



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 28 OF 2017

BENJA MZOMBA NYAWA.....1ST PLAINTIFF

ATHMAN BORA.....2ND PLAINTIFF

MUTSIMBA TSUMA.....3RD PLAINTIFF

-VS-

NYAWAS MANGALE NGOME.....1ST DEFENDANT

MDIGO NYAWA.....2ND DEFENDANT

RULING

1. The Application under consideration is the Notice of Motion dated 8th February 2017 in which the Plaintiffs/Applicants are seeking the following orders:

1. THAT this application be certified as extremely urgent and do proceed ex-parte in the first instance.

2. THAT pending the inter-parties hearing of this Application the Defendants, their servants and/or agents or otherwise be restrained from trespassing, alienating, disposing, selling, constructing structures, misusing, damaging, destroying or in any manner dealing with the 8 acre piece of land situated at Lunga Lunga.

3. THAT pending hearing of Main Suit the Defendants, their servants and/or agents or otherwise be restrained from trespassing, alienating, disposing, selling, constructing structures, misusing, damaging, destroying or in any manner dealing with the 8 acre piece of land situated at Lunga Lunga.

4. THAT the OCS Lunga Lunga Police Station do give security in effecting this order.

5. THAT costs of this Application be provided for.

2. The Application is based on the grounds on the face of the motion and supported by the Affidavit of Benja Mzomba Nyawa, the 1st Plaintiff sworn on 8th February 2017. The 1st Plaintiff avers that he is the legal owner of the undermacated 8 acre Suit Property being ancestral land inherited from his father,

Mzomba Nyawa (deceased) and that the Defendants who are his relatives are trying to grab the same and are unlawfully trespassing onto the portion of the land and are interfering with the 2nd and 3rd Plaintiffs who have leased a portion from the 1st Plaintiff. He avers that the Defendants have with no colour of right attempted to harvest coconut, makuti and mangoes from the land and are planning to sell off the 8 acres to unsuspecting members of the public.

3. The Application is opposed by the Defendants with the 2nd Defendant filing a Replying Affidavit sworn by himself on 3rd March 2017. The 2nd Defendant deposed that the (1st) Plaintiff is his son to his late brother, Mudzomba Nyawa Mangale (deceased.) He avers that the 1st Defendant is his father and is the bona fide owner of the Suit Property. According to the 2nd Defendant, before his demise the 1st Plaintiff's father and the Defendants' father held a family meeting and subdivided his land equally amongst his three sons, namely: Mdigo Nyawa Mangale, Mangale Nyawa Mangale (deceased) and the 1st Plaintiff's father Mudzomba Nyawa Mangale (deceased). The 2nd Defendant states that his father reserved about 8 acres of his land for his personal use. It is the Defendant's contention that the 1st Plaintiff should have consulted the family if he needed financial assistance instead of leasing the property to the 2nd and 3rd Plaintiffs. The Defendants deny that the 1st Plaintiff is the *bona fide* owner of the property and that the property is the only source of livelihood of the 1st Defendant who stands to suffer great loss if the orders sought are granted.

4. Both parties filed Written Submissions which I have read and I need not reproduce their contents herein.

5. I have considered the Application, the affidavit in support and against and the rival submissions made. The principles to be applied when considering an application for Temporary Injunctions are well settled. In the famous case of **Giella –V- Cassman Brown & Co (1973) EA 358**, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage; and if the Court is in doubt, it will decide the matter on balance of convenience. Both the Plaintiffs and the Defendants are in agreement that the Suit Property is undermacated ancestral land. There is no dispute that the 1st Plaintiff and the Defendants are relatives and both are claiming the Suit Land. The Plaintiffs have, in my view failed to show that they have a better right in the Suit Property than the Defendants. From the evidence on record, both parties have lived in the Suit Land for several years, save for the 2nd and 3rd Plaintiffs who as the evidence show have leased the same from the 1st Plaintiff. If the Court were inclined to grant the orders sought, it would mean that the Defendants are restrained from what they also regard as their ancestral land. This may result in hardship on the part of the Defendants. In my view, it is only after a proper demarcation has been carried out and each person shown his rightful portion that individual rights will be clearly ascertained.

6. Having considered the Plaintiffs' Application, I am not satisfied on the material before me that the Plaintiffs' have established a *prima facie* case against the Defendants with a probability of success. In any event the Plaintiffs have not shown that damages will not adequately compensate them in the event of their case succeeding in the end. I am also of the view that the balance of convenience tilts in favour of the Defendants who are and have been in occupation of the Suit Property and utilizing it with the 1st Plaintiff for several years.

7. The upshot of the foregoing is that the Plaintiffs have failed to satisfy the conditions for granting the orders sought. In the circumstances I find no merit in the Notice of Motion dated 8th February 2017 and the same is hereby dismissed. Each party to bear their costs.

8. I have also considered the size of the subject matter herein. It is stated to be about 8 acres and from the evidence on record, the same was leased out for Kshs.25,000 and 10 goats. I am of the view that this is a matter that falls within the jurisdiction of the Magistrates Court. Accordingly I *suo moto* transfer this matter forthwith to the Chief Magistrates Court, Mombasa for trial and determination.

Delivered, signed and dated at Mombasa this 1st March, 2018.

C. YANO

JUDGE