



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 149 OF 2016

PILI ATHMAN SHEHE..... PLAINTIFF/APPLICANT

-VS-

1. AYUB CHAI LEWA

2. OMAR KACHOGO

3. THE DISTRICT LAND & ADJUDICATION OFFICER

4. THE CHIEF LAND REGISTRAR, MOMBASA

5. THE HON. ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion dated 3rd June 2016 brought under Section 1A, 1B, 3A, 63(e) of the Civil Procedure Act, Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 134 of the Land Act, the Plaintiff/Applicant is seeking the following orders:

1. Spent

2. Spent

3. That this Honourable Court be pleased to restrain the Respondents herein jointly and severally, their servants and/or agents from trespassing, invading, subdividing, disposing, interfering or in any ways dealing with the Applicant's parcel of land being plot MOMBASA/ZIWA LA NGOMBE SCHEME/329 pending hearing and determination of this suit.

4. That the 4th Respondent herein be restrained from issuing Title to the 1st and 2nd Respondents herein or any other persons with respect to PLOT MOMBASA/ZIWA LA NGOMBE SCHEME/329.

5. That this Honourable Court be pleased to revoke the title issued in the names of the 1st and 2nd Respondents herein.

6. THAT costs of this Application be provided for.

7. THAT this Honourable Court be pleased to make any such order it may deem fit to grant in the circumstances.

2. The Application is based on the grounds on the face of the motion and supported by the affidavit of Pili Athman See, the Applicant sworn on 7th June 2016 and further affidavit sworn on 16th November 2016. It is the Applicant's case that she is the registered owner of **PLOT MOMBASA/ZIWA LA NGOMBE SCHEME/329** having been allocated the same through a verification process by the scheme's committee and the District Land Adjudication and Settlement Officer and a title Deed issued on 18th August 2013. The Applicant has attached a copy of the said title deed marked "PAS1". The Plaintiff avers that shortly thereafter, she received a letter dated 26th November 2013 from the 4th Respondent asking the Plaintiff to surrender the said Title Deed under unclear circumstances and that the letter was copied to the 1st and 2nd Respondents herein. The Applicant contends that she followed up the issue with the District Land Adjudication Officer and the committee and through a letter dated 20th July 2015, the **Committee of ZIWA LA NGOMBE SETTLEMENT SCHEME** resolved that the plot belonged to the Applicant, the same having been duly allocated to her. It is the Applicant's contention that the 1st and 2nd Respondents have built some structures on the suit property and are in the process of disposing it off to third parties in a bid to dispose the

Applicant of the plot. She deposes that unless the respondents are restrained by an order of the Court, the Applicant stands to suffer great prejudice and loss as she will lose the plot which had been duly allocated to her. The Applicant further deposes that it is in the interest of justice that the application is allowed and any other title issued in the names of the 1st and 2nd Respondents and/or their agents be revoked.

3. The Application is opposed by the Respondents with the 1st Respondent filing a Replying Affidavit sworn by himself on 13th September 2016 in which he deposes that in 1985, the 1st Respondent's mother Winnie Kihenyu Lewa purchased an unsurveyed parcel of land measuring one(1) acre from the 2nd Respondent at Ziwa La Ngombe Area in Bombolulu where the 1st Respondent states he lived with his family. The 1st Respondent deposes that in 1998, the Government embarked on adjudication and registration of the land within that area which was designated as Ziwa La Ngombe Adjudication Scheme and that he was registered and allocated the Suit Property. The 1st Respondent further deposes that it later emerged during verification that his **plot No.329** overlapped with the 2nd Defendant's **Plot No.328** thereby forcing them to be registered as joint owners. He states that sometime in 2012 he learnt of a scheme by the new committee of the scheme to interfere with the original list of bona fide beneficiaries of the plots and irregularly dispossessed him of his plot. That on 14th February 2013, the 1st Respondent through his advocate wrote a protest letter to the 3rd Respondent protesting against attempts by the Plaintiff to irregularly acquire the 1st Respondent's plot and that on 5th September 2013, the 3rd Respondent summoned all the parties to a meeting on 10th September 2013 but the Plaintiff failed to attend the meeting. The 1st Respondent states that following a meeting held on 17th September 2013, the 3rd Defendant resolved to visit the site on 24th September 2013. That the committee together with the 3rd Defendant visited the site and pointed out the boundaries of **plot Nos.328 and 329** and recommended that the suit plot be allocated to the 1st Respondent and the 2nd Respondent. It is the 1st Respondent's contention that on 13th October 2013 the 3rd Respondent rightly advised the 4th Respondent to issue the 1st and 2nd Respondents with a title and on 26th November 2013, the 4th Respondent recalled the Plaintiff's Title in line with the recommendation made. The 1st Respondent further deposes that they were subsequently issued with a Title Deed in their joint names pursuant to the recommendations by the 4th Defendant's officers. According to the 1st Respondent, the Plaintiff was erroneously and irregularly issued with the Title to the suit property pursuant to the illegal minutes of 20th July 2015 which purported to overturn all the previous decisions by the 3rd and 4th Defendants, and that the allocation of the suit property to the Plaintiff was a fraudulent scheme perpetuated by one Juko Alex Tabulo, a committee member who is a husband to the Plaintiff herein. He avers that the Plaintiff has never occupied the suit property and has never been a resident of Ziwa La Ngombe Settlement Scheme and could not have been genuinely or regularly allocated any plot in the scheme.

