



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.191 OF 2017**

**KAINGU KARISA KATANA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JULIUS NGALA MEMBA.....DEFENDANT/RESPONDENT**

**RULING**

1. By this application dated 19<sup>th</sup> May 2017 but filed in Court on 11<sup>th</sup> September 2017, Kaingu Karisa Katana (the Plaintiff) prays for an order of injunction to restrain the defendant from wrongfully and illegally trespassing and or excavating stones and or dealing in any manner howsoever with all that parcel of land known as Plot No. 429 Madeteni Settlement Scheme in Kilifi County pending the hearing and determination of the suit.
2. The Plaintiff's application is supported by an affidavit sworn by the Plaintiff on 19<sup>th</sup> May 2017 and is premised on the grounds that:-
  - i. By a letter of offer dated 9<sup>th</sup> December 2002, the Plaintiff was allotted the suit premises by the Ministry of Lands and Settlement;*
  - ii. The Plaintiff accepted the offer, paid the 10% deposit and has been making payments required towards the purchase of the suit premises;*
  - iii. The Defendant has however illegally entered into the suit property, taken possession thereof and has now embarked on excavating stones therefrom.*
3. In a Replying Affidavit sworn and filed herein on 27<sup>th</sup> November 2017, Julius Ngala Mumba (the Defendant) avers that it is not true that Plot No. 429 Madeteni was wholly allotted to the Plaintiff. Accordingly the Defendant denies that he has trespassed onto or dispossessed the Applicant of his property as stated.
4. The Defendant avers that he is the lawful owner of the suit property having bought the same from one Shadrack Katana Mumba who owned two acres of land on the said portion. It is his case that upon purchase as aforesaid, the Defendant embarked on the process of developing the suit property and has now cultivated and fully developed the same complete with a house in which the Defendant stays with his family.
5. The Plaintiff craves an order of injunction to restrain the Defendant from dealing in any manner howsoever with all that parcel of land known as Plot No. 429 Madeteni Settlement Scheme. According to the Plaintiff, he was offered the said Plot No. 429 by the Settlement Fund Trustees on 9<sup>th</sup> December 2002. He subsequently accepted the offer and paid the 10% deposit as required. He has also been making further payments geared towards the outright purchase of the said parcel of land.
6. While he does not state when the Defendant trespassed onto the said parcel of land, the Plaintiff accuses the Defendant of wrongfully entering the same and taking possession thereof. It is his case that despite repeated requests for the Defendant to vacate the suit premises, the Defendant has failed to heed the same and adamantly refuses to vacate and/or yield possession of the premises.
7. The Defendant on the other hand also insists to be the rightful owner of a portion of the suit property measuring two acres. It is his case that he bought the said portion from one Shadrack Katana Mumba who originally owned the land on 18<sup>th</sup> March 1999 and that he has since built a home therein. He accuses the Plaintiff of dishonesty in his contention that he has recently trespassed into his portion of the land.
8. From the material placed before me, more so a letter dated 14<sup>th</sup> March 2017 from the Chief Land Adjudication and Settlement Officer

Kilifi(Annexure JNM 2'c' to the Replying Affidavit) it would appear that the suit property which measures approximately 1.1 Ha was registered in the names of two persons, namely, the Plaintiff and one Kademu Masha. The family of the said Kademu Masha appears to have sold a portion of their part measuring two acres to the Defendant herein as per the agreement dated 18<sup>th</sup> March 1999 aforesaid.

9. It is evident that there has been a long outstanding dispute as regards the ownership of the land whose title is yet to be discharged by the Settlement Fund Trustees. The Defendant was indeed at one time charged with the offence of Forcible Detainer in Kilifi SRM Criminal Case No. 62 of 2017 although, according to the Defendant, that case was withdrawn by the office of the Director of Public Prosecutions on 2<sup>nd</sup> October 2017.

10. As it were, an applicant for an order of injunction must first and foremost demonstrate that he has a prima facie case with a probability of success. As the Court of Appeal stated in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR:-*

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...”*

11. In the circumstances before me, the Plaintiff's Letter of Offer dated 9<sup>th</sup> December 2002 states that he was offered part of Plot No. 429 Madeteni Settlement Scheme. The Defendant claims to have bought his portion from a party who by virtue of the letter from the Land Adjudication Office dated 14<sup>th</sup> March 2017 aforesaid, owns the other part of the said Plot No. 429 Madeteni Settlement Scheme.

12. That being the case and until the parties are heard with witnesses from the relevant Government offices, it cannot be said that the Plaintiff presently has any superior right or title to the suit premises to warrant the grant of an order of injunction as sought. Besides, the Defendant has demonstrated in my view that he has established his home on the disputed portion of the land since he bought the same in 1999 and he is more likely to be affected where any orders were to be issued restraining him from dealing with the portion he claims to own.

13. In the result, I find no merit in the Plaintiff's application dated 19<sup>th</sup> May 2017. The same is dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 14<sup>th</sup> day of March, 2019.**

**J.O. OLOLA**

**JUDGE**