



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 241 OF 2018

STEPHEN MUNGAI MUNGA

DORRIS NDUKU NYAMAI.....PLAINTIFFS

-VERSUS-

1. HENRY KALUME KATANA

2. HAMISI FUGO KONDE

3. KARISA MWALIMU NDORO ALIAS WISDOM

4. SAMMY IHA

5. ANTHONY CHARO KARISA

6. WANJE KARISA

7. CHENJE KARISA SAFARI KARISA

8. JUMA KARISA KAHINDI.....DEFENDANTS

RULING

1. By a Notice of Motion dated 17th October 2018 and brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and Section 1A, and 3A of the Civil Procedure Act, the Plaintiffs/Applicants seek the following orders:

1. Spent

2. Spent

3. That the Defendants through its servants, agents or any other persons whatsoever be restrained from entering upon, interfering with and/or having any dealing of adverse nature with the parcels of land known as PLOT NOS. 11576, 11577, 11578, 11579, 11580, 11581, 11582, 11583, 11584, 11585, 11586, 11587, 11588, 11589 and 11590 (ORIGINAL NO.10469/2) SECTION II MAINLAND NORTH, MOMBASA pending the hearing and final determination of this suit;

4. That the Defendants through its servants, agents or any other persons whatsoever be restrained from constructing on and/or continuing with the construction of any buildings or any other structures on the parcels of land known as PLOT NOS. 11576, 11577, 11578, 11579, 11580, 11581, 11582, 11583, 11584, 11585, 11586, 11587, 11588, 11589 and 11590 (ORIGINAL NO.10469/2) SECTION II MAINLAND NORTH, MOMBASA pending the hearing and final determination of this suit;

5. That this honourable court be pleased to grant an order compelling the office of OCS Mtwapa Police Station and/or the OCPD Kilifi South by themselves or through their servants, employees, agents, assigns, representatives to provide security on the suit properties on and restrain the Defendants and/or their servants, employees, contractors, agents, assigns, representatives and/or any other person with no legal title to the suit properties from entering upon interfering with and/or having any dealing of adverse nature on the suit properties pending the hearing and final determination of this suit; and

6. That the costs of this Application be provided for.

2. The Application is premised on the following grounds:

a. The Defendants and/or their agents have unlawfully entered on the Plaintiff's' aforesaid properties and commenced excavation of the suit property and construction of illegal buildings and/or structures thereon and are threatening to take possession of the suit properties.

b. The Defendants have ignored notices issued by the Plaintiffs and the police demanding that the Defendants cease the trespass;

c. By reason of the Defendants' said actions, the suit properties have been wasted and continues to be wasted and the plaintiffs have been deprived of the use and enjoyment of the said properties; and

d. The Plaintiffs are apprehensive that the Defendants unless prevented by this honourable court, intend to permanently invade and remain on the Plaintiffs' said properties without any authority or consent from the plaintiffs, or any colour of right to do so.

3. The Application is supported by the affidavit of Stephen Mungai Munga sworn on 17th October, 2018 and further affidavit sworn on 29th March, 2019. The Applicants' case is that they are the sole proprietors of the suit properties. As proof of ownership, the Applicants, have annexed copies of Certificate of Title in respect to the properties. It is deponed that the Applicants bought the suit properties from Mwalimu Khamis Mwahadzi, Chumbani Rashid Abdalla and Mwanamkuu Ali in the year 2014 at a consideration of Kshs.10 million. The Applicants have attached a copy of the Sale Agreement between themselves and the aforesaid sellers together with a copy of Transfer.

4. The Applicants claim is that on or about the 29th September, 2018, the Respondents and their agents, without any colour of right, unlawfully entered into the suit property demolished a boundary wall that had been set up by the Applicants demarcating the suit property, encroached upon the said property and proceeded to excavate the suit property and put up various structures therein. The Applicants have annexed a photograph showing the demolished boundary wall. It is the Applicants' contention that the Respondents actions amount to trespass by the Respondents which threatens the Applicants' exclusive right to enjoyment of the suit property in contravention to Article 40 of the Constitution which action was promptly reported at Mtwapa Police Station. That despite arrests ad charges having been preferred against the Respondents and their agents, they have continued on with the trespass, which action has necessitated this suit and the Application herein.

5. In opposing the Application, the Respondents filed replying affidavits in which they claim entitlement of the property known as PLOT NO.1665/III/MN by virtue of having allegedly lived thereon for several years. They also claim there is another suit at Malindi ELC 183 of 2015 which is yet to be decided. The Respondents have attached copies of the pleadings in Malindi ELC No. 183 of 2015 which is a dispute over PLOT NO. 1665/III/MN. The Respondents further aver that the Applicants' complaint is not only against them but more than 150 residents living in Barani Village and especially on PLOT NO. 1665/III/MN.

6. The Application was canvassed by way of written submissions which were duly filed by the Advocates for the Applicants and for the Respondents. I have considered the application, the affidavits in support and against as well as the submissions filed. The only issue for determination is whether the orders for temporary injunction pending the hearing and determination of the suit should be granted.

7. The principles to be applied when considering an application for injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co Ltd (1973) EA 358**, the Applicants must show that they have a prima facie case with a probability of success; that they stand to suffer irreparable damage which would not adequately be compensated by an award of damages/ and if the court is in doubt it will decide the matter on the balance of convenience.

8. In the case **Mrao Ltd –v- First American Bank of Kenya (2003)KLR 125**, a *prima facie* case was said to be one in which one the material presented to the court or 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.

9. In this case, there is no dispute that the Applicants are the registered proprietors of the suit properties. The Applicants have exhibited before the court certificate of titles in their names. No other title documents have been produced by the Respondents in respect of the suit properties. The Respondents claim ownership of PLOT NO. 1665/III/MN which in my view is a different title from those claimed by the Applicants. Indeed, the Respondents have stated that there is another pending case being Malindi ELC NO.183 of 2015 over PLOT NO. 1665/III/MN. From the pleadings attached to the replying affidavits, it is clear that the Applicants are not parties to that suit and neither is there a pending application to join them that has been exhibited. The Respondents in my view, have not given a satisfactory explanation to justify their invasion of the suit property.

10. From the evidence on record, I find that the Applicants have established a *prima facie* case with a probability of success against the Respondents. The Applicants have demonstrated that they are the registered proprietors of the suit property and have therefore shown their right over the suit property. I take the view that should the Respondents' actions be allowed to continue, the suit property will be wasted and the continued invasion and illegal constructions will alter the character of the suit property and the Applicants will thereby suffer irreparable damage. No doubt the damage and/or loss that would be suffered by the Applicants would be significant if an injunction is not granted. The balance of convenience, if I had doubt, would tilt in favour other Applicants who it is not denied, are proprietors of the suit property and who by law are entitled to the rights and privileges belonging or appurtenant thereto.

11. The upshot of this is that the Notice of Motion dated 17th October 2018 is allowed with costs to the Applicants.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Akwata holding brief for Ms. Kageni for Plaintiffs

No appearance for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE