



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 190 OF 2017

MANNASSEH SAMUEL TSUMA AND ANOTHER.....PLAINTIFF

VERSUS

KITUI FLOUR MILLS AND 3 OTHERS..... DEFENDANTS

RULING

1. By this Notice of Motion application dated 11th September 2017, the Plaintiffs pray for an order of injunction to issue restraining the Defendants from utilizing, sub-dividing, transferring, alienating or in any way interfering with the Plaintiff's quiet possession and enjoyment of Plot No. 15069 situated at Mwembe Kuku Area within Kilifi County.

2. The application which is supported by an affidavit sworn jointly by the two Plaintiffs Manasseh Samuel Tsuma and Charles Myombo Tsumah is premised on the grounds, inter alia:-

i) That the Applicants are the administrators and/or beneficiaries of the said parcel of land measuring 0.0958 Ha;

ii) That the said land previously belonged to the Applicants father the late Arthur Jeremiah Tsumah who passed away on 19th November 2012;

iii) That in or about 1973, the said Applicant's father rented out the six roomed Kiswahili house to tenants who have lived on the property since then; and

iv) Following their father's death the Defendant are in the process of fraudulently registering the 1st Defendant who occupies an adjacent parcel of land as the registered proprietor of the suit property.

3. By Grounds of Opposition dated 10th October 2017, the 2nd and 3rd Respondents objected to the Motion on the grounds that:-

i) The application seeks orders of injunction against the Government grant of which is expressly prohibited under Section 16 of the Government Proceedings Act;

ii) The application is premised upon speculation, unfounded fears and concealment of material facts thus falls short of the basic criteria for grant of the reliefs sought;

iii) The Applicants have not furnished sufficient proof to establish ownership or entitlement to the suit property hence the Application lacks merit;

iv) The application has not met the threshold for the granting of an injunction as sought by the applicant;

v) That the applicant's allegations of fraud against the 2nd Defendant are too vague, ambiguous and unsubstantiated to constitute an arguable case against the said respondent; and

vi) That the application is otherwise an abuse of the process of this Honourable Court.

4. Even though they filed a Memorandum of Appearance, the 1st Defendant did not file any response to the application. I have considered the said application and the Grounds filed in opposition thereto.

5. The Applicants have approached this Court craving orders of injunction to issue against the Respondents. The threshold for the grant of such orders at this stage were laid out in the well-known case of **Giella –vs- Cassman Brown Company Ltd(1973)EA 358** where the Court stated that an applicant seeking such orders must first satisfy the Court that he has a prima facie case with a probability of success. Secondly, such an applicant must demonstrate that he stands to suffer irreparable loss or injury which cannot be compensated by an award of damages. If the Court is in doubt, it will decide the matter on a balance of convenience.

6. Arising from the foregoing, this Court must accordingly proceed first and foremost to consider the question of whether or not the applicants before me have demonstrated that they have a prima facie case with a probability of success. As was stated in **Mrao –vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125:-**

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. 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 or rebuttal from the latter....”

7. In the matter before me, the Plaintiffs/Applicants contend that their father the late Arthur Jeremiah Tsumah was the owner of all that property known as Plot No. 15069 situated at Mwembe Kuku area, Malindi measuring approximately 0.0958 Ha. According to the Plaintiffs, their father who passed away on 9th November 2012 had purchased the disputed parcel of land from one Salim Bakshuen and had lived therein with his family before renting the six roomed Swahili house to some tenants.

8. In support of the said contention the Plaintiffs have attached photos of an old house (annexture MST 3) with an inscription of Kioko Auto Tyres emblazoned thereon. While the Plaintiffs aver that their father purchased the said plot of land, nothing has been attached to their affidavit to demonstrate either that the land in question formerly belonged to the said Salim Bakshuen and/or that their father purchased the same. There is neither a Sale Agreement for the alleged purchase nor evidence of any purchase price paid.

9. As Administrators of the estate of the deceased Arthur Jeremiah Tsumah, it was incumbent upon the Applicants to demonstrate that the impugned parcel of land was part and parcel of the deceased’s estate. While they claim that the 1st Defendant fraudulently registered itself as the owner of the suit property without their involvement, there was nothing put before me in proof of the alleged fraud or any other unlawful dealing with the suit property.

10. Again while they claim that they stand to suffer irreparable loss and injury if the orders sought herein are not granted, they did not produce any evidence either that they occupied the parcel of land and/or that they have been collecting rent from the tenants said to have been left therein by their father. I was accordingly not satisfied that the Plaintiffs stand to suffer the alleged or any loss or injury.

11. In the circumstances, I am not satisfied that the Plaintiffs have as at this stage demonstrated that they have a prima facie case with the probability of success at the trial. Their application dated 11th September 2017 is dismissed.

12. I make no order as to costs.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE