



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 164 OF 2017

MOSES MASIVAI BARASA.....PLAINTIFF/APPLICANT

VERSUS

ESTHER NEEMA MTUNJI.....DEFENDANT/RESPONDENT

RULING

1. By this Notice of Motion application dated 26th July 2017 and filed herein on 27th July, Moses Masivai Barusa (the Plaintiff) prays for an order of temporary injunction to issue restraining Estehr Neema Mtunji (the Defendant) from erecting any structures on Plot No. 71 Ukombozi Squatter Settlement Scheme and/or dealing with the said Parcel of land in any manner whatsoever pending the hearing and determination of this suit.

2. The application is supported by the Plaintiff's affidavit sworn on 26th July 2017 and is based on the following grounds:-

i) That the Plaintiff is the lawful owner of the suit premises measuring 80ft by 44ft situated at Ukombozi where he has built a residential house and rears livestock;

ii) That the Plaintiff purchased the suit premises on 21st October 2016 from one Mwangemi Munga Deche who had been continuously cultivating the same and rearing livestock thereon since 1997;

iii) That in April 2017, the Defendant in the company of the area Chief and four others invaded the suit premises and proceeded to lodge a complaint with the National Land Commission alleging that she is the owner of the same;

iv) That the Defendant's actions are unlawful, illegal and unprocedural and her aim is to destroy and/or waste the suit premises and destroy evidence of occupation by the Plaintiff's; and

v) That the Defendant will not suffer any prejudice if the orders sought herein are granted but the Plaintiff stands to suffer irreparable loss and damage.

3. In a Replying Affidavit sworn and filed herein on 13th September 2017, the Defendant denies that the Plaintiff is the owner of the suit premises. She avers that she is the rightful and legitimate owner having bought the same from one Eric Nguzo Nguwa on 23rd August 2010 for Kshs 290,000/-.

4. According to the Defendant, an entity known as Ukombozi Community Self Help Group was the entity mandated by the Ukombozi Squatter Settlement Community to supervise and register Plots within the Ukombozi Settlement Scheme in Kilifi County. The Defendant visited the Group Offices where the said Eric Nguzo Nguwa was registered as the owner of Plot No 71 and the officials of the Group made changes in the register to reflect the change in ownership.

5. The Defendant thus accuses the Plaintiff of having trespassed into the suit property and proceeding thereon to construct a permanent structure within three months without the Defendant's knowledge.

6. I have considered the Plaintiff's application and the Defendant's response thereto. I have equally considered the submissions placed before me by the Learned Advocates for the parties.

7. Traditionally, on the basis of the well accepted principles set out by the Court of Appeal ***in Giella –vs- Cassman Brown & Company Ltd(1973)EA 358***, the Court has had to consider the following questions before granting injunctive relief:-

i) Is there a prima facie case

ii) Does the applicant stand to suffer irreparable harm....? And

iii) On which side does the balance of convenience lie?

8. In *Mrao Ltd –vs- First American Bank of Kenya Ltd(2003) eKLR*, the Court of Appeal defined a prima facie case as follows:-

“.....A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant’s case upon trial...It is a case 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....”

9. The material placed before me in this matter points to the fact that Plot No. 71 falls within what is described as Ukombozi Squatter Settlement Scheme. According to the Plaintiff, he purchased the said Plot from the original owner thereof one Mwangemi Munga Deche on 21st October 2016. It is his case that the said Mwangemi Munga Deche had been continuously cultivating the land and rearing livestock thereon since 1997.

10. As it were however, the Plaintiff has placed nothing before me to show that the said Plot belonged to the said Mwangemi Munga Deche and/or that the purported Vendor had occupied the same since 1997. In a Supplementary Affidavit sworn in support of the Plaintiff’s case and filed herein on 21st November 2017, he confirms having sold the land to the Plaintiff.

11. According to Mwangemi Munga Deche, he was the original owner of the suit land. In support of this contention, he annexes to his affidavit (Annexure MMD 1) minutes of a meeting held on 21st August 2005 between Kilifi County Council and the residents of Ukombozi Settlement Scheme. A perusal on the List of Residents that he relies on does not however show that the Plot was his own. Instead, it shows that the Plot was registered under the name “Musikiti.”

12. In explaining this anomaly, Mwangemi Munga Deche states as follows at Paragraphs 4 and 5 of his affidavit:-

4. That I had offered to give away the parcel of land on the strict condition that and for purposes of construction of a mosque on the said land hence the appearance of the name MUSIKITI alongside Plot 71 on the said list.

5. That to my utter shock and dismay I soon realised that there was an unsuccessful attempt by one Mr. Pole Mwasambu, the then Chairman of Ukombozi Scheme to grab the land for his own personal use despite my very clear and strict instructions and/or wishes to have the same transferred for purposes of constructing a Mosque or in default the same to remain in my name.”

13. I did not find any evidence that the disputed Plot was in the said Mwangemi Munga Deche’s name and/or that it reverted to his name after the failed bid to make it a Mosque as per Mwangemi’s wishes. While it may as well be true that the Plot was controversially changed from being reserved for a Mosque and transferred to an individual’s name, nothing was placed before me to demonstrate that this Mwangemi had any title capable of transfer to the Plaintiff as at 21st October 2016.

14. What was clear to me was that the Squatter Settlement Scheme was under the management of Ukombozi Community Self Help Group. The officials of this Group kept records of the Plots and the owners thereof. The correspondence from the Group as annexed to the Defendant’s Replying Affidavit shows that the Group recognises the Defendant as the owner of Plot No. 71.

15. In the circumstances of this case, I am not convinced that the Plaintiff has made out a prima facie case with a probability of success at the trial.

16. Accordingly, I find no merit in the application dated 26th July 2017. The same is dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE