REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 167 OF 2018

KENGA KUTSOA MBARUK

RICHARD NZAI RUWA.....PLAINTIFFS/APPLICANTS

= VERSUS =

KIMERA BOZO CHENGO.....DEFENDANT/RESPONDENT

R U L I N G

1. For determination is the notice of motion application dated 16th July 2018 filed under the provisions of Order 40 and 51 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. It sought orders that:

(a) Spent

(b) THAT the Respondent by himself, his servants and / or agents are otherwise however, be restrained by temporary injunction from entering, trespassing into or continuing to trespass into, alienating, disposing of building on or in any other way interfering with the plaintiffs' ownership and occupation of the piece of land situated at Mutulu Mwanamwinga in Kilifi County measuring approximately 150 acres pending the hearing and determination of this suit.

(c) THAT the costs of this application be provided for.

2. The application is supported by the grounds listed on the face of it and the affidavit in support thereof. The grounds listed include the following:

1. The applicants are beneficial owners of the piece of land situated at Mutulu in Mwanamwinga location, Viragoni sub-location in Kilifi County.

2. The respondent has without any colour of right or any lawful excuse and / or authority from the applicants trespassed into the suit land at Mutulu Mwangamwinga, Kilifi County and has purported to unlawfully and illegally sell portions of the said piece of land to other people without the consent of the applicants.

3. The respondent's act of trespass ought to be stopped forthwith as it is inimical to the applicants' right title and interest in the said land.

4. The applicants' right to the land remains un-impeached and ought to be protected.

3. The application is opposed by the Replying Affidavit sworn by the Respondent on 26th November 2018. The Respondent deposed that the suit property is his ancestral land. That his father Mzee Bozo Chengo purchased it in 1940 and lived on it gaining prominence until the area became known as Kwa Bozo Village. That their ownership is recognized by all the elders and event the local administration as shown in the letters produced as annextures **"KBC 1 & 2".** The Respondent deposed further that the plaintiffs do not live in Kwa Bozo Village and cannot therefore have a claim to the suit property. He urged the court to dismiss the application as no prima facie case has been disclosed.

4. Both parties submitted on the principles to be considered for granting orders. The plaintiffs deposed that the Respondent has trespassed on the suit land and began selling to 3rd parties. The applicants also stated that adjudication has not been undertaken in the area where the suit land is located. The applicants did not however disclose to the court when the alleged trespass started and the nature of the trespass or when the sale to the 3rd parties happened. Further there is nothing annexed even by way of affidavit/letters from an elder from the village to

corroborate that indeed the applicants are the owners/occupiers of the 150 acres of land at Mutulu trading centre which land the Respondent has trespassed on.

5. The Respondent in his replying affidavit has given a historical background on why he is entitled to the land being claimed by the plaintiffs. He annexed some correspondence from the village elder made on 22/10/2018 and a letter dated 31/7/2018 connecting him to the suit land. Whether the letters are genuine or not will be dealt with during the hearing of the main suit.

6. The defendant has thus demonstrated at this preliminary stage that the balance of convenience tilts in his favour in not having the orders of injunction being issued. The decision in the case of ***Thomas Mumo Maingi Vs Sarah Nyiva Hillman & 3 others (2018) eKLR*** cited by the Respondent is of relevance to this case. In that case, the Court of Appeal quoted the decision of ***Mbuthia Vs Simba Credit Finance Corporation & Ano (1988) KLR 1*** which held thus, ***"the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact but rather to weigh up on the relevant strength of each side's propositions."***

7. The applicants herein have not laid a basis that the harm they will suffer is irreparable. The Court of Appeal in the case of ***Nguruman Ltd Vs Jan Bonde Nielsen & 2 others (2014) eKLR*** held thus;

> ***"If the applicant establishes 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 in law is an adequate remedy and respondent is capable of paying, no interlocutory order of inunction 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?"***

8. In conclusion, it is my considered opinion and I so hold that the application falls below the threshold to warrant the grant of the orders of temporary injunction. Consequently, I dismiss it with costs to the Respondent.

Dated and signed at BUSIA this 19th day of November, 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 27th Day of November, 2019

C. YANO

JUDGE