



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 38 OF 2018

- 1. JONAH ISMAEL AMBAKA**
- 2. FREDRICK CHARO MNYIKA**
- 3. MWANAJUMA SULEIMAN**

(Suing on behalf of 80 others).....PLAINTIFF/APPLICANTS

VERSUS

- 1. MUNYUA KIMANI**
- 2. OCS BAMBURI POLICE STATION**
- 3. DISTRICT COMMISSIONER KISAUNI**
- 4. OCS KIEMBENI POLICE STATION....DEFENDANTS/RESPONDENTS**

RULING

1. The Application for determination is the Notice of Motion dated 15th February 2018 and filed on 16th February 2018 by the Plaintiffs/Applicants seeking orders of a temporary injunction restraining the 1st respondent by himself, his servant and or his agent from evicting, demolishing, harassing and/or interfering with the applicants occupation of **PLOT NO.183/II/MN KADZANDANI, BAMBURI** in the County of Mombasa pending hearing and determination of this application and the suit. The applicants also seek an order that the notice on the newspaper of 30th January 2018 seeking to evict the applicants and others on **PLOT NO.183/II/MN** be stayed pending the inter-parties hearing of this application.

2. The application is grounded on the following grounds:

- 1. That the plaintiffs have stayed over the said parcel of land for over 20 years.**
- 2. That the 1st defendant is not the true owner of the plot and has proceeded to demolish the plaintiff's houses and is still threatening to do so.**
- 3. That the 1st defendant is also threatening to evict the plaintiffs from the suit premises without a lawful court order.**
- 4. That the chronology of ownership by the 1st defendant of the said plot is in doubt.**

3. The application is supported by the affidavit of Jonah Ismael Ambaka, the 1st applicant sworn on 15th February 2018 in which he depones inter alia that he has the authority on behalf of the members to swear the affidavit. He avers that they are the residents of **PLOT NO.183/II/MN** and have lived on and resided as a community on the said plot since 1970. That the said plot has been occupied by the families of indigenous communities from Kenya. He states that the land is under the absentee landlord programme 2013/2014 and already the County Assembly have passed a motion of compensation to anybody who shall bring evidence of ownership. He further states that the CEM, Land, Planning & Housing, Mombasa County Government, Francis Thoya had requested vide a letter dated 17th December 2014 that any intended eviction be halted to allow the court to engage the parties. That the 1st defendant has constantly threatened to evict the applicants from the said parcel of land and that on 30th January 2018 a notice was published in the newspaper giving the applicants 30 days to vacate from the suit plot or be forcefully evicted. He states that after doing some investigations the applicants discovered that the chronology leading to the 1st defendant claiming ownership of the said plot is in doubt and that he possessed the suit land illegally because

the land had already been occupied by the indigenous communities. That social amenities and feeder routes passing through the scheme have already been identified by the committee. It is his contention that the 1st defendant has severally been colluding with police officers to demolish the applicants houses without any court order or eviction order. The applicants now want the court to intervene and issue temporary orders of injunction pending hearing of the suit.

4. The application is opposed by the 1st defendant who filed a replying affidavit sworn by himself on 17th April 2018 in which he denies in toto all the allegations in the plaintiffs' pleadings and state that they are bare and communicating no or all rights in their favour worth protection by law. He depones that he knows of his own knowledge that **LR. NO.1823/MN/II** does not exist as the same was extinguished upon sub-division which are named in the warrant to give vacant possession dated 8th January 2018 which is annexed and marked "MK-1".

5. The 1st defendant avers that the Court of Appeal has concluded a dispute over the land through its ruling in CA. Civ.Appl No.40 of 2016 (MSA) arising from the judgment in **ELC No.287 of 2008 (MSA)** and annexed copies of the ruling and order marked "MK 2(a), (b) and 2 (c)", and added that the parties have neither challenged the ruling in the supreme court or otherwise and hence bringing to finality the dispute over the land. It is his contention that the plaintiffs are merely obstructing justice by filing this unnecessary suit hoping to delay execution of the decree lawfully obtained in **ELC. C. NO.287 of 2008 (MSA)**. Relying on legal advice, the 1st defendant states that the present suit had not challenged the titles to the new sub-divisions which are a subject of execution therefore should be struck out and the orders sought in the motion denied.

6. The 1st defendant also filed grounds of objection dated 17th April 2018 on the grounds that the suit is bad in law as the subject matter LR. NO.183/II/MN was the one that was contested in ELC C. No.287 of 2008 (MSA) whereby the plaintiffs herein lost both in this court and the Court of Appeal. That the subject matter has since been sub-divided and LR. NO.183/MN/II has been closed. It is averred that the plaint is vague as one cannot be able to discern any meaning from paragraphs 4 and 5 as the averments are silent on who is the owner of LR. NO.183/II/MN or any other parcel. It is contended that the prayers sought in the plaint are res judicata as they were decided in ELC NO.287 of 2008 (MSA) and by the Court of Appeal in C.A.Civ.APPL No.40 of 2016 (MSA), adding that the grounds on the face of the application are frivolous in that they allege that the defendant is not the true owner and there is no evidence to the contrary to prove who they allege to be the owner. The 1st defendant states that his ownership was confirmed by the court in ELC NO.287 of 2008 and the Court of Appeal in CA. CIV APPL NO. 40 of 2016 (MSA).

7. The Application was canvassed by way of written submissions which were duly filed by the advocates for both parties. In their submissions the applicants have reiterated the contents of the affidavit in support of the motion. It is their submission that they have satisfied the conditions for the grant of temporary injunction as set out in the case of **Giella –v– Cassman Brown & Co. Ltd.** They also relied on the Canadian case of **R.J. R Macdonald –v- Canada (Attorney General), American Case of Cynamid Co. –v- Ethicom Limited, Ireland case of Camus Oil –v- the Minister of Energy** as well as **Kenyan case of Mbuthia –v- Simba Credit Corporation Ltd** where it was stated that in an application for interlocutory injunction the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases. They also cited the case of **Mrao Ltd –v- First American Bank of Kenya & 2 Others** where the Court of Appeal held that: "a prima facie in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...."

8. The 1st Defendant submitted that the present suit is res judicata the ownership of the subject matter having been adjudicated between the same parties in ELC No.287 of 2008 and Court of Appeal Civ. APPL No.40 of 2016 where the plaintiffs lost in both courts and the 1st defendant upheld as the true and registered owner of the suit property. That the 2nd plaintiff herein, Fredrick Charo Mnyika was the 6th Plaintiff in ELC NO. 287 of 2008 and the 6th Applicant in Civ. Appl. NO. 40 of 2016. Others plaintiffs in the present suit who were also plaintiffs in the former suit are Jonathan Katana Charo, Nassir Mohammed, Ali Salim, Jibril Hassan Omar, Rodgers Rua and Khalif Mohamed. The 1st Defendant's counsel relied on the provisions of Section 7 of the Civil Procedure Act and submitted that the fact that the plaintiffs have added other parties to the claim is inconsequential to defeat the operation of the doctrine of res judicata. They relied in the case of Nancy Mwangi T/A Northlin **Marketers –v– Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd & 2 Others (2014)EKLR.**

9. I have considered the application, the affidavit in support and against, the grounds of opposition and the rival submissions. I have also considered the cited authorities. The principles to be applied when considering an application for temporary injunctions are well settled. In the favour case of **Giella –v- Cassman Brown (1973)EA 358**, the conditions were laid and that is:

“First the applicant must show a prima facie case with a probability of success. Secondly, 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. And thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

10. In this case there is no dispute that the 1st defendant is the registered proprietor of the suit property. The 1st defendant has also adduced evidence that this court in ELC No.287 of 2008 decided in his favour. The court of Appeal in Civ. Appl. No.40 of 2016 upheld that decision and found that the 1st defendant is the owner of the suit property. Indeed, the applicants in their supporting affidavit have annexed a notice that was published in the newspaper in ELC Case. No.287 of 2008 asking the defendants in that case to give vacant possession of the suit property to the 1st defendant herein. Evidence has been shown that some of the plaintiffs herein were parties in the former suit. There was no evidence that the judgment in ELC No.287 of 2008 and the ruling in C.A APPL. No. 40 of 2016 have been set aside.

11. From the material on record, I find that the applicants have not established a prima facie case with probability of success. Secondly, the applicants have not demonstrated that they stand to suffer irreparable harm not compensable in damages. The balance of convenience, if I had doubt, tilts in favour of the 1st defendant who is the registered owner of the suit property and who already has judgment and decree in her favour in a former suit.

12. The upshot is that the Notice of Motion dated 15th February 2018 is without merit. The same is hereby dismissed with costs to the

defendants. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of January, 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Owino for Plaintiffs/Applicants.

No appearance for defendants `

Yumna Court Assistant

C.K. YANO

JUDGE

28/1/19