



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO 59 OF 2017

MOHAMED HASSAN ALI.....1ST PLAINTIFF
REHEMA HASSAN.....2ND PLAINTIFF
ALI KHAMISI JUMA.....3RD PLAINTIFF
JUMAA ABDALLA NGUZO.....4TH PLAINTIFF
SULEIMAN NGWARE.....5TH PLAINTIFF

-VS-

RUKIA HASSAN.....1ST DEFENDANT
MOHAMED KHERI.....2ND DEFENDANT
SELF LAMIR.....3RD DEFENDANT
SWALEH HASSAN.....4TH DEFENDANT

RULING

1. By an amended Notice of Motion Application dated 17th March 2017 brought under **Articles 42, 69 and 70 of the Constitution and Orders 40 and 51 of the Civil Procedure Rules**, the Plaintiffs seek an order of Temporary Injunction restraining the Defendants either by themselves, their employees, servants and/or agents from trespassing unto or entering into, committing acts of wastage, alienating, and/or interfering with the Plaintiffs' quiet and peaceful occupation of a portion on **PLOT SUB-DIVISION NO.6827 (ORIGINAL NO.172/2) SECTION II MAINLAND NORTH** pending the hearing and determination of this Application and the Suit.

2. The Application is based on the grounds in the face of the Motion and supported by the Affidavit of Mohamed Hassan Ali sworn on 24th February 2017 and a further affidavit sworn on 17th March 2017. Briefly, the Plaintiffs aver that they are the Trustees appointed to manage the ownership of **PLOT SUB-DIVISION NO.6227/6827(ORIGINAL NO.172/2) SECTION II MAINLAND NORTH** which is to devolve to the family of the late Ali Bin Nguma. That the heirs to the estate of Ali Bin Nguma and their respective shares were conclusively determined in accordance with Mohammedan Law of Inheritance in Mombasa Kadhi's **Succession Cause No.158 of 2007**. That the sub-division and apportionment of the

shares to each individual heir was ascertained by the Court in that Judgment, and the Plaintiff and the 1st and 4th Defendants were each given specific portions of the Suit Property. It is the Plaintiffs' contention that the 1st and 4th Defendants have since sold off their portions and are encroaching on the portions of other heirs. That the Defendants have without the Plaintiffs' permission and in defiance of the Trustees' administration gone ahead and constructed a semi-permanent house and put up a perimeter wall and run an open garage on the 1st Plaintiff's specific portion of the Suit Property. The Plaintiffs further aver that the 2nd and 3rd Defendants are strangers to the Plaintiffs and are not part of the heirs of the estate of the deceased. That the 1st and 4th Defendants have their portions specifically allocated to them during the sub-division and demarcation and having sold part of their hereditary share in the Estate ought not to be permitted to encroach on the shares of other heirs of the Estate. It is the Plaintiffs case that the Defendants have without the permission of the Plaintiffs and in defiance of the Trustees' administration gone ahead and constructed a semi- permanent house, put up a perimeter wall and run an open garage on the 1st Plaintiff's specific portion of **PLOT SUB-DIVISION NO.6227/6827 (ORIGINAL NO.172/2) SECTION II MAINLAND NORTH.**

3. The Application is opposed by the Defendants with each filing a Replying Affidavit sworn and filed on 31st March 2017. The 1st Defendant has denied the 1st Plaintiff's averments and deposed that the 1st Plaintiff is not an administrator or legal trustee of the estate of the Late Ali Bin Nguma and believes that he holds fake letters of administration since he has been charged with forgery/fraud and creating disturbance in **Criminal Case No.360 of 2017** at Shanzu Law Courts, and suspects the documents annexed to the Affidavit in support of the Application are not genuine. He deposes that the Plaintiffs have no claim over **PLOT NO.172/1** as the same was a road reserve acquired from V.N.M Mulji & Brothers and its original number was 167. He believes that the 1st Plaintiff is only entitled to claim under the estate of the late Hassan Bin Ali, the first principal of the four legal heirs since the other three principals are since deceased and their sons are alive. The 1st Defendant further deposes that she did supervise the building of a wall on the plot of her late father Hassan Bin Ali which had been sold to a buyer and the 1st Plaintiff should confine his claim to 4 acres of **PLOT NUMBER 6827** that fall under the estate of their deceased father and not **PLOT NO.172/2.** The 1st Defendant wants the 1st Plaintiff restrained from processing deed plans for **PLOT NO.172/2.**

4. The 2nd Defendant depones that the Plaintiffs have no valid claim against him because he was allocated a parcel in **PLOT NO.1721** by the County Government of Mombasa from the original **PLOT NO.167** previously owned by V.N. Mulji & Brothers and that the said parcel was previously earmarked as a road reserve.

