



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 112 OF 2017**

**SUDI SULEIMAN BAKARI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JOYCE ZAWADI KEA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR, KILIFI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. I have before me for determination a Notice of Motion Application dated 8<sup>th</sup> May 2017. The Plaintiff Sudi Suleiman Bakari prays for injunctive orders to restrain the Defendants from entering upon, trespassing, disposing or in any other way whatsoever dealing with Title No Kilifi/Kijipwa/129 pending the hearing and determination of this suit. In addition, the Plaintiff prays that the 2<sup>nd</sup> Defendant be ordered to supply him with a number of documents including an Official Certificate of Search, the Green Card for the property and all correspondence, minutes or procedures followed resulting to the approval, allotment and transfer of the title comprised in Plot No. Kilifi/Kijipwa/129.

2. The application is based on a number of grounds stated in the body thereof and which may be summarized as follows:-

- a. That the 1<sup>st</sup> Defendant has threatened and is in the process of unlawfully disposing off the suit property while the parties have a dispute regarding the rightful owner thereof;
- b. That the Plaintiff has been in occupation of the suit property since the 1970s and has developed the same and planted trees besides building a residential house thereon;
- c. That in the process of the preparation of the Scheme in 1980, the Plaintiff's name was erroneously left out but on 7<sup>th</sup> April 2008, he was allotted the land through the Settlement Fund Trustees which eventually transferred the land to him upon payment of the due loan on 13<sup>th</sup> March 2012.
- d. That sometimes in the year 2015, the 1<sup>st</sup> Defendant showed up with a Title Deed purporting to have been issued on 21<sup>st</sup> December 1995 and initiated the prosecution of the Plaintiff for forcible detainer of the land at the Shanzu Law Courts; and
- e. That the Defendants are colluding and hiding documents relating to the suit property for

**purposes of disposing the same and the Plaintiff stands to suffer irreparable loss and damage unless the injunction is granted.**

3. In a Replying Affidavit sworn on 20<sup>th</sup> September 2017, the 1<sup>st</sup> Defendant Joyce Zawadi Kea refutes the Plaintiff's claim over the suitland and avers that she is the rightful owner thereof. She states that she has been in exclusive possession of the suitland for several years having acquired a valid title thereto and that the Plaintiff only came recently to lay a claim thereon. It is further her case that when she noticed the Plaintiff's encroachment on the land, she took the initiative to file a criminal complaint against him after he refused to vacate the property.

4. The 2<sup>nd</sup> Respondent-the District Land Registrar Kilifi Mr. Felix M. Nyakundi has sworn an affidavit on 4<sup>th</sup> July 2017 equally denying the assertions made by the Plaintiff. The Registrar avers that as per the records held in the Registry, the suit property which measures approximately 0.955 Ha was first registered on 8<sup>th</sup> August 1990 to the Settlement Fund Trustees. On 28<sup>th</sup> October 1993, the land was transferred to Muye Mwangome Muye and a title deed issued. The records further show that on 21<sup>st</sup> December 1995, the land was again transferred to the 1<sup>st</sup> Defendant and a title deed was issued to her. Finally, the records shows that on 22<sup>nd</sup> March 2017, the land was transferred to Mount Zion Children's Home of Mombasa and a title deed was issued to that effect.

5. I have considered the Application and the response thereto. I have equally considered the submissions made before me and the authorities cited by the Learned Counsels representing the parties herein.

6. As Spry V.P. stated in the celebrated case of *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 show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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, the question then to ask is whether the Plaintiff has made out a prima facie case with a probability of success. In *Mrao –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, the Court of Appeal explained that:-

**“...a prima facie case in a civil application 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. From the material placed before me, it is evident that the Plaintiff had for some time been in occupation of the whole or part of the suit property. This fact is acknowledged by the 1<sup>st</sup> Defendant at paragraph 7 of the Replying Affidavit where she states:-

**“7. THAT as a matter of fact having noticed the Plaintiff's encroachment on my land, the suit property herein, I took initiative to file a criminal suit against him after he refused to vacate my property.”**

9. It is also evident that as at the time of filing this suit, the Plaintiff was not in occupation of the suit premises, the same having been taken over by the 1<sup>st</sup> Defendant. In a letter addressed to the Director of Public Prosecutions attached to his supporting affidavit marked SSB 12 and dated 26<sup>th</sup> April 2017, the Plaintiff states in the relevant part thus:-

**“Sir, on the 27/3/2017, I was arrested at around 1.00 p.m. by CID Officer from Mtwapa Base**

**without a warrant of arrest and was taken to Court and charged again under CR. 377/17-Shanzu Law Court and stayed at Shimo la Tewa Prison upto 7/4/2017 after paying bond of Kshs 200,000/= after using a Log Book.**

**That while I was in Court the one by the (name) Joyce Zawadi Kea organised some youth from Mtwapa and demolished my two bedroomed house and fence at the shamba with a Court Order.**

**The matter was reported at Kijipwa Police Station by my children but the police never visited the scene up-to-date. The one Joyce is constructing a house in the disputed land.”**

10. From the material placed before me, it is equally clear that the 1<sup>st</sup> Defendant is the registered proprietor of the suit property with a title having been issued in her name on 21<sup>st</sup> December 1995. This must be the basis upon which she filed the criminal complaint and somehow had the Plaintiff removed from the land. It is not very clear why the 1<sup>st</sup> Defendant having acquired the title to the land much earlier never occupied the same and/or how the Plaintiff came to build his house thereon without her taking notice.

11. The Plaintiff has cast a number of aspersions as to the validity of the title held by the 1<sup>st</sup> Defendant. At the end of it all, it may be important for this Court to determine how come the Settlement Fund Trustees was able to allocate the land to the Plaintiff in 2008 when title had already been issued to the 1<sup>st</sup> Defendant in 1995. *As Munyao J. stated in Daudi Kiptugen vs Commissioner of Lands & 4 Others(2015) eKLR:-*

**“It is not enough that one issues a Lease or a Certificate of Lease and asserts that he has a good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

12. As it were however, that sort of an inquiry to determine the validity of the title can only be made at the trial of the main suit. As things stand now, the 2<sup>nd</sup> Defendant who is the custodian of the land records has vouched for the 1<sup>st</sup> Defendant’s title. Indeed from the 2<sup>nd</sup> Defendant’s record, it would appear that on 22<sup>nd</sup> March 2017, shortly before this suit was filed, the property was transferred a third party-Mount Zion Children’s Home of Mombasa who are not a party herein.”

13. For now and despite the aspersions cast upon the title by the Plaintiff, this Courts is otherwise bound to recognize title as prima facie evidence of proprietorship of the land in dispute. Section 26(1) of the Land Registration Act in this regard states that:-

**“The Certificate of Title issued by the Registrar upon registration....shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except-**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

14. While the Plaintiff has made allegations of fraudulent acquisition of the title, no evidence has so far been placed before me in support of that fact.

15. Accordingly and in light of the fact that a third party who is not a party to these proceedings appears to have acquired interest in the suit property, I am unable and decline to grant the orders sought in Prayers Nos 3 and 4 of the Plaintiff's application.

16. I did not however hear the 2<sup>nd</sup> Defendant explaining why the documents sought at prayer No. 5 of the application cannot be granted. The 2<sup>nd</sup> Defendant is accordingly ordered to supply the documents as prayed.

17. The costs of this application shall abide the outcome of the suit.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of February, 2018.**

**J.O. OLOLA**

**JUDGE**