



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 77 OF 2017

GEORGE DZOMBO KATANA

DAVISON DZOMBO KATANA.....PLAINTIFFS

VERSUS

SAMUEL DZOMBO CHIVATSI.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion Application dated 5th April 2017. The two Plaintiffs-George Dzombo Katana and Davison Dzombo Katana pray for injunctive orders to restrain the Defendant Samuel Dzombo Chivatsi from constructing, excavating, clearing, farming, transferring, conveying, selling and/or in any manner, interfering with all that property known as Kilifi/Kinungu'na/39 pending the hearing and determination of this suit.

2. The said Application is supported by the annexed affidavit of George Dzombo Katana sworn on 5th April 2017 and is based on a number of grounds listed thereon as follows:-

- i) That the Plaintiffs are the owners of one half of the property known as Kilifi/Kinung'una/39.***
- ii) That the Plaintiffs presented a Grant as well as the Certificate of Confirmation of Grant to the Registrar of Lands Kilifi on 29th July 2015 where after they were registered as one half share proprietors while the Defendant owned the other half.***
- iii) That thereafter the Defendant with some hired goons armed with pangas proceeded to the suit property which the Plaintiffs had prepared for farming and destroyed the fence.***
- iv) That the Defendant has totally disregarded the law by threatening to corrupt the entire justice system in the event that he is sued and has totally blocked the Plaintiffs from accessing the suit property in contravention of the Plaintiffs rights.***

3. In a Replying Affidavit sworn on 11th May 2017, Samuel Dzombo Chivatsi responds that the application as drawn and filed is frivolous, vexatious and otherwise an abuse of the Court Process. The Defendant concedes that he is an uncle to the Plaintiffs by virtue of his being a brother to their father. It is his case that originally their family land measured about 22 acres following a survey conducted in 1979.

4. The Defendant avers that the family land was originally registered as Kilifi/Kinung'una/39 and they proceeded to share the same with the Plaintiff's father whereupon each one of them got 11 acres. Thereafter, the Plaintiffs' father Dzombo Katana Chivatsi sold his share of land to one Fred Mwai on or about 23rd March 1981. The Defendant avers that upon the sale, the property known as Kilifi/Kinung'una/39 was sub-divided into two equal portions whereupon the parcel taken up by Fred Mwai was registered as Kilifi/Kinung'una/15 while the Defendant retained the original number.

5. The Defendant further avers that later on he proceeded to sub-divide his parcel of land Kilifi/Kinung'una/39 into two portions which were registered as Kilifi/Kinung'una/315 and 316. He sold the portion No. 315 to one Rico Mwalenga but retained Block 316 where he has built his home. It is his further case that at some point in time, he realised that the Plaintiffs had fraudulently caused their names to be included in his title No. Kilifi/Kinung'una/316. It is his case that the Plaintiffs have no claim over his land.

6. I have considered the Application and the response thereto. I have equally taken into account the written submissions filed herein by the respective Learned Advocates by way of canvassing their respecting positions.

7. As Spry V.P. stated in the celebrated case of *Giella versus 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 on application on the balance of convenience.”

8. Arising from the conditions set out above, this Court must first conduct an inquiry as to whether or not the Plaintiffs have made out a prima facie case with a probability of success. In *Mrao-versus First American Bank of Kenya Ltd & 2 Others (2003)KLR 125*, the Court of Appeal stated as follows:-

“.....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.”

9. In the matter before me, the Plaintiffs aver that their father and the Defendant were initially registered as equal owners of LR NO. Kilifi/Kinung'una/39 measuring approximately 4.29 Hectares and situated in Kaloleni. It is the Plaintiff's case that following the demise of their father, they filed Succession Cause No. 52 of 2011 at the Kilifi Senior Resident Magistrate's Court where they obtained a Grant for the Administration of their father's estate. It is equally their case that sometime in 2014, the Defendant in collusion with one of their uncles by the name Simba Dzombo Chivatsi removed their deceased father's name from the register and replaced it with that of the said Simba Dzombo Chivatsi.

10. It is further the Plaintiff's case that following the removal of their father's name from the register, the two proceeded to fraudulently have the suit property sub-divided into two portions being Numbers Kilifi/Kinung'una/315 and Kilifi/Kinung'una/316. It is further their case that thereafter, the Defendant transferred Kilifi/Kinung'una/315 to one Alfred Riko Mwalenga on 10th June 2014. It is the Plaintiffs' position that these acts have deprived them of their entitlement to the suit property hence this suit and their prayer for injunction.

11. On his part, the Defendant does not deny that he caused the land to be sub-divided into the portions now registered as 315 and 316. In his defence however, he asserts that the Plaintiffs' father had long sold his portion of land measuring 11 acres to a third party and he therefore had no entitlement to the portion of Kilifi/Kinung'una/39 which had remained.

12. I have looked at the material placed before me. It is apparent that at some point in time, the parcel of land referred to as Kilifi/Kinung'una/39 was sub-divided into Kilifi/Kinung'una/315 and Kilifi/Kinung'una/316. The Plaintiffs accuse the Defendant and one Simba Dzombo Chivatsi of colluding to sub-divide the land and thereafter causing portion No. 315 to be transferred to one Alfred Riko Mwalenga.

13. A perusal of the evidence before me reveals that the said Simba Dzombo Chivatsi who is said to have colluded with the Defendant is actually a brother to the Defendant and hence an uncle to the Plaintiffs. It is not clear to me why the Plaintiffs chose to only sue the Defendant when the said Simba Dzombo Chivatsi also had some interest in the land Kilifi/Kinung'una/39 and purportedly played a role in the disposal thereof. It is also not clear to me why the Plaintiffs knowing that the land had been sub-divided and a portion thereof was transferred to one Alfred Riko Mwallenga did not sue or enjoin the said Alfred Riko Mwalenga who is likely to be affected by any orders issued by this Court.

14. As it were, the Injunction sought herein refers to the parcel of land described as Kilifi/Kinung'una/39. From a copy of the Green Card attached to the Plaintiff's Supporting Affidavit and marked D5, it would appear that the said Title was closed on sub-division on 12th May 2014 after which two new titles named therein as Nos. 315 and 316 were created. That being the case, this Court is being invited to grant an injunction in regard to a title that no longer is in existence. Granting such orders would amount to this Court acting in vain and this Court will avoid going that route.

15. In any event, it is clear from the material placed before me that it is the Defendant and not the Plaintiffs who reside on the disputed land. The Defendant has annexed various documents including a Sale Agreement showing that the Plaintiffs father the said Dzombo Katana Chivatsi sold his portion of LR No. Kilifi/Kinung'una/39 to one Fred Mwai on 23rd March 1981. The Plaintiffs have not controverted this assertion. The Grant of Letters of Administration issued to the Plaintiffs indicates that the said Dzombo Katana Chivatsi passed away on 12th August 1987 and it is not clear why the Plaintiffs never pursued their interest in the disputed land until some 25 years after his death.

16. As it were, I am not satisfied that the Plaintiffs rights over the suitland, if any, have been threatened with imminent invasion as to require urgent intervention by this Court prior to the hearing and determination of this matter. As the Court of Appeal stated in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR*:

“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.....”

17. Consequently I do not find merit in the application dated 5th April 2017. The same is dismissed with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE