



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CIVIL APPEAL NO. 31 OF 2018

FATUMA AHMED MOHAMMED.....1ST APPELLANT

MARIAM AHMED MOHAMMED.....2ND APPELLANT

VERSUS

CHARLES MWANGI GITUNDU.....RESPONDENT

RULING

What is before Court for determination is the Appellants' Amended Notice of Motion dated the 14th November, 2018 brought pursuant to Article 162 (2b), Sections 13, 16A, 26(4) of the Environment and Land Court Act, Section 152E of the Land Act, Section 3A of the Civil Procedure Act and Order 40 Rules 1, 4 & 10 of the Civil Procedure Rules including all the other enabling provisions of the law.

The application is premised on the following summarized grounds that sometime in 1988 the Applicants entered the suit property known as KAJIADO/ OLE KASASI/549 in which they resided in continuously for a period of over 12 years without interruption. The Applicants' stay on the suit property was no secret and was known to everyone as they have erected a Kindergarten thereon. The interruption of the Plaintiffs' stay came sometime in 2014 way after the lapse of 12 years. They contend that one Ishmael Ole Pasha claimed to be the owner of the suit land and they filed a suit against him at Machakos Environment and Land Court claiming that they gained ownership through adverse possession. Further, that in 2014 the Respondent claimed to have purchased the suit land from Ole Pasha, and filed a suit at the Kajiado Chief Magistrate Court where the Applicants' challenged the Court's jurisdiction. They insist the Respondent has not demonstrated how he acquired the suit land and the Chief Magistrate's Court failed to consider the issue raised by the Applicants and issued injunctive orders, despite lacking jurisdiction as value of suit land exceeded the Court's pecuniary jurisdiction. They claim the copies of the title documents produced by the Respondent attached in the Civil Suit No. 154 of 2014 are questionable. Further, the Respondent is held bent on selling the suit property despite knowing that the same is being contested in this Court. The eviction by the Respondent violates the Appellants' rights over the suit property, which they have occupied for over 12 years. Further, the eviction was a violation of the fundamental rights of the Children who schooled at the Kindergarten erected on the suit land. The Respondent failed to serve the said Order and or issue notice to the Applicants' prior to the eviction. There has never been a determination by the Court over ownership of the suit land known as Kajiado/ Ole Kasasi/ 549 and the Chief Magistrate in issuing its orders relied on the fact that the High Court matter had been dismissed. They reiterate that the dismissal was not their fault as there was confusion that occurred during the transfer of the Court file from Machakos to Kajiado County. The illegal demolition has caused the Applicants damages, which was solely due to the Respondent's failure to adhere to the procedure laid down under the Land Act. Further, that it is trite law and practice that for eviction to be effected, there ought to be service of eviction order, which ought to be verified, and the occupants given a three (3) months' notice prior to eviction.

The application is supported by the affidavit of FATUMA AHMED MOHAMMED where she reiterates their claim as stated above and avers that after the Respondent had evicted them with the assistance of the Officer Commanding Rongai Police Station, he put up the suit land for sale. She insists the Respondent failed to serve them the order and or issue notice to vacate the suit prior to the demolitions. She contends that there has never been a determination of ownership over land parcel number KAJIADO/ OLE KASASI/ 549 as the Chief Magistrate in issuing her orders, based her decision on the fact that the High Court matter had been dismissed.

The application is opposed by the Respondent CHARLES MWIRIGI GITUNDU who filed a replying affidavit where he deposed that the value of the land that is the subject matter of this suit is Kshs. 9,000,000/=, which is within the monetary jurisdiction of the Principal Magistrate. He avers that the Applicants did not raise the issue of the value of the property in their defence. Further, that the only issue raised was that the matter was subjudice in view of the Machakos High Court Civil Case No. 88 of 2009 but the said line became untenable when the suit was dismissed on 20th March, 2017. He claims the valuation report which was done on 12th October, 2018 has been prepared with the sole aim of aiding the Applicants. He contends that the Applicants have not annexed any documents to demonstrate they own the suit land but on his part, he has produced certificates of official search to confirm he owns the said land. He insists the Applicants' argument that they have become entitled to the suit land through the doctrine of adverse possession is baseless as they did not move the court for the said orders. Further, that being the registered owner of the suit land, he will suffer irreparable loss and damage if the orders sought are granted. He states that the Applicants were given ample notice to vacate the suit land but they ignored. He explains that the Applicants failed to prosecute the Machakos HCCC NO. 88 of 2009 which they had filed on 24th March, 2009 culminating in its dismissal for want of prosecution on 20th March, 2017. Further, that the Applicants have not moved the Environment and Land Court to reinstate the suit and that

