to title to the suit land, I have seen nothing that would support that claim. From the documents before me, it appears that the suit land was previously owned by one Uche Charo Chaleo. She sold her land to the 1st respondent through a sale agreement dated 16 February 2000. The petitioner is in fact noted as one of the vendor's witnesses to the sale. I can see nothing in that agreement that supports the contention of the petitioner that what the 1st respondent purchased was only a portion measuring 50 X 100 feet. To me, at least from the

material before me at this stage of the proceedings, this appears to be a very wild claim by the petitioner. The assertion by the 1st respondent that the vendor faced disturbance from her relatives, appears to be confirmed by a letter dated 17 May 2000 written by the vendor to the District Officer Kisauni, and further by the filing of the suit Mombasa CMCC No. 105 of 2001, where the vendor sued Hussein Hanga, Tune Hanga, Kahindi Tune and Rashid Hussein and obtained interlocutory orders of injunction against them pending hearing of the suit. I have also seen that the 1st respondent filed against the petitioner and others, the suit Mombasa CMCC No. 2343 of 2008, and she did obtain orders of injunction against them until the suit is heard and determined. It is common ground that this case is yet to be determined. Now if there was already an order restraining the petitioner from the suit land pending hearing of that case, how can the petitioner justify his assertion that he was on the suit land and that his structures were demolished by the 1st respondent? If indeed he was on the suit land as he claims, then this would appear to be going against the order of injunction issued in the suit Mombasa CMCC No. 2343 of 2008. He certainly would have no business residing or interfering with the suit land in light of the order of injunction against him. I note his complaint that the land was adjudicated in favour of the 1st respondent while the said case was going on. However, I have seen no order of injunction to stop the adjudication of this land. The order of injunction issued was against the petitioner, not against the 1st respondent, meaning that there was nothing to stop the 1st respondent from obtaining title to the suit land under the adjudication process. If indeed the petitioner is of the view that the land was wrongly adjudicated to the 1st respondent, then the best thing would be for the petitioner to file suit for the cancellation of that title and for him to give reasons why he believes that the title of the 1st respondent was wrongfully issued which can very well be done through the already existing case, Mombasa CMCC No.1243 of 2008. In my view, what the petitioner alleges is a private claim, which ordinarily is filed by way of plaint, and not by way of a constitutional petition as has been done in this case. In light of all the above, it will be seen that I take a very dim view of the case of the petitioner. He certainly has not satisfied me that he has any prima facie case capable of sustaining an application for injunction.

7. Given the above, I see no merit in the application before me. It is hereby dismissed. The result is that the petitioner will need to argue his case without the benefit of an injunction. Indeed, he needs to stay away from the suit property given that there is already an order of injunction against him issued in the suit Mombasa CMCC No. 2343 of 2008. The petitioner will also pay the costs of this application.

8. Orders accordingly.

DATED AND DELIVERED THIS 16 DAY OF SEPTEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA