REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 203 OF 2017

IN THE MATTER OF PROTECTION OF RIGHT TO

PROPERTY-ARTICLE 40 OF THE CONSTITUION OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT

AND

IN THE MATTER OF DEPRIVATION OF LAND PARCEL NO 124 AND

125 SITUATE AT MAJIVUNI KILIFI COUNTY, BY AN ACT OTHER

THAN COMPULSORY ACQUISITION OF LAND

AND

IN THE MATTER OF ENFORCEMENT OF THE CONSTITUION OF KENYA

AND

IN THE MATTER OF FAIR

ADMINISTRATION OF JUSTICE

KUPATA NGARE.....1ST PLAINTIFF/RESPONDENT

CENTRAL MUUNGANO SELF HELP GROUP

suing through its officials **BENARD KAINGU**

TAURA (CHAIRPERSON) SHIDA TAURA

MAHIN (TREASURER)HARRISON MANYESO

KAVOI (SECRETARY).....2ND PLAINTIFF/RESPONDENT

VERSUS

ABDUL HUSSEIN HAMZAA

ALI DOSSAJEE.....1ST DEFENDANT/APPLICANT

ASGARALI HUSEINBHAI.....2ND DEFENDANT/APPLICANT

HABIB BASHIRALI.....3RD DEFENDANT/APPLICANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT/APPLICANT

CHIEF LANDS REGISTRAR.....5TH DEFENDANT/APPLICANT

REGISTRAR OF TITLES.....6TH DEFENDANT/APPLICANT

DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER.....7TH DEFENDANT/APPLICANT

HONOURABLE ATTORNEY GENERAL..8TH DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion application dated 23rd October 2017, the 1st, 2nd and 3rd Defendants herein pray for an order of temporary injunction to issue restraining the Plaintiffs/Respondents from trespassing on or interfering with Land Portion Nos 124 and 125 situated at Majivuni Village in Mtangani Area. The Defendants further seeks orders barring the Plaintiffs from digging holes, cutting down trees, constructing structures and/or in any manner dealing with the said Parcels of land in a manner that is adverse to the interests of the Defendants pending the hearing and determination of the Defendant's Counterclaim.

2. The application is based on the Defendant's contention that they are the rightful and legal owners of the said portions of land respectively measuring 23.64 acres (Portion 124) and 10.47 acres (Portion 125). It is the Defendant's case that the Plaintiffs herein are imposters, strangers and trespassers who have no legal right to the parcels of land.

3. According to the 1st, 2nd and 3rd Defendants, the two portions of land originally belonged to their grandfather one Gulamhussein who later sold the same to the Defendant's uncle named Kayum Ali Abdulhussein. The said Kayum Ali Abdulhussein later sold the land to the Defendants vide an indenture dated 9th September 1998(for Kshs 300,000/- Portion 124) and another dated the same date for Kshs 150,000/- for the Portion No. 125. At the time of the said sale the 1st Plaintiff was a servant of the said Kayum and was squatting on Portion No. 125.

4. The Defendants further contend that after they purchased the land, they sympathized with the 1st Plaintiff's situation and gave him a plot measuring 1 ½ acres carved out of Portion No. 125 to utilize with his family. In addition, the Defendants aver that they 'compensated' the 1st Plaintiff with Kshs 40,000/- in respect of the fruit trees the 1st Plaintiff had grown thereon as well as some wind and wattle houses that had been constructed thereon.

5. The Defendants therefore accuse the 1st Plaintiff of colluding with the other Plaintiffs to illegally lay a claim to the subject parcel of land. They aver that when this Court declined to grant the Plaintiffs an order of injunction after they filed this suit, the Plaintiffs maliciously moved to the ground and started clearing bushes digging holes and laying foundation for the construction of temporary and permanent structures in an attempt to defeat justice. Accordingly they urge this Court to intervene and grant the restraining orders sought herein.

6. In two Replying Affidavits sworn separately on 1st November 2017 by Kupata Ngare (the 1st Plaintiff) and Benard Kaingu Taura (2nd Plaintiff) on behalf of Central Mungano Self Help Group and filed herein on the same day, the Plaintiffs are opposed to the grant of the orders sought.

7. In this regard the 1st Plaintiff insists that he is the lawful proprietor of the suit property. He accuses the 1st, 2nd and 3rd Defendants of mischievously falsifying documents to have themselves registered as owners of the property in question.

8. On the other hand the 2nd Plaintiff contends that the Defendant's application is fatally defective as the Defendants have not annexed any evidence in support of their contention. The 2nd Plaintiff further avers that this Court is being asked to act on mere hearsay and that the granting of the Orders sought herein would amount to an eviction of the Plaintiffs and several other residents currently living on the suit property. They deny selling any portion of the land to any 3rd Parties as contended by the Defendants and urge the Court to dismiss the application.

9. The application was argued orally before me on 2nd November 2017. I have considered the application together with the affidavits filed in support thereof and in response thereto. I have taken into consideration the oral submissions made before me by the Learned Advocates for the Parties.

10. There is no dispute that the 1st, 2nd and 3rd Defendants/Applicants are the registered holders of the title to the subject property. The Plaintiffs however contend that their rights over the land are derived from their lineage of ancestry as the land in question was initially allegedly occupied and settled by their ancestors. This is the basis upon which they seek the cancellation and annulment of the title deed issued to the Applicants for the two Portions of land.

11. I note that in their response to the counterclaim, the Plaintiffs claim that the Applicants have since abandoned the land and that they are entitled thereto by virtue of adverse possession. While not denying the existence of the Agreement between the 1st Plaintiff and Applicants, they contend that the said Agreement was a mere proposal which was never enforced.

12. From the material placed before me, it is evident that the Plaintiffs' have no title to the land which is the subject matter of this dispute. I note however that it is also not in dispute that the 1st Plaintiff in particular has been living on the said land since the Applicants acquired title to the same in 1998. The Applicants themselves concede that, on humanitarian grounds they gave the 1st Plaintiff 1 ½ acres to utilize with his family.

13. In my view, a grant of the Orders sought herein would lead to the eviction of the Plaintiffs from the land which they have apparently occupied over a period of time, before the dispute is heard on its merits. Such an Order could also lead to the eviction of the 1st Plaintiff in particular from land which the Applicants had in their own admission allowed him to occupy with his family and which they consider their home since 1998.

14. Thus while I find the Plaintiffs claim to the land contradictory in itself, I think the balance of convenience lies in favour of maintaining the status quo until such a time that this Court is able to hear both parties in the dispute and to interrogate the reasons for the apparent contradictions on the Plaintiffs' claim to the suitland.

15. In the interest of justice therefore, I hereby order that the status quo obtaining as of today be maintained pending an expeditious disposal of this matter. Accordingly, while the Plaintiffs may remain on the suit land and continue using the same to eke out a living as before, they are hereby expressly barred from any further digging of holes, cutting down trees, constructing permanent structures and/or in any manner adversely dealing with the said parcels of land being Portion Nos. 124 and 125 situated at Majivuni Village in Mtangani Area of Malindi, pending the hearing and determination of the dispute herein.

16. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE