



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC NO. 2 OF 2020

MOHAMED AHMED DAHIA.....1ST PLAINTIFF/APPLICANT

OSMAN HASSAN AFFEY.....2ND PLAINTIFF/APPLICANT

MOHAMMED NUN AFFEY.....3RD PLAINTIFF/APPLICANT

MOHAMMED HASSANOT MOHAMED.....4TH PLAINTIFF/APPLICANT

VERSUS

ABBEY HASSAN MAALIM..... DEFENDANT/RESPONDENT

RULING

1. The Application under consideration is the Notice of Motion dated 14th February, 2020 in which the Plaintiff is seeking the following orders:

- 1) **This Honourable Court be pleased to certify this application as urgent and be dispensed in the first instance.**
- 2) **Pending the hearing and determination of this application, this Honorable Court be pleased to issue a temporary injunction restraining the defendant/respondent by himself, agents, or any other person claiming through him from whatsoever trespassing into the Plaintiff/Applicants parcel of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240, 31241 situated within Mandera township.**
- 3) **Pending the hearing and determination of this case, this Honorable Court be pleased to issue a temporary injunction restraining the defendant/respondent by himself, agents, or any other person claiming through him from whatsoever trespassing into the Plaintiff/Applicants parcel of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240, 31241 situated within Mandera township.**
- 4) **Costs of this application be provided for.**

2. The application is premised on the grounds in the face of the motion namely that the Plaintiffs/applicants are the registered owners of parcels of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240, 31241 situated within Mandera township, and that the defendant respondent herein has unlawfully and without any colour of right trespassed on their land and is in the process of setting up a water plant and has begun erecting pillars in preparation of setting up a major building therein. They contend that they have indefeasible titles to the subject parcels of land and therefore the Respondent/defendant ought to be stopped by this Honourable Court.

3. The application is supported by the affidavit of Mohamed Ahmed Dahia sworn on 14th February, 2020 and filed on 20th February, 2020, reiterating their case above urging the court to issue the orders sought. They have produced the copies of their respective certificate of title for the above subject parcel of land.

4. The Defendant Respondent in response to the applicant's application filed his response vide a replying affidavit dated 19th March, 2020 and filed on 12th June, 2020. He avers that he was allotted the suit property by the defunct Mandera County Council in the year 2009 through a company he owned called Barwaqo Water Company to set up a water refining plant. He was allotted 4 acres, and he produced the minutes of the said council meeting of 9th April, 2009 averring that at the time he was Councilor but did not participate in the meeting. His parcel is BK02.

5. In addition, he avers that the defunct Mandera County Council in year 2012 undertook survey of the whole Barwaqo Area where the subject property is situated and on 15th September, 2015 he was issued with an allotment for parcel No. BK02 and ownership certificate by

the Mandera County Government, and has been in possession of the subject parcel of land since the year 2009.

6. Further, he avers that he has since the year 2013 been paying the land rates to the Mandera County Government for land parcel BK02, and the applicants plaintiffs herein titles are forgeries and urged the court not consider them as such as their numbering does not belong to land situated in Mandera but those of Machakos.

7. Furthermore, he avers that the subject parcel land has been the subject of court proceeding being Civil suit No. 7 of 2014 which he filed against the 1st Plaintiff/applicant herein who had tried to grab his parcel, where he failed to produce ownership documents, and further Criminal Case number 4 of 2017 where he was charged before Mandera Senior Resident magistrate for forcible detainer. He submits that the court never found that the land belongs to the applicants/ plaintiff.

8. He vehemently opposed the instant application urging the court to set aside the orders herein and dismiss the applicant's application.

Submissions

9. The applicants vide their filed written submissions dated 9th July, 2020 and filed on 15th July, 2020 submitted that they have established the grounds for grant of the sought temporary injunction herein as established by the Court in the cases of **Giella vs Cassman Brown & Co. LTD 1973 E.A 358** and **MRAO V First American Bank of Kenya Ltd & 2Others (2000)eklr.**

10. On the first limb of prima facie case, they submitted that they have established a prima facie case with probability of success at trial given that they hold absolute and indefeasible title to the suit land. They have exhibited copies of title documents of land parcels Numbers 31235, 31236, 31237, 31238, 31239, 31240 and 3124 and that under section 26 of the of the Land Registration Act, the title to land is prima facie evidence of land ownership and that the Respondent allegations of fraud and forgery herein are unsubstantiated and mere assertions with no basis as they have not discharged the burden of proof as provided for under section 107 of the Evidence Act.

