



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 46 OF 2017

LONE PALM LIMITED.....PLAINTIFF

VERSUS

MTSONGA KABILA CHARO.....1ST DEFENDANT

KHAMIS MOHAMED.....2ND DEFENDANT

EMMANUEL FADHILI JEFWA.....3RD DEFENDANT

MASHA MRAMBA MASHA.....4TH DEFENDANT

ESTHER TSOROMBA TSULU.....5TH DEFENDANT

BARANI POLE POLE SELF HELP GROUP.....6TH DEFENDANT

RULING

1. By a Notice of Motion application dated 20th February 2017 but filed herein on 12th March 2017, Lone Palm Ltd, the Plaintiff herein, prays for a temporary injunction to issue against the six Defendants restraining them from occupying, selling, leasing, transferring and/or in any other manner interfering with the title to Plot No. 1605/III/MN.

2. The Plaintiff's application is supported by an affidavit sworn by Catherine Mundia, a donee of a Power of Attorney from the Plaintiff, and is premised on the grounds that:-

i. The Plaintiff is the registered proprietor of the said Plot of land;

ii. The 1st to 5th Defendant/Respondents are members and officials of the 6th Defendant/Respondent;

iii. Sometimes in 2015 the 6th Respondent and its members trespassed upon the Plaintiff's said Plot of land and demolished the perimeter wall and residential house after assaulting the caretaker stationed therein;

iv. The Respondents have since sub-divided the land and are seeking buyers therefor;

v. The Respondents have filed ELC No. 75 of 2015 (O.S) seeking orders to be declared owners of the Plaintiff's plot plus other properties in the area;

vi. The Plaintiff/Applicant is now apprehensive that the Defendants may alienate and/or transfer the land to third parties; and

vii. The Applicant stands to suffer significant and irreparable loss and damage unless this Court intervenes and restrains the Respondents as prayed.

3. In a Replying Affidavit sworn and filed herein on 5th April 2017 by the 3rd Defendant Emmanuel Fadhili Jefwa, the Defendants aver that the Plaintiff's application is full of falsehoods and urge the Court to dismiss the same. It is the Defendants' case that the land in question has always belonged to them and that it is the Plaintiff that has trespassed therein as the Plaintiff has never resided in nor cultivated any part of the suit property.

4. The Defendants further aver that the Plaintiff's case herein is not just about those named as Defendants herein but it affects more than 500 other residents of Barani Village and more so, those in Plot No. 337/III/MN who have lived there since 1968.

5. The Defendants further accuse the Plaintiff of complacency in destroying the community shrine (the "Kaya") where they get their medicine and go for prayers.

6. I have considered the application and the Defendants' response thereto. I have also considered the written submissions placed before me by the Learned Advocates for the parties as well as the authorities they referred me to.

7. As was stated in the celebrated case of *Giella –vs- Cassman Brown Company Ltd & Another (1973)EA 358:-*

"The conditions for the grant of an interlocutory injunction are now, we think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly if the Court is in doubt, it will decide an application on the balance of convenience."

8. In this regard the first issue for this Court's consideration would be whether or not the Plaintiff has established a prima facie case with a probability of success. Considering what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd –vs- First American Bank Ltd & 2 Others(2003)eKLR* addressed itself as follows:-

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

9. In the matter before me, the Plaintiff contends that the suit property is registered in its name. They have annexed a Certificate of Title to their pleadings showing that they became registered as proprietors of all that piece of land situate North of Mtwapa Creek in the Kilifi District containing by measurement 1.0 hectares being sub-division No. 1605(Original No. 495/9 Section III Mainland North) on 6th April 1993.

10. The Plaintiff avers that on or around April 2015, certain people invaded the property and destroyed a residential villa built for its directors in 1996 as well as a fence surrounding the same. The Defendants herein do not deny that they invaded the land. Instead, they accuse the Plaintiff and some unspecified people of complacency in destroying the community shrine where they claim to get their medicine in

addition to using the same for prayers. According to the Defendants at paragraph 16 of the Replying Affidavit, if indeed the Plaintiff's suit property is where the Plaintiff claims it to be, then it must be one of the several subdivisions which were carried out by strangers in the year 1997/1998 to the detriment of residents of Barani who have lived on the land since 1968.

11. That line of argument by the Defendants does not in my view avail them the right to forcibly take the land. If it is the Defendants' argument that the Plaintiff's title is vitiated by fraud, misrepresentation or that the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said Defendants to move the Court by suitable proceedings in that behalf for such determination. Otherwise in the absence of such determination, the Plaintiff is entitled to protection of its property rights.

12. As was stated by JB Ojwang, Ag. J. (as he then was) in *Park View Shopping Arcade –vs- Kangethe & 2 Others (2004) eKLR:-*

“The Constitution safeguards the sanctity of private property. It was not proper for the defendants to forcibly occupy the Plaintiff's land and then plead public interest in environmental conservation to keep out the registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation.

13. Similarly in the matter before me, there is evidence that the Plaintiff was not only the registered owner of the subject parcel of land but also that it had developed the same. It was not open for the Defendants either acting individually or as members of the 6th Defendant self Help Group to force their way into the property and take over the same.

14. As Murrithi J stated in *Mohansons (Kenya) Limited –vs- Registrar of Titles & 2 Others(2017) eKLR:-*

“There is public interest in the observance of the Rule of Law principle (under) Article 10 of the Constitution. The law must keep its promise to the registered proprietor that his interest in land property will be protected unless it has been proved to have been obtained through fraud or misrepresentation to which he was a party or the title document has been acquired illegally, unprocedurally or through a corrupt scheme.”

15. As it were the Defendants have neither exhibited evidence of their entitlement to the land nor a determination that the Plaintiff's title was obtained in a manner that is otherwise irregular. The Plaintiff on its part has exhibited evidence of actual harm suffered through the invasion of the suit property.

16. Accordingly and for the reasons given, I find merit in the Plaintiff's application dated 20th February 2017. The same is allowed with costs.

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

J.O. OLOLA

JUDGE