4. The 2nd Respondent filed a Replying Affidavit sworn on 20th September 2016 and filed in Court on 22nd September 2016 whose contents are more or less similar to that of the 1st Respondent.

5. The 3rd, 4th and 5th Respondents filed grounds of opposition dated 15th June 2016 on the following grounds:

- 1. THAT the Application is misconceived, frivolous, vexatious and an abuse of the process of the Court.**
- 2. The Applicant is the author of his own misfortune.**
- 3. The applicant is guilty of laches.**
- 4. That the orders sought by the applicant are unattainable**
- 5. For the foregoing reasons, the respondents pray that the applicant's Application be dismissed with costs.**
- 6. Such other and further reasons to be adduced at the hearing thereof.**

6. The Plaintiff filed written submissions on 8th December 2017, the 1st Defendant filed his on 22nd January 2018 and the 2nd Defendant on 18th November 2016, all of which I have read and need not reproduce their contents herein.

7. I have considered the Application, the affidavits in support and against and the rival submissions made as well as the authorities cited. The principles upon which an interlocutory Injunction may be granted are well settled. One has to establish a *prima facie* case with a probability of success and an interlocutory Injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the Court will decide the matter on a balance of convenience.

8. It is not in dispute that **TITLE NUMBER MOMBASA/ZIWA LA NGOMBE SCHEME/329** was registered in the name of Pili Athman Shee, the Plaintiff and a Title Deed dated 18th August 2013 issued in her favour. It is also not in dispute that vide a letter dated 26th November 2013, the 4th Respondent following complaints from the 1st, 2nd and 3rd Defendants wrote to the Plaintiff requesting the Plaintiff to surrender the title deed that was issued to her. It is the Defendants contention that the Plaintiff was erroneously and irregularly allocated and registered as the owner of the suit property and that the same rightly belong to the 1st and 2nd Defendants. The Plaintiff however maintains that the allocation and subsequent registration of the suit property in her name was pursuant to a lawful process.

9. I have perused the documents on record. The title deed dated 18th August 2013 for **TITLE NUMBER MOMBASA/ZIWA LA NGOMBE SCHEME/329** in the name of Pili Athman Shee shows the size of the land as approximately 0.015 hectares. The letter of offer dated 15th February 2002 attached to the 1st Defendant's Replying Affidavit refers to **Plot No.434** of approximately 0.02 hectares while the letter of offer also dated 15th February 2002 attached to the 2nd Defendant's Replying Affidavit is for **Plot No.435** of approximately 0.02 hectares. Whereas the 1st and 2nd Defendants allege that the title that was issued to the Plaintiff is for their combined plots, it is clear that the sizes as per the said documents are not the same. Although the 1st and 2nd Defendants have deposed that they have been issued with title

deed in their joint names pursuant to the recommendation by the 4th Defendant, the alleged title deed has not been attached to any of the defendant's affidavits. However, I have seen a copy of the title deed dated 15th October 2015 for **TITLE NUMBER MOMBASA/ZIWA LA NGOMBE SCHEME/329** in the name of Umar Karisa Ngoa and Ayub Chai Lewa attached to the 2nd Defendant's affidavit sworn on 7th September 2016 in support of the notice of motion dated 7th September 2016. Whereas the combined area of the 1st and 2nd Defendants plots as per the letters of offer dated 15th February 2002 is 0.04 hectares, the approximate area in the title deed in the joint names is 0.0150 hectares.

