



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 104 OF 2018

OMAR SAID.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH MWAVIDA MWAMUYE.....DEFENDANT

RULING

1. By their Notice of Motion application dated and filed herein on 9th May 2018, Omar Said, the Plaintiff/Applicant herein prays for an order of injunction to restrain the Defendant/Respondent Joseph Mwavita Mwamuye from alienating, offering for sale, selling, taking possession of, leasing, transferring, charging or in any manner whatsoever interfering with Plot No. 15 Kijipwa Scheme.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:-

i. That the said Plot No. 15 Kijipwa Settlement Scheme is registered in the name of the Plaintiff's father, the late Said Salim Mwidani;

ii. That the Plaintiff has already sought to obtain a grant of letter of administration to enable him administer his father's estate but the Defendant has in the meantime started offering the said Plot of land for sale to third parties; and;

iii. That the Defendant is not the registered owner of the said Plot and in the event he disposes of the Plot of land on which the Plaintiff resides, the Plaintiff and his family shall be greatly prejudiced and disinherited.

3. In a Replying Affidavit filed in opposition to the said application on 22nd June 2018, the Defendant avers that he is currently occupying Plot No. 13 Kijipwa Scheme together with his family. He denies occupying the Plaintiff's Plot No. 15. Further and in addition to the foregoing, the Defendant asserts that he caused to be sub-divided his Plot No. 13 measuring 1.035 Ha into two portions on 11th December 2015 following which he sold the second portion measuring 0.2 Ha to a third party.

4. The Defendant asserts that he has lived with his family on the said Plot No. 13 since 1985 after inheriting the same from his father Mwamuye Ziro Kombe who was the original allottee thereof.

5. I have considered both the application and the response thereto. I have also considered the written submissions filed thereon by the Learned Advocates for the parties.

6. As was stated in *Giella –vs- Cassman Brown(1973)EA 358:-*

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must establish 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

7. Accordingly this Court must of necessity first enquire as to whether the Applicant herein has established a prima facie case with a probability of success. From the material placed before me, it is not contested that the Plaintiff's father the late Saidi Salim Mwidani is the registered proprietor of Plot No. 15 Kijipwa Scheme. The Plaintiff accuses the Defendant of meddling with the said Plot and alienating parts thereof to third parties.

8. The Defendant denies the Plaintiff's accusations and asserts that he resides on his own Plot No. 13 Kijipwa Scheme which Plot he

inherited from his father one Mwamuye Ziro Kombe.

9. From a perusal of the documents attached both to the application and to the responses, it would appear that both parties occupy separate and distinct plots but which plots have had some considerable dispute as to their rightful boundaries.

10. In a Supplementary Affidavit (wrongly titled Further Replying Affidavit) filed by the Plaintiff on 13th July 2018 in response to the Defendant's Replying Affidavit, the Plaintiff avers at paragraphs 5 thereof as follows:-

“5. That I know of my own accord that Plot No. 13 is occupied by Mzuri Gambo but is allocated to Mwamuye Ziro, and that Joseph Mwavita (the Defendant) resides on Plot Number 15 with our family on the ground and not Plot No. 13 as alleged in the Defendant's Replying Affidavit. (Annexed as “OS-1” is an extract letter and copy of a lands report on the said Plot).”

11. The Report referred to is an extract of a report enclosed in a letter dated 26th May 2005 from the Kilifi District Lands Adjudication & Settlement Officer to the Director Land Adjudication and Settlement in Nairobi. The said extract shows that indeed Plot No. 13 Kijipwa Scheme is occupied by one Mzuri Gambo Ndago while the allottee thereof is Mwamuye Ziro Kombe. At the remarks section, it is stated as follows:-

“Surveyor to amend and the map to read Plot No. 11 instead of 13. The plot to be sub-divided between the allottee and the occupant.”

12. In regard to Plot No. 15 Kijipwa, the extract of the report shows the occupants to be Said Salim Mwidani, Mwamuye Ziro Kombe and Salim Ali Salim. The allottee of the said Plot is shown to be Said Salim Mwidani and at the remarks section, the report states:-

“Sub-division amongst the allottee and the two occupants.”

13. From the said report, it is evident that the Defendant herein was to benefit from both Plot No. 13 and Plot No. 15 Kijipwa. Plot No. 15 was to be sub divided to accommodate the three occupants at the time. Nothing was placed before me to show if and how that sub-division was done.

14. I note however that while the Defendant denies having dealt with any portion of Plot No. 15 Kijipwa, the title annexed issued in the name of his father the said Mwamuye Ziro identifies the parcel of land measuring 0.34Ha as Kilifi/Kijipwa/15.7. In my mind, even though the proprietorship section of the Title Deed indicates that the parcel is a sub-division of Plot No. 13, I think it was important that before we throw away the Plaintiff's case, an inquiry be done as to how the said Plot came to be referred to as such if indeed it emanated solely from Plot No. 13.

15. Pending such an inquiry, which can only be done at the trial herein, I think it would be in the interest of justice that the status quo obtaining as of now be maintained in regard to the suit property and that the Defendant be restrained from any further alienation thereof.

16. Accordingly, I will allow the Plaintiff's application in terms of Prayer no. 3 thereof.

17. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE