



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 146 OF 2016

JOYCE MUTHONI WACIUMA.....PLAINTIFF

VERSUS

DR. FRANK K. MWONGERA.....1ST DEFENDANT

PHILIP MUNGE NDOLO.....2ND DEFENDANT

LA MARINA LIMITED.....3RD DEFENDANT

RULING

1. By a Notice of Motion application dated and filed herein on 10th June 2016, the Plaintiff, Joyce Muthoni Waciuma prays for a number of orders as follows:-

1.

2.

3. That this Honourable Court be pleased to issue an order compelling the Defendants, their employees, agents and/or servants, tenants, sub-tenants, lessees and any other person claiming under them be evicted from Title No. Chembe/Kibabamshe/424.

4. That in the alternative, the Honourable Court be pleased to issue a mandatory injunction compelling the Defendants, their employees, agents and/or servants, tenants, lessees and any other person claiming under them to vacate and give vacant possession to the Plaintiff of all that parcel of land known as Title No. Chembe/Kibabamshe/424.

5.

6. That the orders of this Honourable Court be supervised and or enforced by the Officer Commanding Police Division(OCPD) Malindi Division.

2. The said application is supported by the Plaintiff's Affidavit sworn on 10th June 2016 and is premised on the grounds that:-

a. The suit property is, and has always been, under the absolute ownership of the Plaintiff;

b. This Honourable Court has already determined in Petition No. 14 of 2013 that the suit property belongs to the Plaintiff and ordered that entries in the relevant file in Kilifi District Land Registry be rectified accordingly;

c. The Defendants have illegally and without any colour of right trespassed thereon and built temporary structures thereby denying the Plaintiff the use thereof ; and

d. Unless the orders are granted, there is serious and probable risk of perpetuation of an illegality and the total alienation of the said property to the Plaintiff's detriment.

3. In response to the said application, Dr. Frank Kamunde Mwangera, the 1st Defendant has sworn a Replying Affidavit filed herein on 27th

September 2016 denying that the Plaintiff is the registered proprietor of Title Number Chembe/Kibabamshe/424. The 1st Defendant states that the parties that purportedly transferred the suit property to the Plaintiff were not the registered proprietors thereof and could not give a better title than they had to the Plaintiff.

4. The 1st Defendant avers that the Certificate of title in the Plaintiff's possession is a nullity and the same ought to be surrendered to the Land Registrar for purposes of cancellation and destruction. In this regard, it is the 1st Defendant's case that by a Gazette Notice dated 20th June 1986, the Government of Kenya cognizant of certain fraudulent activities in the relevant Adjudication Section had placed an embargo on the land in question. Thereafter those erroneously issued with titles under the Land Adjudication Act were asked to surrender them after the same were determined to be invalid.

5. It is the 1st Defendant's case that thereafter the suit property was surveyed afresh and the subject plot was allocated himself. Subsequently, he received afresh title Number Chembe/Kibabamshe/720. He avers that he has been in actual and physical occupation and possession of the title since 1999 and is therefore entitled to the same.

6. As at the time the application came before me for hearing, the 2nd and 3rd Defendants were yet to enter appearance and/or file any response to the application.

7. I have considered the application and the 1st Defendant's response thereto. I have equally considered the Written Submissions of the Learned Advocates for the parties as well as the authorities they referred me to.

8. The principles behind the grant of a mandatory injunction at an interlocutory stage were considered in *Kenya Breweries Ltd & Another – vs- Washington O. Okeyo(2002)eKLR* where the Court of Appeal stated that:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury's Laws of England 4th Edition Paragraph 948 which reads:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear, and one which the Court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the Plaintiffs.... A mandatory injunction will be granted on an interlocutory application.”

9. The remedy of a mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution. Before granting a mandatory injunction, the Court must be persuaded to have a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted. That standard is different and I would say, higher than that required of a prohibitory injunction.

10. As it was stated in *Locabil International Finance Ltd –vs- Agro Export (1986) 1 ALL ER 901:-*

“The matter before the Court is not only an application for a mandatory injunction but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.”

11. According to the Plaintiff, the case before the Court is a clear and a straightforward one capable of summary disposal. It is her case that there is strong evidence backed by a Ruling of the Honourable Court to the effect that the Plaintiff is the legal owner of the suit premises.

12. I have considered the circumstances herein. The Judgment the Plaintiff refers to was apparently issued in High Court Petition No. 14 of 2013. While the 1st Defendant does not dispute that Judgment was rendered thereon on 26th June 2015 in favour of the Plaintiff (who was the Petitioner therein) neither a copy of the Judgment nor the pleadings in the said case were supplied by either party herein to enable the Court to effectively appreciate the tenor and purport thereof and circumstances under which the Judgment was rendered.

13. Be that as it may, it is evident that the Defendants herein were not parties to the said Petition. That must be the reason the Plaintiff has filed this suit separately against the Defendants. From paragraph 11 of the Plaintiff's Petition, the Respondent in the Petition were required to reinstate and make available land records, including the register pertaining to the suitland as it was as at 21st December 1978. The Plaintiff has not told this Court whether that order was enforced and if not what action if any was taken. Instead they have filed the present suit seeking a mandatory injunction against the Defendants herein.

14. The reason for this suit must lie in the contention by the 1st Defendant that he also has a legal title issued in his name and that he has been in actual and physical occupation and possession of the land since 1999. From the material placed before me, it is apparent that by a Gazette Notice dated 20th June 1986, the Government for some reason or the other purported to reconsider titles issued within Chembe/Kibabamshe, Kilifi/Jimba, Kilifi Madoteni, Kakuyuni/Machurenni and Kilifi/Matsangoni Adjudication areas within Kilifi County.

15. Thereafter the Government again purported to cancel the previous titles and to issue fresh ones. That is the process through which the 1st Defendant appears to have acquired the land in question. As it were, the reason behind the 1st Defendant's entry into the parcel of land are not simple and summary matter which this Court can decide at an interlocutory state. The circumstances under which the Defendant entered the land would require ventilation through a trial. The Plaintiff has not demonstrated that the 1st Defendant breached any law when he entered the premises and/or that he forced his way in a manner that is inimical to trespass.

16. Accordingly I do not find any merit in the application dated 10th June 2016. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

J.O. OLOLA

JUDGE