11. It is their submissions that the cases referred to by the Respondent including Mandera PMCCR No. 4 of 2019 did not make a determination on the ownership of the subject parcel of land and title thereof. They relied in the cases of **Sinohydro Corporation Limited vs GC Retail Limited & Another (2016)** and **Kibiro Wagoro Makumu vs Francis Nduati Macharia & Another (2018) Eklr.**

12. On the second limb, they submitted that this court ought to issue the orders sought as the applicants would suffer irreparable and substantial loss that cannot be adequately compensated by damages, as the Respond has commenced the process of setting up a water plant by erecting permanent pillars on the suit property. They relied in the case of **Muiruri Bank of Baroda (Kenya) Limited (2001) eklr.**

13. And finally, on the third limb, which is the balance of convenience, they submitted that it lies in the court issuing the sought injunction, as the lower risk of justice is the court avoiding the pulling down of a permanent water plant in the event the plaintiffs are successful. They rely in the case of **Ngurumani Limited vs Jan Bonde Nielsen & 2 others (2014) eklr.**

14. The Respondents through their written submissions dated 21st July, 2020 and filed on 23rd July, 2020 identified two issues for determination. The first issue is whether the application merits the grant of the injunctive orders sought, and in this regard they submitted that the instant application does not meet the threshold under Order 40 Rule (a) and (b) as they have failed to prove that the property in dispute is in danger of being alienated or disposed or damaged. In addition, they submitted that the applicants have never been in possession of the suit land and therefore the same cannot be trespassed, and that the main issue in contention herein is a boundary issue and the court ought not to issue the orders as was held in **Vini Investments Limited vs James Mburu Ndua(2013)Eklr.**

15. The second issue addressed by the Respondent is whether prima facie case has been established. And in this respect, it is their submissions that the applicants have not met the threshold for grant of injunction as established in **Giella vs Cassman Brown case.** On the first limb, that is whether they have established prima facie case with probability of success, it is his submissions that the applicants did not produce documentation to support their case, moreso their history on the acquisition of the subject property and that they have no record with the defunct Mandera County Council. They relied in the case of **National Land Commission vs Afrison Export Import Limited & 10 others (2019) eklr.**

16. On the second limb of irreparable loss, they submitted that the applicants have not met this ground as they have never been in possession of the subject property, as the Respondents has been in possession for a total of 11 years and therefore issuing the sought orders is synonymous to issuing a mandatory permanent injunction removing him from his property.

17. And finally, on the third limb, that is the balance of convenience, he submits that the applicants did not demonstrate their ownership of the subject property and therefore the application should be dismissed. They rely in the case of **Jan Bolden Nielsen vs Herman Philips Steyn (2012) eklr.**

Determination

18. I have considered the application, the affidavits on record in support and against and the rival submissions made as well as the authorities cited. The principles upon which an interlocutory injunction may be granted are well settled in the above cited case **of Giella -v- Cassman Brown & Co. Ltd (1973) EA 358** which are that an applicant needs to establish that he has a prima facie case with a probability of success and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the court is however, in doubt on the foregoing, then it will decide the matter on the balance of convenience.

19. In this case, the plaintiffs aver that they are the registered owners of the parcel of lands numbers 31235, 31236, 31237, 31238, 31239, 31240 and 3124. I have looked at the pleadings before me and have seen the copies of tile held by the applicants which bears their names.

Section 26 of the Land Registration Act directs courts to take title as *prima facie* evidence of ownership. The said Section 26 provides as follows:

“(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

20. It is clear from the above section that the title can be impeached where it has been procured by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. However, until such vitiating factors are proved, the court is to assume that the title is a good title and that is why there is the direction that the court needs to take title as *prima facie* evidence of ownership. In this case the Respondent has argued that the titles herein are forgeries and this ought to deny the sought orders, however, that can be proved upon hearing the parties on the same, however the documentation before does not *prima facie* impeach the applicants’ certificate of title tendered herein.

21. Further, the crucial issue for determination at this stage is whether the plaintiffs should be granted the orders sought given the circumstances of this case. In the case of **Mrao Limited –v- First American Bank of Kenya (2003) KLR 125** the court of Appeal held that:

“a prima facie case... in civil cases, is a case in which on the material presented to the court, a 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...”

22. Courts have also granted injunctions on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case find that a greater injustice has been occasioned. See **Suleiman – v – Amboseli Resort Ltd (2004) KLR 589.**

Conclusion

23. Having looked at the facts that have emerged in this case and the evidence by way of affidavits, it is clear to me that the plaintiffs have established a *prima facie* case with a probability of success against the defendants. The certificate of titles herein is *prima facie* evidence of ownership, and denying the injunctions sought herein would allow the Respondent to continue within erection of a water plant on the property and he would suffer immense loss in the event that the plaintiffs are successful. Therefore, the balance of convenience is in favor of granting the sought injunction.

24. Accordingly, I do grant the application in terms of prayer (c) thereof to the extent that the defendants are restrained from continuing with any further dealing of the suit property pending hearing and determination of this suit. Costs shall be in the main cause.

READ, DELIVERED and SIGNED in open Court at Garissa this 30th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence:

1. Mr. Were holding brief Khaemba for Plaintiff.
2. Mr. Abdiaziz for Defendant.
3. Fardowsa – Court Assistant.