



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 46 OF 2019**

**1. FIOLABCHEM COMPANY LIMITED**

**2. ABDIRAHMAN MAALIM ABDULLAHI**

**3. LAWRENCE MUSYOKA ISIKAH.....PLAINTIFFS**

**VERSUS**

**KATANA NDULE.....DEFENDANT**

**RULING**

1. By their Notice of Motion application dated 21<sup>st</sup> June 2019 as filed herein on 2<sup>nd</sup> July 2019, Fiolabchem Company Ltd, Abdirahman Maalim Abdullahi and Lawrence Musyoka Isikah (the Plaintiffs) pray for orders:

**2. That this Honourable Court be pleased to issue an eviction order against the Defendant, his agents and or servants in respect of the parcel of land known as Kilifi/Mtondia/950 and all the sub-plots created therefrom;**

**3. That the defendant, his agents and/or servants do give the Plaintiffs/Applicants vacant possession of the parcel of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950 and all the sub-plots created therefrom;**

**4. That a mandatory injunction be issued compelling the Defendant, his agents and/or servants to vacate the parcel of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950 and all the sub-plots created therefrom;**

**5. That this Honourable Court do issue a permanent injunction restraining the Defendant, his agents and or servants from trespassing on the suit property;**

**6. That the Officer Commanding Police Station, Kilifi do assist the Court Bailiff in enforcing the orders herein; and**

**7. That the costs of this application be provided for.**

2. The application which is supported by an affidavit sworn by one Joshua Mutinda Kiteme, a director of the 1<sup>st</sup> Plaintiff is premised on the grounds:

**i. That the Plaintiffs are the duly registered owners of the two properties and the sub-plots created therefrom;**

**ii. That the continued occupation and trespass by the Defendant on the suit properties is causing the Applicants irreparable loss, damage, hardship and prejudice;**

**iii. That the Defendant has failed and or refused to vacate the properties and continues to trespass upon the same in spite of the notice served upon him;**

**iv. That the Defendant has heightened his unlawful occupation and has turned the suit property into a quarry; and**

**v. That the Applicants are unable to work on their land and or enjoy a return on its investment by reasons of the Defendant's unlawful occupation thereof.**

3. The application is opposed. In a Replying Affidavit sworn on 14<sup>th</sup> August 2019 as filed herein on 15<sup>th</sup> August 2019, Katana Ndule (the Defendant/Respondent) avers that the 1<sup>st</sup> Plaintiff has never been the registered owner of land parcel No. Kilifi/Mtondia/108 and that the truth of the matter is that the said parcel of land was sold to the 2<sup>nd</sup> Plaintiff who proceeded to sub-divide the same into Parcel Nos. Kilifi/Mtondia/949 and Kilifi/Mtondia/950. The Defendant further avers that on 12<sup>th</sup> September 2001, the 2<sup>nd</sup> Plaintiff transferred Kilifi/Mtondia/949 to the 1<sup>st</sup> Plaintiff.

4. The Defendant denies that he was a caretaker of the Vendor of the suit property and avers that he has been in physical occupation of the entire 12 -acre parcel of land then known as Kilifi/Mtondia/108 in his own right as the owner thereof since 1975. The Defendant further avers that he was allocated the suit property on 16<sup>th</sup> March 2011 and that he paid the requisite charges and fees to the Settlement Fund Trustees and have been waiting for the discharge of the same.

5. The Defendant asserts that while he waited for the discharge, he learnt upon inquiry at the Lands Registry on 19<sup>th</sup> March 2019 that the property had been unknown to him registered in the name of Rosemary Auma Oile on 22<sup>nd</sup> May 2000 and that the said Rosemary subsequently transferred it to the 2<sup>nd</sup> Plaintiff on 30<sup>th</sup> May 2001. It is his case that the registration in the name of Rosemary and the subsequent transfers were obtained by mistake, misrepresentation or fraudulently.

6. The Defendant further avers that before this suit was instituted, he had sued the Plaintiffs and some third parties to whom the Plaintiffs had transferred the sub-divided parcels of land in ***Malindi ELC Case No. 17 of 2019; Katana Ndule Chai –vs- Rosemary Auma Oile and 6 others***. In view of the existence of the said case, the Defendant avers that this present suit is sub judice.

7. The Defendant further asserts that since the Plaintiffs' suit is premised on their acquisition of Title Nos. Kilifi/Mtondia/108; Kilifi/Mtondia/949 and Kilifi/Mtondia/950 sometime in the year 2001, their claim is time-barred by the provisions of Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. It is further his case that Title No. Kilifi/Mtondia/949 has long since been sub-divided into various parcels and the claim therefor cannot stand.

