



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 367 OF 2017

1. CELESTINE ANN KING
2. CELESTINE ANNA VON MOLTKE
3. MICHAELA NINA CARMICHEAL
4. SUSAN GERELDINE KNOTT
5. ANTHONY BASILMITTONPLAINTIFFS

VERSUS

1. SAID HASSAN MWATSUMIRO
2. MSHENGA VUYAA RUGA
3. FATUMA O. ZONGA
4. OMAR H. KITENGELEE
5. MOHAMED HASSAN VYONI
6. DISTRICT LAND REGISTRAR, KWALE.....DEFENDANTS

RULING

1. This is the Notice of Motion dated 12th October, 2017. It is brought under Article 40 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, (Chapter 21 Laws of Kenya) Order 40 Rule 1 and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders;

a) Spent.

b) Spent.

c) That upon hearing interpartes, an order be issued restraining the Defendants, their agents, employees and/or servants from selling, transferring, disposing off and/or interfering in any other manner whatsoever with the parcel of land to wit Title Number Kwale/Diani Beach/Block 248 (being the remainder of parcel of land to wit Title Number Kwale/Diani Beach Block/76) pending the hearing and determination of the suit herein.

d) That costs of this application be provided for.

3. The grounds are of the face of the application and are listed as in paragraphs 1-14. I do not need to reproduce them here.

4. The application is supported by the affidavit of Celestine Ann King, the 1st Plaintiff/Applicant herein sworn on the 12th October, 2017.
5. The application is opposed. There is a replying affidavit sworn by Mshenga Vuyaa Ruga, the 2nd Defendant/Respondent sworn on the 3rd November, 2017.
6. On the 20th November, 2017, it was agreed between the parties that the Notice of Motion be disposed of by way of written submissions. The written submissions were filed and a date for highlighting the same was given.

7. THE PLAINTIFFS'/APPLICANTS' SUBMISSIONS

Sometimes in 1971 a portion of the suit property then belonging to Nina Mitton was compulsorily acquired by the Government of Kenya for the Diani Tourist Road and the Registry index map duly amended accordingly. The said acquisition resulted in new land reference numbers and the suit property now became parcel number 248 while the road became number 249. The said Nina Mitton passed on on 3rd June, 2000 and Julian David Knott and Peter Doenhoff who were executors of Mrs. Nina Mitton's will applied for grant of probate over the estate. The same was confirmed and issued on 4th December, 2000.

8. On 3rd August, 2001, the suit property was transferred to the 1st, 2nd, 3rd, 4th and 5th Plaintiffs by virtue of being beneficiaries to the estate of the deceased Nina Mitton. They were issued with a certificate of lease on 22nd August, 2001.

They have been in quiet possession, enjoyment and occupation of the suit property for a period of 16 years. They have been paying land rent to the 6th Defendant and land rates to the County Government of Kwale.

Mrs. Nina Mitton was never issued with a certificate of lease for Plot Number 248 being the remainder of Plot Title Number Kwale/Diani Beach Block/76.

9. The 1st, 2nd, 3rd, 4th and 5th Defendants were purportedly issued with a certificate of lease for Title Number Kwale/Diani Beach Block/248 on 4th October, 2006 vide a letter of allotment of 4th July, 2001.

It is further the Plaintiffs/Applicants submissions that their case has met the threshold for grant of temporary injunctions. The remainder of Kwale/Diani Beach Block/76 was transferred to the Plaintiffs/Applicants through succession on 4th August, 2001 and a certificate of lease issued in 2001.

The certificate of lease issued to the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents on 4th October, 2006 was irregular, fraudulent, null and void. They have relied on the cases of;

- 1) ***Giella –versus- Cassman Brown And Co. Limited (1973) EA 358.***
- 2) ***Mrao Limited –versus- First American Bank Limited (2003) KLR 125.***
- 3) ***National Bank of Kenya Limited And 2 Others –versus- Sam Con Limited (2003) KLR 462 where the Court adopted with approval the position in Abel Salim And Others –versus- Okongo And Others (1976) KLR 42.***

10. An official search on Title Number Kwale/Diani Beach Block/76 confirms the Plaintiffs/Applicants are still the bona fide registered owners of the same. They have also relied on Sections 26, 27, 28, and 107 of the Land Registration Act No. 3 of 2012. The certificate of lease issued to the Plaintiffs supersedes whatever interest and/or claim by the 1st, 2nd, 3rd, 4th and 5th Defendants as their title was irregularly, illegally, unlawfully and/or fraudulently issued on 4th October, 2016.

11. The Plaintiffs right to own property is enshrined in Article 40 of the Constitution of Kenya 2010. They have also relied on the cases of;

- 1) ***Joseph N. K. Arap Ngok –versus- Moijo Ole Keiwua And 4 Others (1997) eKLR.***
- 2) ***Gitway Investment Limited –versus- Tajmal Limited And 3 Others Nairobi HCCC Number 114/2012 (2006) eKLR.***
- 3) ***Benja Properties Limited –versus- Syedna Mohammed Burhannu Sahed And 4 Others (2015) eKLR.***

Finally, that the Plaintiffs/Applicants are in possession and have been in possession of the suit property.

12. THE DEFENDANTS/RESPONDENTS' SUBMISSIONS'.

The Plaintiffs'/Applicants' case does not meet the threshold for grant of temporary injunctions as laid down in the Giella case.

The Defendants/Respondents are the bona fide registered owners of Plot Number Kwale/Diani Beach Block/248 for value without notice and that the 6th Defendant issued the certificate of lease after the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents followed due process and upon payment of the necessary statutory fees.

The Defendants/Respondents have filed a counterclaim which ought not to be disregarded. They have relied on the cases of ;

- *Panari Enterprises Limited –versus- Lijoodi And 2 Others Civil Case Number 779 of 2013 (2014) eKLR.*
- *Mrao Limited –versus- First American Bank Ltd And 2 Others (2003) KLR 125.*

13. The Plaintiffs/Applicants have not demonstrated a prima facie case with a probability of success. The alleged fraud illegality and/or forgery without an iota of evidence. They have relied on the Section 26(1) of the Land Registration Act 2012.

The Plaintiffs/Applicants will suffer no injury as they have failed to establish a clear legal right or breach. The balance of convenience tilts in favour of the Defendants/Respondents who ought not to be denied the fruit of their property by being restrained at this stage. They pray that the application be dismissed with costs.

14. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit and the annexures. I have considered the written submissions of counsels, the oral highlights and the authorities cited.

The issues for determination are;

- i) Whether or not the Plaintiffs/Applicants’ application meets the threshold for grant of temporary injunctions.**
- ii) Whether or not the Plaintiffs/Applicants are entitled to the orders sought.**
- iii) Who should bear costs?**

15. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction, the onus is on the applicant to satisfy the court that it should grant an injunction.

An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles. In the celebrated case of *Giella – versus- Cassman Brown And Company Limited (1973) EA 358* the court set out the principles for grant of temporary injunctions as follows;

- i) The Applicant must establish that he has a prima facie case with a probability of success.**
- ii) The Applicant would suffer irreparable loss that cannot be compensated by an award of damages.**
- iii) If the court is in doubt it will decide on a balance of convenience.**

16. In the case of *Mrao limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125* the Court of Appeal in determining what amounts to a prima facie case stated;

“A prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I am guided by the above authorities.

17. It is the Plaintiffs/Applicants case that the Title Number Kwale/Diani Beach Block/76 was compulsorily acquired by the government of Kenya for the construction of Diani Tourist road.

The said acquisition resulted in new land reference numbers. The suit property became number 248 while the road became Number 249. It is also their case that they were issued with a certificate of lease on 22nd August, 2001. They have been in quiet possession, enjoyment and occupation of the suit property for the last 16 years.

18. It is admitted by the Plaintiff/Applicants that Mrs. Nina Mitton, the original owner of Kwale/Diani Beach Block/76 was never issued with a certificate of lease for the resultant Plot Number 248 (being the remainder of Plot No. Title Kwale/Diani Beach Block/76). It is not in doubt that the Plaintiffs/Applicants being beneficiaries of the estate of Nina Mitton were issued with a certificate of Title No. Kwale/Diani Beach Block/76 and not the resultant Plot No. 248. It is safe to say that following the compulsory acquisition and the resultant new numbers Plot No. 76 ceased to exist. It did not exist in 2001. On the other hand, there exists a certificate of Title in favour of the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents.

19. The Plaintiffs/Applicants have claimed the same was irregular, illegal and fraudulent but they have put forward no evidence to confirm this. In the absence of any proof that the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents committed any fraud in order to obtain registration, then I find that the Plaintiffs/Applicants have failed to establish a prima facie case with a probability of success at the trial.

In *Kenleb Cons. Limited –versus- New Gatitu Service Station Limited and Another (1990) KLR 557*. It was held by Bosire J. (as he then was) that;

“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”

I am not persuaded by the facts presented by the Plaintiffs/Applicants herein that they deserve this kind of protection.

20. It is not in doubt that Plot No. Kwale/Diani Beach Block/76 ceased to exist following compulsory acquisition by the Government of Kenya for purposes of making a road. The title was surrendered to the government only part of the land was used.

New survey was carried out and new parcels with different titles were created. The 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents made an application which was approved and were allocated the suit property.

What is existing now is Plot No. Kwale/Diani Beach Block/248 in the names of the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents. I find that the Plaintiffs/Applicants have failed to demonstrate that they are likely to suffer irreparable injury or loss which cannot be compensated by an award of damages of these orders are not granted.

If there is any wrong doing committed against the Plaintiff/Applicants, then it is the government. They can sue the government. I find that they have failed to demonstrate that damages is not an appropriate remedy.

21. In the case of *Paul Gitonga Wanjau –versus- Gathuti Tea Factory Co. Ltd And 2 Others (2016) eKLR*, Mativo J. held;

“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.”

I am of the view that in the present case, the Plaintiffs/Applicants have failed to discharge this burden to the required standard. I find that the balance of convenience tilts in favour of the Defendants/Respondents who are the registered owners of the suit property.

22. All in all I find that this application lacks merit and the same is dismissed. The interim orders of injunction granted on 12th October, 2017 area hereby discharged. The costs of this application do abide the outcome of the main suit.

It is so ordered.

DATED, and SIGNED at Mombasa on the 13th day of June, 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at Mombasa on the 13th day of June, 2018.

A. OMOLLO

JUDGE