5. The 3rd Defendant has denied encroaching or trespassing on the 1st Plaintiff's portion of land as claimed and that the garage he has built is well within his portion of plot no.167 belonging to his late father and does not fall inside plot no.172/2/ as alleged by the 1st Plaintiff. He avers that neither the 1st Defendant, the 4th Defendant and himself have any interest in plot no.172/2. He further avers that he has lived in his plot no.167 for over twenty (20) years peacefully until April 2016 when the 1st Plaintiff started interferences and disturbances by bringing into the plot several buyers including one Mr. Saidi Mzee and that the 1st Plaintiff hereafter forced a private surveyor to irregularly include the 3rd Defendants into his portion without any legal reasons.

6. The 4th Defendant deposed that he has not encroached or trespassed into the Plaintiffs portion as he only put up structures inside his late father's property, **SUB-DIVISION NO.6827.** He states that the 1st Plaintiff is not and has never been an administrator or Trustee as he alleges and that the 1st Plaintiff has fake letters of administration which is a subject of a criminal case at Shanzu Law Courts. He further states that he was earlier on appointed an administrator but the 1st Plaintiff moved to the High Court in the year 2006 to challenge the same. He urged the Court to dismiss the Plaintiffs' Application for being bad in law and misconceived and because the 1st and 3rd Defendants have rightly built inside their late father's plot.

7. The Advocates for both parties agreed to dispose of the Application by written submission and filed their respective submissions in which they outlined the facts as contained in their affidavits and pleadings.

8. I have carefully considered the Application. This being an Application for Interlocutory Injunction, the Plaintiffs must satisfy the conditions laid down in the case of **Giella –v- Cassman Brown & Co Ltd (1973)** EA 358. The Plaintiffs must show that they have prima facie case with a probability of success and that they stand to suffer irreparable damage. If the Court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

9. The dispute is over the ownership of **PLOT SUB-DIVISION NO.6227/6827 (ORIGINAL 172/2) SECTION II MAINLAND NORTH** which was to devolve to the family of the late Hassan Bin Ali for which the Plaintiffs and some of the Defendants are heirs and beneficiaries. Whereas it appears that the property has since been distributed to the beneficiaries some of whom have disposed of their portions, there is a dispute as to whether the portions on the ground belong to one party or the other. The Plaintiffs allege that the Defendants have since sold off their portions and have unlawfully encroached and trespassed onto a portion of the property allocated to other heirs and specifically the 1st Plaintiff. The Defendants have denied this and allege that their actions are on a different portion or parcel of land.

10. In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd (2003) eKLR**, the Court of Appeal held that:

“... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicants case upon trial....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 from the latter.....”

11. In this case, the acts complained of by the Plaintiffs are not denied. The main dispute is whether they are in the portion that belongs to the Plaintiffs, and specifically the 1st Plaintiff, or on the portion that rightly belongs to the Defendants. This is an issue that can only be ascertained at the trial. Until that fact is established, it is only fair that the status quo prevailing be maintained. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the Plaintiffs have established a prima facie case with a probability of success against the Defendants. In my view it is clear that the Plaintiffs have shown their rights over the suit property. As regards irreparable damage, I take the view that the Defendants actions on the Suit Property which have not been denied may result in a loss that might not be quantified in damages as the status of the property would have changed completely. The balance of convenience would tilt in favour of the Plaintiffs so that the status of the land is not changed through the Defendants continued activities pending hearing of the suit.

12. Arising from all the above reasons, I find that the Plaintiffs have satisfied the threshold for grant of an Interlocutory Injunction. Accordingly, I find merit in the Application and grant the order for Temporary Injunction in terms of prayer 3 of the amended Notice of Motion dated 17th march 2017. As this dispute involves family members, the costs of this Application shall be in the cause.

Delivered, signed and dated at Mombasa this 8th February, 2018.

C. YANO

JUDGE