10. It is apparent that both the Plaintiff and the 1st and 2nd defendants claim the same land and both have title deeds in their favour. Of course, the 4th Defendant had by the letter dated 26th November 2013 written to the Plaintiff requesting the Plaintiff to surrender the title deed that was issued to her. The said letter however does not give the reason for the surrender save that it was pursuant to a letter of complaint from the District Land Adjudication and settlement officer, the 3rd Defendant, in respect of the suit land. Both parties have attached rival minutes of meetings recommending the plot to either of the parties. Whereas it should be noted that it is difficult at this stage for the Court to ascertain the correct position from the disputed affidavits and documents, it is my belief that that does not preclude the Court from making a determination on the Application before Court.

11. The crucial issue for determination is whether the Plaintiff should be granted the orders sought given the circumstances of this case. To my mind, the Injunction sought is for purposes of maintaining the respective parties' positions in the suit properties until the dispute is determined. Courts have granted an Injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory Injunction and after hearing of the case, find that a greater injustice has been occasioned. See **Suleiman –v- Amboseli Resort Ltd (2004) KLR 589**. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. The Plaintiff has a title deed in her favour. On the other hand, the 1st and 2nd Defendants are also registered as proprietors of the suit property. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

12. In the Application, the Plaintiff is also seeking an order restraining the 4th Respondent from issuing Title to the 1st and 2nd Respondents. From the evidence on record it would appear that the said title has been issued and granting the order would be an exercise in futility. The Court does not issue orders in vain. The Plaintiff is also seeking an order to revoke the title issued in the name of the 1st and 2nd Respondents. This order is in the nature of a Mandatory Injunction. The law as regards the principles to be applied when considering whether or not to grant an interlocutory Mandatory Injunction is different from the principles set out in the **Giella – V – Cassman Brown** case for the standard of approach is higher.

13. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) I ALL 901**, it was stated.

“A Mandatory Injunction ought not to be granted on an interlocutory Application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the Injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the Plaintiff. moreover, before granting a Mandatory Injunction the Court had to feel a high sense of assurance that at the trial it would appear that the Injunction had rightly been granted that being a different and higher standard than required for a prohibitory Injunction.”

In the case of **Lucy Wangui Gachara –v- Muindi Okemba Lore (2015)eKLR**, the Court of Appeal stated:

“It has been stated time and again that although the Court has jurisdiction to grant a Mandatory Injunction at the interlocutory stage, such Injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the Court approaches the matter is informed by the fact that the grant of a Mandatory Injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the Court, after hearing the suit, ultimately decide that there was no basis for the Mandatory Injunction at the interlocutory stage.”

14. In this case, both parties hold titles to the suit property. It will have to be decided at the hearing which of the titles is genuine and which one should be revoked. Having carefully, considered the material before me, in my humble view a case of a Mandatory Injunction has not been made out. No special circumstances have been shown by the applicant and the case is not one that I can consider a clear one that can be decided at once or in a summary manner. I am therefore not satisfied that prayer 5 of the application can be granted and I decline to grant the same.

15. I am however satisfied that the facts as presented in this case demonstrate that the applicant has established a *prima facie* case and the balance of convenience tilts in her favour for the prevailing circumstances to be maintained. The applicant has reason to seek to preserve the suit property from changing hands so that this case is not rendered an academic exercise.

16. Accordingly, I do grant the Application in terms of prayer 3 thereof to the extent that the Respondents are restrained from alienating, disposing of or developing the suit land pending hearing and determination of this suit.

Each party to bear their respective costs of the Application.

Delivered, signed and dated at Mombasa this 14th March, 2018.

C. YANO

JUDGE