



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 27 OF 2020**

**HUSSEIN JUMA ALI.....PLAINTIFF**

**VERSUS**

**JUMA ALI OMAR**

**ALI ABDALLA JUMA**

**MOHAMED FAKHI MWINYIHAJI.....DEFENDANTS**

**RULING**

1. This ruling is in respect of the application for injunction dated 24<sup>th</sup> February, 2020 which was filed by the plaintiff together with the plaintiff. The plaintiff's case as elaborated in the plaint is that he is the legal and beneficial owner and entitled to exclusive and quiet possession of all the property known as BUBUBU "A" SETTLEMENT SCHEME PLOT NUMBER 19, 103 AND 537 (hereinafter referred to as "the suit property"). The plaintiff's claim is for the whole of Plot No. 19 and 103 and part of Plot NO.537 which excludes the area surrounding the 2<sup>nd</sup> defendants' homestead and the trees thereon. The plaintiff avers that the original plot No.19 was comprised of the whole of plot No.103 and 537 which were allegedly hived from it by the local area chief without any rights or powers to do so. The plaintiff avers that the suit property initially belonged to his late grandfather, one Ali Omar, and therefore is their ancestral land. The 1<sup>st</sup> defendant is the plaintiff's son while the 2<sup>nd</sup> defendant is a neighbour and the 3<sup>rd</sup> defendant is a purchaser of plot. No.103. The plaintiff's avers that the defendants have trespassed on the suit land, illegally subdivided it and are selling, erecting structures thereon, cutting down mature trees and occupied it, yet they have no proprietary interests and rights over it, thereby depriving the plaintiff of his constitutionally secured proprietary rights over the land. In the suit, the plaintiff wish to have orders of a declaration that he is the rightful owner of the suit property, cancellation of the transfer and registration, permanent injunction, compensation as well as a declaration that the defendants have been holding the suit property in trust for the plaintiff.

2. In the application for injunction, the plaintiff is seeking orders of temporary injunction restraining the defendants from encroaching, cutting down trees, constructing, sand harvesting, undertaking and/or continuing to carry on quarrying or related works on the suit property and or unlawfully subdividing, selling or otherwise disposing of the same.

3. The application is supported by the affidavit of Hussein Juma Ali the plaintiff sworn on 24<sup>th</sup> February, 2020. The plaintiff has annexed copies of correspondences showing long outstanding dispute over the boundary and/or ownership of the suit property. The plaintiff has also annexed copies of photographs allegedly showing various activities going on the suit property.

4. In opposing the application, the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant filed a replying affidavit sworn by Juma Ali Omar on 10<sup>th</sup> March 2020. He has deposed that the suit property was legally sold to the 3<sup>rd</sup> defendant by all the beneficiaries of the estate of Ali Omar. He denied the plaintiff's averments, adding that the plaintiff lacks the legal standing to sue on behalf of the late Ali Omar. The 1<sup>st</sup> defendant avers that under Islamic Law, the plaintiff who is his biological son cannot inherit from his grandfather when the 1<sup>st</sup> defendant is still alive.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for the plaintiff and the advocates for the 1<sup>st</sup> and 3<sup>rd</sup> defendants. I have considered the application and the rival submissions. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her right has been infringed.

6. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a prima facie case with a probability of success and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable

injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience.

7. It is not in dispute that the suit property initially belonged to one Ali Omar (deceased) who was the father and grandfather of the 1<sup>st</sup> defendant and the plaintiff respectively. While the plaintiff case is that the defendants have disinherited him of ancestral land, the 1<sup>st</sup> defendant avers that the land was legally sold to the 3<sup>rd</sup> defendant by the beneficiaries of the deceased. The plaintiff has also deposed that he allowed the 2<sup>nd</sup> defendant to settle on part of the suit property sometime in the year 1995. It is therefore clear that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have been on the land for quite sometime. The issue as to who is entitled to ownership of the suit property can only be determined during the full hearing. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of the court that the plaintiff has not established a prima facie case with a probability of success against the defendants. As regards irreparable damage, I take the view that any damage suffered by the plaintiff, if any, can be quantified in damages.

8. Arising from all the above reasons, I find that the notice of motion dated 24<sup>th</sup> February, 2020 lacks merit and the same is dismissed. Considering the relationship of the parties in this case, I order that parties bear their own costs.

9. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 28<sup>th</sup> day of October 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**