



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 83 OF 2018

KARISA MBOGO KONDE (Suing for and on behalf of the Estate of

MBOGO KONDE TUVA (DECEASED).....PLAINTIFF

VERSUS

KANG'OMBE JOHN CHARO

ELIZA NYAKERARIO OSORO.....DEFENDANTS

RULING

1. I have before me for determination the Plaintiff's Notice of Motion application dated and filed herein on 11th April 2018. By the said application, the Plaintiff prays for an order of injunction to restrain the Defendants, their agents and/or servants from trespassing onto, encroaching, cultivating, cutting down trees and/or in any manner dealing with all that property known as Kilifi/Ngerenyi/1492. In addition, the Plaintiff prays that those injunction orders be enforced by the OCS, Kilifi Police Station.

2. The application is supported by an affidavit sworn by the Plaintiff and is premised inter alia, on the grounds:-

i. That even though the title to the suit property was registered in the name of one John Charo Konde, a brother to the Plaintiff's father, both the Plaintiff's father and the said John Charo Konde tilled the land jointly and it is the Plaintiff's father who developed the suit property;

ii. That following the death of the said John Charo Konde and the Plaintiff's father, John Charo Konde's wife (the 1st Defendant herein) secretly took out Letters of Administration and transferred the suit property to her name. Thereafter, she proceeded to sell the land to third parties including the 2nd Defendant herein leaving out only an acre of land where the Plaintiff's homestead was situated;

iii. That the 2nd Defendant has now invaded the half-share portion belonging to the Plaintiffs and is busy cutting trees and building structures thereon.

3. In a Replying Affidavit sworn and filed herein on 7th May 2018, Kang'ombe John Charo (the 1st Defendant) denies the averments made by the Plaintiff and asserts that the Plaintiff has no claim to the suit property as alleged or at all. While not denying that her husband and the Plaintiff's father were brothers, the 1st Defendant denies that the Plaintiff's father cultivated and/or developed the property.

4. The 1st Respondent avers that matters involving the estate of her deceased husband were dealt with in Kilifi SPM Succession Cause No. 48 of 2011 and that neither the Plaintiff nor anyone for that matter objected to the same. She asserts that matters to deal with the estate of the Plaintiff's father were handled vide Malindi High Court Succession Cause No. 126 of 2012 and that the two estates are separate and distinct from each other.

5. Further and in addition to the foregoing, the 1st Defendant avers that the parcel of land being claimed by the Plaintiff is a sub-division of the original parcel of land known as Kilifi/Ngerenyi/632 which title was sub-divided into Kilifi/Ngerenyi/1488, 1490, 1491 and the suit property (1492) all of which were registered in the name of her deceased husband John Charo Kombe as captured in the said Kilifi Succession Cause No. 48 of 2011 and that the Plaintiff has no claim thereon whatsoever.

6. I have considered the Plaintiff's application and the response thereto. I have equally considered the submissions and authorities placed before me by both Mr. Lughanje and Mr. Nyamwange, the Learned Advocates on record respectively for the Plaintiff and the Respondents.

7. As was stated in the oft-cited case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 360*, the conditions for the grant of an interlocutory injunction are now well settled. First, an applicant must show a prima facie case with a probability of success. Secondly, an applicant must demonstrate that unless the injunctive orders sought are granted, he will suffer irreparable harm which would not be adequately compensated for by an award of damages. Thirdly, where the Court is in doubt, it will decide the case on a balance of convenience.

8. Again as was stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others CA No. 77 of 2012*, the above conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Accordingly, the first inquiry that this Court must make is whether or not the Applicant has established a prima facie case with a probability of success.

9. In the matter before me, the Plaintiff/Applicant contends that sometime in 1963, his father and the 1st Defendant's husband settled in the suit property long before the process of land adjudication was undertaken in the area. As his father was a businessman, he gave the 1st Defendant's husband his personal tax card documents when the time for registration came, with the instructions that the land be registered in his name.

10. Apparently, even after coming back from his business trip and realizing that his younger brother had instead contrary to his instructions registered the land in his own name, the Plaintiff's father took no action and continued to share the land with the 1st Defendant's husband. As fate would have it, the Plaintiff's father Mbogo Konde Tuva passed away on 3rd March 1998. His brother John Charo Konde also passed away on 4th August 2001, and it is the Plaintiff's case that it is after the death of the said John Charo Konde, that the 1st Defendant moved secretly to register the entire parcel of land in her own name and thereafter sold a portion to the 2nd Defendant.

11. From the material availed before me however, it is evident that as at the time of the death of the two brothers, the suit property was not in existence. The parcel of land that was in existence was Kilifi/Ngerenyi/632 which was at the time registered in the name of the 1st Defendant's husband. Again from the material placed before me, the suit property was only registered on 21st February 2018 following the sub-division of the original parcel into five (5) different parcels.

12. While the Plaintiff claims that his father was entitled to half of the original parcel of land, nothing was placed before me to demonstrate either his entitlement thereto or any evidence that he had been using the same.

13. Again from the Plaintiff's own documents, it was evident that following his father's death, the family filed High Court Succession Cause No. 126 of 2012. A Certificate of Confirmation of Grant issued to the Plaintiff and one Kadzo Mbogo Konde on 17th June 2015 does not list the suit property in the schedule of their deceased father's properties.

14. As was stated by the Court of Appeal in *Mrao Ltd -vs- First American Bank of Kenya Ltd(2003)KLR 125:-*

“A prima facie case in a civil application includes but is not limited to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself concludes that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. From the material placed before me, I am unable to conclude at this stage that the Plaintiff has a right which has been infringed by the Defendants as to call for their explanation or rebuttal.

16. The result is that I did not find any merit in the Plaintiff's application. The same is dismissed with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 28th day of March, 2019.

J.O. OLOLA

JUDGE