



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 56 OF 2017

KWEKWE JEMBE MEKUNDE.....PLAINTIFF

VERSUS

GLADYS DZAME SANGA.....DEFENDANT

RULING

1. By a Complaint dated 14th March 2017 and filed herein on 15th March 2017, the Plaintiff Kwekwe Jembe Mekunde prays for Judgment against the Defendant for:-

a) A finding or declaration that the Plaintiff is the lawful owner of the suit premises, being Plot/Membership No. 118 (and) also known as 173 measuring 33 feet by 100 feet situate at Ukombozi-Kilifi within Kilifi County.

b) A permanent injunction restraining the Defendant and/or her agents, employees, servants or any other person(s) acting on the Defendant's behalf from entering and/or invading and/or erecting any structure(s) on the Plaintiff's parcel of land and/or transferring the same to a third party; being, Plot/Membership No. 118 also known as 173 situate at Ukombozi within Kilifi County and/or dealing with the suit premises in any manner whatsoever detrimental to the rights and interests of the Plaintiff herein.

c) Costs of the suit.

2. Filed on the same day with the Complaint is a Notice of Motion also dated 14th March 2017 seeking a temporary injunction in the manner sought in Prayer No. 'b' of the Complaint, pending the hearing and determination of the suit.

3. The said application is premised on the grounds that:-

i) The Plaintiff is the lawful, legal and/or beneficial owner of the said premises;

ii) The premises were allocated to the Plaintiff in 1999 as Plot No. 118 Ukombozi Scheme, but later on the number changed to Plot No. 173 after involvement of a physical planner;

iii) In 2016, the Respondent invaded the Plaintiff's land and started erecting a structure thereon but ceased thereafter upon intervention by the Government;

iv) On 17th February 2017, the Defendant/Respondent once again deposited building materials on the suit premises with the intention of continuing with the construction she had earlier started;

v) The said actions are unlawful and meant to waste the subject matter of the suit and to create evidence of occupation on the part of the Respondent which did not exist at the commencement of this suit; and

vi) That no prejudice shall be suffered by the Defendant if the orders sought are granted.

4. In a Replying Affidavit sworn and filed in Court on 3rd April 2017, the Defendant, Gladys Dzame Sanga opposes the grant of the Orders sought. It is her case that the Applicant does not merit the grant of the orders sought on the basis that:-

i) There is no evidence adduced or demonstrated that indeed the Applicant is the legal/beneficial owner of the subject property.

ii) The Respondent has been in occupation and possession of the premises since 2007 and has constructed her house in the said property having bought the same in 1999.

5. I have considered the application and the response thereto. I have equally considered the submissions placed before me by the Learned Advocates for the parties.

6. The principles for the grant of temporary injunctions are now well-settled. In the often-cited case of **Giella –vs- Cassman Brown & Company Ltd(1973)EA 358**, the Court stated that:-

“First, an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the Applicants 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. Arising from the foregoing, the first issue for determination by this Court is whether or not the Applicant has established a prima facie case with a probability of success. A prima facie case as was stated in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR (Civil Appeal No. 39 of 2002):-**

“.....includes but is not confined to a “genuine and arguable case.” 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 or rebuttal from the latter.....”

8. In the matter before me, the Plaintiff avers that she is the legal and/or beneficial owner of the suit premises having been allocated the same in 1999 by virtue of her membership of Ukombozi Scheme. It is further her case that in 2016, the Defendant invaded the land and commenced construction thereon but was stopped upon Government intervention.

9. I have looked carefully at the material placed before me by the Plaintiff. There is no evidence of the alleged allocation and/or anything to show that the Plaintiff is a member of the Ukombozi Squatter Formalisation Scheme which appears to have been in charge of allocating land within the scheme. The Government intervention which the Plaintiff refers to as having stopped the initial construction by the Defendant is not a document capable of conferring title nor does it pretend to do so. The said intervention is a one-paragraph letter dated 21st April 2016 from the Assistant County Commissioner Bahari Division addressed to the Deputy County Commissioner Kilifi stating as follows:-

RE: Kwekwe Jembe Mekunde- A Plot in Mkombozi Scheme

I am referring the above case to you. Kwekwe Jembe Mekunde works in Kaloleni Law Court and she claims to have a Plot in Mkombozi Scheme.

Kindly assist Sir.

Signed

10. The letter neither mentions the Plot Number nor does it state that categorically that the Plot of land belongs to the Plaintiff. From the pictures annexed by the Plaintiff to his Supporting Affidavit sworn on 14th March 2017, it is evident that the Defendant has put up some construction on the disputed plot.

11. According to the Defendant, she bought the land and has been occupying the same since the year 2007. She has annexed a number of documents in support of her contention including the Sale Agreement and payment receipts for the Plot.

12. In *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR*, the Court of Appeal stated in its definition of a prima facie case that:-

“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..”

13. In the circumstances of this case, there is a claim by the Defendant which is not controverted that she has occupied the land since 2007. There is evidence that the Defendant uses and/or has built a residential house on the land. If this Court were to issue the orders sought, the same may amount to an eviction of the Defendants from the parcel of land whose ownership is yet to be fully determined.

14. Accordingly, I shall disallow the application. The Plaintiff shall bear the costs of the application.

Dated, signed and delivered at Malindi this 22nd day of February, 2018.

J.O. OLOLA

JUDGE