



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 455 OF 2017

1. PETRON NDURYA MWAGOMBA

2. DENA MWAGOMBA GOVI

3. WABUNGO MWAGOMBA GOVI

4. RAMA MWAGOMBA GOVI.....PLAINTIFFS

VERSUS

THE BOARD OF MANAGEMENT

KINANGO POLYTECHNIC.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 18th December 2017 brought under Sections 1A, 1B and 3A of Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Articles 40, 47 and 27 of the Constitution. The plaintiffs/applicants are seeking orders of temporary injunction restraining the defendant either by itself, servants and/or agents from further erecting, building, and/or constructing any structure, occupying, meddling, trespassing, interfering in any manner whatsoever or from any other or further dealings with suit plot herein known as Kinango "B" (MWAGOMBA PLOT) which included but not limited to Plot Nos, 363, 365,366, 367, 368, 369, 371, 377, 395, 459,574, 579,717,718,719 and 720 belonging to the Plaintiffs pending hearing and determination of this application and the suit.

2. The application is premised on the grounds in the face of the motion and supported by the affidavit of **PETRO NDURYA MWAGOMBA**, the 1st applicant sworn on 18th December, 2017, and a further affidavit sworn on, 6th June 2018. The applicants' case is that they are the sons/heirs and/or beneficiaries of the late Mwangomba Govi (deceased) who died in the year 1982. That the deceased is the rightful and beneficial owner of the unregistered property known as "KINANGO -B" originally known as Mwangomba land, and that the deceased had settled on the suit land since time immemorial and bore the Applicants on the said land. That upon demise, the deceased was buried on the suit land. The applicant aver that they have lived on the suit land together with their families for over 40 years whereupon they have developed and eked a living by farming and building residential houses thereon.

3. It is the applicants' contention that sometime in 2013 their rights and interests and those of clan members living therein were ascertained through adjudication process and the land was recorded as per the numbers listed herein above. That prior to the adjudication process, sometime in 1984 after the demise of the deceased, the defendant approached the applicants in their capacities as heirs of the deceased to seek a piece of land to put up a learning institution known as Kinango Youth Polytechnic and the applicants, in good faith donated in benevolence three (3) acres only. The applicants believed and intended that the said learning institution would benefit not only themselves but the entire Mwangomba clan and the community at large.

4. It is the applicants' contention that despite having knowledge of the said 3 acres, the defendants have now fraudulently and forcefully extended the area to fifteen (15) acres of the applicant's land and gained forceful entry thereon. The applicants state that by virtue of a forged declaration form dated 6th February 1979, the defendant falsely claim ownership of 15 acres on grounds that the said declaration was executed by the applicants upon a sale transaction worth Kshs.5,000/=. It is the applicants' contention that the said declaration form is false, misconceived, malicious and fraudulent to the extent that the defendant took advantage of the fact that the applicants are illiterate and proceeded to forge the document so as to unlawfully, unjustly and maliciously deprive the applicants of their rightful possession of the suit property. That the defendant has forcefully and illegally put up a barbed wire fence around the said plots engulfing houses and the applicants' structure standing thereon, including yards, animals, homesteads and other resources which have been enclosed within the said fence, thus blocking the applicants' and their animals access to their resources. The applicants aver that as a result of the defendant's actions, some of their animals have died and the applicants and their families have been subjected to excessive poverty.

5. The applicants' further state that the defendant has expressly and constructively issued imminent threats to evict them and their families from the suit property and they therefore fear being rendered landless and homeless in the circumstances. They aver that despite forcefully acquiring the applicants' plots, the defendant has not in any way fully and/or adequately compensated the applicants as required by law. That if not restrained, the defendant will evict and/or continue to threaten to evict the applicants and interfere with their peaceful enjoyment, possession and occupation of the suit property.

6. The applicants have annexed consent which they obtained from the Land Adjudication officer, Kinango to file this suit. They have also attached a copy of a death certificate for the deceased as well as a photograph of his grave yard and the applicant's residential houses as well as bundle of decided cases and letters from the Ministry of Lands.