the order for transfer of Machakos HCCC No. 88 of 2009 was made on 7th February, 2018 almost one year after the suit had been dismissed for want of prosecution. He further contends that the Applicants have also not sought to have the administrators of the estate of Ole Pasha appointed as such for purposes of being sued in the purported intended suit. He reiterates that the Applicants did not have a counterclaim in Kajiado CMCC No. 154 of 2014 and there is no way this instant Appeal will confer ownership on them.

Both the Applicants and the Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the materials presented in respect of the Amended Notice of Motion dated the 14th November, 2018, together with the supporting and replying affidavits including the parties' submissions, the only issue for determination at this juncture, are whether the interim injunction sought by the Appellants ought to be granted pending the hearing and determination of the Appeal.

Both the Appellants and the Respondent are staking claim over the suit land. From the materials presented, it emerges that the Respondent is the registered proprietor of the suit land and has been issued with a title deed to that effect. Further, that the suit land has been subdivided and not longer exists.. The Appellants on the other hand contend that they have been residing thereon for more than 12 years and established a Kindergarten . Further, that they are entitled to the suit land by virtue of adverse possession. They dispute the Respondent's title and claim he failed to prove how he acquired the suit land.They relied on the case of **Richard Ncharpi Leiyagu V Independent Electoral Boundaries Commission & 2 others Civil Appeal No. 18 of 2013; Noormohammed Janmohammed Vs Kassam Ali Virji Madham (1953) 20 LRK and Yego Vs Tuiya & Another (1986) KLR 726** to support their arguments for an injunction. The Respondent opposed the application for injunction and relied on the following case law: **Mrao Ltd V Frist American Bank (K) Ltd & 2 others (2003) eKLR; Mwangi S Kimenyi V Attorney Geenral & Another (20140 eKLR;** and **Thomas Mumo Mangey (Suing on his own and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others (2018) eKLR** to buttress their arguments.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the celebrated case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

In the first instance as to whether the Appellants have demonstrated a prima facie case with probability of success. As I have alluded to above, the Respondent already has a title to the suit land and the same has since been subdivided. Further, the Appellant have since been evicted from the suit land and it is the Respondent in occupation. The Appellants contend that the trial Magistrate did not have jurisdiction to strike out their Defence as the dispute over ownership of the suit land was yet to be determined. The Appellants are apprehensive that if the suit land is not preserved, the Appeal would be rendered nugatory as the Respondent is in the process of selling the said land. In the case of **Thomas Mumo Mangey (Suing on his own and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others (2018) eKLR**, the Court of Appeal while citing in approval the case of **Nguruman Limited V Jan Bonde Nielsen & 2 others (2014) eKLR** held as follows:’ **if the Applicant established a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant’s claim may appear at that stage. If prima facie is not established, then irreparable injury and balance of convenience need no consideration.**’

From the evidence presented and relying on this case, I find that the Appellants claim for an injunction has been overtaken by events and they have not established a prima facie case to warrant it. However, I opine that since the Appellants have lodged an Appeal against the decision of the Senior Principal Magistrate, it is pertinent if the substratum of the suit was preserved pending the outcome of the Appeal.

Since both the Appellants and the Respondent are staking claim over the suit land, with the sanctity of the title being in dispute but the Appellants already evicted from the suit land and the Respondent being in occupation thereon, I will proceed to make the following orders

1. Obtaining Status Quo of all that suit property known as KAJIADO/ OLE KASASI/ 549 which was subdivided into LR. KAJIADO/ OLE KASAI/ 1181; 1182; 1183; 1184; 1185; 1186; 1187; 1188; 1189; 1190; 1191; 1192 and 1193 be maintained pending the outcome of the Appeal
2. The costs will be in the cause.

I direct the Appellant to file a Record of Appeal within 90 days from the date hereof after which the Appeal should be set down for directions.

Dated signed and delivered in open court at Kajiado this 18th day of March, 2019.

CHRISTINE OCHIENG

JUDGE