8. I have perused and considered the Motion together with the response thereto. I have similarly considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

9. The considerations for granting an interlocutory mandatory injunction were settled by the Court of Appeal in ***Kenya Breweries Ltd & Another –vs- Washington O. Okeyo (2002) eKLR*** where the Learned Judges of Appeal opined thus:

**“The test whether to grant a mandatory injunctions or not is correctly stated in Volume 24 Halsbury’s Laws of England, 4<sup>th</sup> Edition Paragraph 948 which reads:**

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks ought to be decided at once or if the act done is a simple one which can be easily remedied, or if the Defendant attempted to steal a match on the Plaintiffs.....a mandatory injunction will be granted on an interlocutory application.”**

10. Reiterating that same position in the more recent case of ***Nation Media Group Ltd & 2 Others –vs- John Harun Mwau (2014) eKLR***, the Court of Appeal stated as follows:

**“it is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances.... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases”.**

11. Arising from the foregoing, it is evident that a Court considering an application for an interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear.

12. In the matter before me, the Plaintiffs assert that at all times material, the 1<sup>st</sup> plaintiff was the registered owner of the parcel of land measuring about 5.20 Ha or thereabouts and more particularly known as Kilifi/Mtondia/108 having purchased the same in or about the year 2001 from one Rosemary Auma Oile at a consideration of Kshs 720,000/-.

13. It is the Plaintiffs' case that as at the time of the sale, the said Rosemary Auma Oile (the Vendor) had allowed her caretaker, the Defendant herein, to put up a house in a small portion of the land measuring about one acre.

14. Given the Vendor's assurance that the Defendant would have no problem vacating the land, and on humanitarian grounds, the Plaintiffs allowed the Defendant to continue his stay on the land. The Plaintiffs aver that despite that assurance by the Vendor that the caretaker would have no problem vacating the land, the Defendant has ever since refused and or neglected to vacate the said property and has instead not only converted the portion he occupies into a quarry but is now claiming ownership of the entire suit property.

15. On his part, the Defendant denies any knowledge of the said Rosemary Auma Oile and any suggestion that he entered the land by virtue of his being her caretaker. On the contrary, he asserts that he has been on the land as of his own right since the year 1975 and asserts that the registration of the said Rosemary as the proprietor of the suit premises and the subsequent transfer to the Plaintiffs was procured either by mistake, misrepresentation or outright fraud.

16. From the evidence placed before me so far, I must say that the Defendant's claim to the suit property is rather tenuous and slippery. That however, is not to say, that this is a clear case in which an order of mandatory injunction ought to be granted as sought by the Plaintiffs.

17. I say so because first and foremost, the Defendant did not just happen on the land recently by an act of trespass or otherwise. The Plaintiffs admit that long before they purchased the property in the year 2001- that is some 19 years ago- the Defendant already had his house where he resided on a portion of the suit property. While the Plaintiffs insist that the Defendant was a caretaker of the land having been authorized to enter and or be on the land by the Vendor, Rosemary Auma Oile, the Defendant denies that he was such a caretaker.

18. A perusal of the material placed before me reveals that the first registered owner of the parcel of land then known as Kilifi/Mtondia/108 was the said Rosemary Auma Oile-who subsequently sold the same in February 2001 to Joshua Mutinda Kiteme. The said Joshua Mutinda Kiteme a director and the deponent of the Affidavit in support of the application then sub-divided the said parcel of land into two parcels, namely, Kilifi/Mtondia/949 and Kilifi/Mtondia/950. Joshua then transferred Kilifi/Mtondia/949 to the 1<sup>st</sup> Plaintiff.

19. At Paragraphs 12 and 13 of the supporting affidavit, Joshua deposes that Title No. Kilifi/Mtondia/949 was sub-divided into 39 separate parcels and that title deeds were issued for the said 39 parcels some of which were then sold to third parties. In his Replying Affidavit, the Defendant has exhibited copies of certificates of Official Searches for the 39 parcels and it is clear that Joshua remains the registered proprietor of Kilifi/Mtondia/950 while none of the parcels is registered in the name of the 1<sup>st</sup> Plaintiff a limited liability company in which Joshua is said to be a director.

20. In this respect, it would appear to me that Title No. Kilifi/Mtondia/949 having been so sub-divided no longer exists. The other parcel sought herein Kilifi/Mtondia/950 is solely registered in the name of Joshua and despite his being the deponent of the affidavit in support of the application before me, Joshua is not one of the Plaintiffs herein. While he may be a director of the 1<sup>st</sup> Plaintiff company, it was clear to me that the 1<sup>st</sup> Plaintiff is a separate legal entity with no claim on the suit properties.

21. That being the case, the Plaintiffs claim over the suit properties is equally tenuous and their claim for vacant possession of the same is troublesome and difficult to sustain. As Megarry J long cautioned in the English Case of *Shepherd Homes Ltd -vs- Sandham (1971) 1 Ch 340*:

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action the Court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”

22. Taking into account that caution and bearing in mind the circumstances of this case, I am not satisfied that the Plaintiffs/Applicants have met the threshold for the grant of the orders sought herein.

23. The result is that the Motion dated 21<sup>st</sup> June 2019 is dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of November, 2020.**

**J.O. OLOLA**

**JUDGE**