



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 24 OF 2018

1. SAID MUSA MITSANZE

2. HAMISI CHENGO

3. ERICK K. MZUNGU.....PLAINTIFFS/APPLICANTS

VERSUS

1. YUSUAFALI ISMAILEE KIVANJEE

ST. ELIZABETH ACADEMY KAREN

DISTRICT COMMISSIONER – KISAUNI

OCS BAMBURI POLICE STATION

OCS KIEMBENI POLICE STATION.....DEFENDANTS/RESPONDENTS

RULING

1. The application for determination is the Notice of motion dated 5th February 2018 by the plaintiffs/applicants seeking orders of a temporary injunction restraining the defendants by themselves their servants and/or their agents from evicting, demolishing, harassing and/or interfering, with the applications occupation of **PLOT NOS. 394/II/MN and 395/II/MN** in Utange in the County of Mombasa pending hearing and determination of this application and the suit.

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 defendants are not the true owners of the plots and have proceeded to demolish the plaintiffs' houses and are still threatening to do so.
- 3.** That the defendants are also threatening to evict the plaintiffs from the suit premises.
- 4.** That the chronology of ownership by the 1st and 2nd defendants of the said plot is in doubt.

3. The application is supported by the affidavit of Said Musa Mitsanze, the 1st applicant sworn on 5th February 2018 in which he depones inter alia that he has authority on behalf of members to swear the affidavit. That as residents of the suit plots, they have lived on, farmed and resided as a community on the said plots. He avers that the said plots have been occupied by the families of indigenous communities from Kenya and their main activity has been farming. He further avers that the defendants have constantly threatened to evict them from the said parcels of land. He stated that after doing some investigations they discovered that the chronology leading to the defendants claiming ownership of the said plots is in doubt. That the 1st and 2nd defendants claim ownership of the said parcels of land but the same was surrendered to the crown. It is the applicants' contention that the above stated persons possessed the suit land illegally because the land had already been occupied by the indigenous communities, adding that social amenities and feeder routes passing through the scheme have already been identified by the community. The applicants aver that the defendants have on several occasions been colluding with police officers to demolish the applicants' houses without any court or eviction order. They now want the court to intervene and issue temporary orders of injunction pending hearing of the application and the suit.

4. The application is opposed by the 2nd defendant who filed a replying affidavit sworn by Anne Wanjiku Munene, a director of the 2nd defendant on 25th April 2018 in which she deposes that **LAND CR. NO.1049 PLOT NO.395/II/MN** situated in Utange belongs to the 2nd defendant and has annexed copies of the title deed and an official search. She avers that the 2nd defendant acquired the said plot in the year 2010 as a going concern that is a school, and continued to run the same to date. She further avers that the plaintiffs have never had any form of claim over it and that they are trespassers and land grabbers who are attempting to grab the 2nd defendant's land by demolishing the 2nd defendant's wall which is around the property and putting up mud houses on the property with a view of intimidating the 2nd defendant to surrendering its lawfully acquired property. Photographs of the demolished wall and the structure being erected have been attached.

5. It is the deponent's averment that the 2nd defendant through her reported the matter to the police at Kiembeni Police Station. According to her, the plaintiffs are what are now commonly known as 'professional squatters' who invade lawfully owned pieces of land with a view of forcefully getting a piece thereof or entering into some buy –off agreements with lawful land owners which action she urges the court to put to a stop. It is the 2nd defendant's contention that it has never been summoned by any investigating agency to answer to any questions on the legality of its title to the suit property and denies the alleged investigations mentioned in the supporting affidavit.

6. The Honourable Attorney General for 3rd, 4th and 5th defendants/respondents also opposed the application and filed grounds of opposition dated 10th May, 2018 in the following terms:

i. That the application is misconceived, frivolous, vexatious and an abuse of the court process.

ii. That the applicants have illegally occupied PLOT NOS.394/II/MN and 395/II/MN IN UTANGE and cannot claim ownership of the said plots while the true owners have indefeasible titles on the said plots of land.

iii. That the orders sought are untenable and if they were to be granted would constitute a breach on the true owners fundamental right to own property of the two plots of land as enshrined in the Constitution.

iv. The applicant is author of its own misfortunes.

7. Both parties filed written submissions which I have read and I need not reproduce their contents herein.

8. I have considered the application, the affidavit in support and against, the grounds of opposition and their rival submissions made. The principles to be applied when considering an application for temporary injunction are well settled. In the famous case of **Giella –v- Cassman Brown & Co. (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.”

9. In this case there is no dispute that the 2nd defendant is the registered proprietor of the suit property. The applicants allege that they have stayed on the land for over 20 years. However, the 2nd defendant has adduced evidence that it acquired the property in the year 2010 as a going concern that is, a school and has continued to run the school to date. There was no affidavit filed by the applicants to contradict the 2nd defendant's averments. Moreover, the evidence on record, and in particular the structures put up show that the same are recent developments some of which are still incomplete. I also note that the applicants have averred that the property had been surrendered to the crown. The 2nd defendant has however produced title documents showing that the property is in its name. The 2nd defendat has also filed a counter-claim. In my view, the issue as to who between the plaintiffs and 2nd defendant is entitled to the suit property can only be determined at the main trial.

10. From the evidence on record, I find that the applicants have not established a prima facie case with a probability of success. Secondly, the applicants have not shown that they stand to suffer irreparable harm not compensable in damages. The balance of convenience, if I had doubt, vests with the 2nd defendants who is the registered proprietor of the suit property.

11. The upshot is that the Notice of Motion dated 5th February 2018 is without merit and the same is hereby dismissed with costs to the defendants. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Mulei for 2nd Respondent

Owino for plaintiffs

No appearance or 3rd, 4th and 5th Respondents

Yumna Court Assistant

C.K. YANO

JUDGE

28/1/19