



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 211 OF 2017

ATHMAN RAMATHAN

SULEIMAN NGUMA

MUELEEM NGUMA (Suing as representative of MSABAHA MUSLIM

ASSOCIATIONS.....PLAINTIFFS

VERSUS

HANNINGTON KESI BAYA

ABUDULKARIM MWAKALINGA

TOM ONYANGO.....DEFENDANTS

RULING

1. By this Notice of Motion Application dated and filed herein on 31st October 2017, the Plaintiffs pray for an order of injunction to issue restraining the defendants from constructing on, remaining in, selling, transferring and/or in any manner dealing with all that parcel of land measuring five acres known as Plot No. 5044/R, Msabaha.

2. The Plaintiffs application is supported by an Affidavit sworn by Athman Ramadhan(the 1st Plaintiff) and is based on the grounds:-

i) That the Plaintiffs are representatives of Msabaha Muslim Association which was allocated the Plot of land by the Mazrui family as a Muslim burial ground;

ii) That the 1st Defendant despite being aware of the true position, has gone ahead and started building structures thereon without the consent of the Plaintiffs;

iii) That the 1st Defendant has also sub-divided the land and is in the process of selling the same to the 2nd and 3rd Defendants; and

iv) That unless the Defendants are restrained from building structures on the suitland, the Plaintiffs shall suffer irreparable loss and damage and shall have nowhere to bury their dead.

3. In his Replying Affidavit filed in opposition to the application on 5th December 2017, Hannington Kesi Baya (the 1st Defendant) avers that he settled on the Mazrui family land Plot No. 5044/R Msabaha in the year 1992. It is his case that the said Plot comprises approximately 399 acres of land and further that there are many squatters now settled on the land.

4. While he admits that he also initially entered the land as a squatter, it is his case that by a Sale Agreement dated 2nd January 1992 he bought a portion of the land measuring five acres from one Ali Suleiman Ali, a member of the Mazrui family who own the land. He avers that all those occupying any part of the Mazrui family land at Msabaha is a squatter and no one has the capacity or basis to apply for eviction of the other.

5. Responding to the said Application, Tom Onyango Mbaka (the 3rd Defendant) also avers that he bought a portion of the land he occupies.

It is his case that there is no evidence showing that the land belongs to the Msabaha Muslim Association as purported by the Plaintiffs. He avers that he has lived on the portion of land he occupies since the year 2000 and he has never witnessed any Muslim being buried on the said piece of land.

6. I have considered the application and the responses thereto. The 2nd Defendant did not file any response. The principles for the grant of an interlocutory injunction were long settled in the case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*. These principles are that:-

i) The Applicant must establish a prima facie case with a probability of success;

ii) The Applicant must demonstrate that he stands to suffer irreparable loss or damage that cannot be compensated for by an award of damages; and

iii) Where the Court is in doubt, the application may be determined on a balance of convenience.”

7. In the matter before me the Plaintiffs aver that they are the rightful beneficial owners of a five acre portion of Plot No. 5044/R situated at Msabaha having been allocated the same by the Mazrui family for use as a burial ground. They accuse the 1st Defendant of seizing a portion of the said land and building structures thereon. They also accuse the 1st Defendant of sub-dividing the land and selling portions thereof to the 2nd and 3rd Defendants.

8. In support of their claim to the land, the Plaintiffs have annexed three letters marked as annexures ‘AR-1’, ‘AR 2(a)’, and AR-2(b). Annexure AR-1 is a letter dated 4th August 1999 from the Secretary Msabaha Muslim Association and addressed to Sheikh Salim A1-Almin Mazrui, the Chairman of Mazrui Trust Land. It reads in part as follows:-

“Information received from Mzee Omar Chengo-the Caretaker of Mazrui Trust Land- Msabaha states that a portion of the above mentioned property had been sold to Sharrif Alwy Bin Ahmed Bafaqih.

The said portion is occupied by Mr. Maro, a staff member of Cotton Research Station-Msabaha, who claims that he had legally acquired the same property which at the moment has several permanent structures.

This is not only a sad situation but poses a great problem for the Muslim Community in Msabaha who have been denied the essential amenity of burying their dead in a Muslim and Islamic atmosphere and surrounding. We therefore turn to you as a brother Muslim and the Chairman of this estate to please intervene in this matter as it needs urgent attention.”

9. In his response dated 19th August 1999(Annexure AR 2(a)) the Chairman advised the Msabaha Community that they were looking for an amicable solution to the matter as the member of the Mazrui family said to have sold part of the land had allegedly denied selling the same. That letter as it were neither confirms the allocation of the ground to the Plaintiffs nor the size thereof.

10. The third letter attached in support of the application is a letter addressed by the said Chairman of the Mazrui Trust land to the Provincial Administration dated 13th August 1999(Annexure “AR-2b”) seeking assistance to deal with the Squatters Problem and illegal grabbers of the Mazrui land which is said to measure 399.45 acres.

11. As it were, the Plaintiffs did not present anything before me to demonstrate that they had been allocated the land they claim by the said Mazrui family and/or that they had acquired any justifiable interests therein that would warrant their claim herein.

12. On the flip side, the Defendants while admitting they entered into the land as Squatters did show that they entered into Sale Agreements with some people including alleged members of the Mazrui family who are said to own the land and that they have since built certain structures on the land and have used the same as their residential homes for a number of years.

13. That being the case, I did not think that the Plaintiffs had established a prima facie case that their suit herein has a probability of success at the trial. In the circumstances, I find no merit in the application dated 31st October 2017.

14. The application is dismissed with costs to the 1st and 3rd Defendants/Respondents.

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

J.O. OLOLA

JUDGE