7. The application is opposed by the defendant through a replying affidavit sworn by Harrison Gachuru on 3rd May 2018. He depones inter alia, that he is the Director for the Youth Training in the Defendant Board. That the defendant purchased the 15 acres on 6th February 1979 from Punga Mwagomba, the Applicants' father for Kshs.5,000/= and an agreement was executed. That in the Civil Suit No.1 of 1984 **Charo Mwachiti –v- Punga Mwagomba, Mr. Mwagomba** confirmed on oath that 15 acres of the suit land was given to the defendant. It is the defendant's contention that ever since the acquisition of ownership, the defendant has been in peaceful possession and enjoyment of the suit property without any let or hindrance from anybody and have been exercising all rights of ownership including putting up structures and a fence. It is stated that the defendant communicated to the defunct County Council of Kwale requesting to be issued with lease of the suit property, and a survey was subsequently done, beacons placed and a physical plan of the area prepared, and the defendant was issued with a copy of the original part development plan which identified the defendant's land as portion Number 23 measuring 15 acres.

8. It is the defendant's contention that recently, the applicants started encroaching on the suit property, cleared vegetation and are putting up semi-permanent and permanent houses. That on 3rd September, 2014 the defendant reported to the County Government of Kwale and was immediately allowed to fence the suit property which it has. The defendant state that immediately after fencing, one Victor Lewa Bandika filed Kwale **CMCC NO.196 of 2015** against the defendant which suit was struck out in limine with costs to the defendant. That the evidence in the former suit and the present suit are the same.

9. The defendant contend that prior to 2014, there has never been any person occupying the suit property other than the school. That the invasion of the school compound started in 2014 and pursuant to reports to the relevant authorities, the defendant was authorized to fence the land. The defendant reiterates that it is the legal owner of the suit property and that the plaintiffs have no any colour of right to occupy or till it. It is the defendant's contention that the youth polytechnic is operational and should the application herein be allowed, the same will be completely shut down and students chased away from school. The defendant urged the court to dismiss the application and allow it to complete fencing the school land.

10. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties and which I have read and need not reproduce their contents herein.

11. I have considered the application, the affidavits in support and against 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 famous case of **Giella – v- Cassman Brown & Co Ltd (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.”

12. In this case, the dispute is over the suit property measuring 15 acres or thereabouts. The defendant's case is that it purchased the same from the applicants' deceased father in 1979. It is their contention that they have been in occupation ever since and that the school is running. The defendant accused the applicants for trying to encroach on the suit land.

13. On their part, the applicants aver that only 3 acres was given to the defendant sometime in 1984.

14. From the material on record, it is apparent that there have been disputes over the suit property, including Kwale **CMCC No.196 of 2015**. The Applicants have admitted that the defendant is in occupation of the suit property, although it is their contention that the defendant fraudulently and forcefully gained entry thereon. The applicants aver that the declaration form dated 6th February 1979 used by the defendant to claim the suit property was obtained fraudulently. The defendant however maintains that it acquired the suit property legally and it has been in occupation ever since. The issue of whether or not the defendant acquired the suit property fraudulently or legally can only be ascertained after the trial.

15. From the material on record, I find that the applicants have not established a prima facie case with a probability of success. Secondly, the applicants have not demonstrated that they stand to suffer irreparable harm not compensable in damages. The applicants accuse the defendant of acquiring their plots without fully and adequately compensating them. In my view, at the end of the trial, the suit property can still be valued and the applicants compensated in damages in the event their case succeeds at last. The balance of convenience, if I had doubt, tilts in favour of the defendant which is in occupation and to avoid closure of the school which is running.

Granting the orders sought would certainly inconvenience the students who are currently undertaking their studies at the defendant's institution.

16. The upshot is that the notice of motion dated 18th December 2017 is without merit. The same is hereby dismisses with costs to the defendant.

17. I have also considered the value of the subject matter herein. The disputed agreement for sale or declaration form puts the consideration of the suit property at Kshs.5,000/=. I am of the view that this is a matter that falls within the magistrate's court. Accordingly, I *suo moto* transfer this matter to the Chief Magistrate's Court, Kwale for trial and determination. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Jengo holding brief for Ms. Mwangi for Plaintiffs/Applicants.

Mrs. Umara for defendant/respondent

Yumna Court Assistant

C.K. YANO

JUDGE

14/2/19