



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 386 OF 2017

NASSIR SALIM MBARUK.....PLAINTIFF/APPLICANT

-VS-

1. FAUZ GADIM

2. NAGIB GADIM.....RESPONDENTS/DEFENDANTS

RULING

1. By a Notice of Motion dated 23rd October 2017, the Plaintiff/Applicant is seeking an order of injunction restraining the Respondents whether by themselves or their agents from evicting, selling, alienating and/or interfering with the Applicant's quiet enjoyment of **PLOT NO.KILIFI/MTWAPA/229** pending the hearing and determination of this suit. The Plaintiff also seeks costs of this Application. The Application is premised on the grounds appearing on the face of it and supported by the affidavit of Nassor Salim Mbaruk, the Applicant sworn on 23rd October 2017 and Further Affidavit sworn on 14th December 2017 in which he deposes that he has occupied, used and/or possessed the Suit Property measuring 2.6 hectares since 1993. He has annexed a copy of the title deed and certificate of official search in the names of Nagib Omar Ali and Fawzi Omar Ali. He further deposes that on 20th October 2017 he woke up and found leaflets dotting his compound warning him to vacate the Suit Premises or face dire consequences and have threatened him with eviction. He denies seeking permission from one Mbarak Ali Gadim or entering into an agreement with him on sharing proceeds from thereon.

2. The Application is opposed by the Defendants who filed a Replying Affidavit sworn by Nagib Omar Ali, the 2nd Defendant on 20th November 2017. He avers that he, together with his brother, Fauzi Omari Ali are the registered proprietors of the Suit Property. He denies that the Plaintiff has lived on the land at all and stated that sometime in the late 1990s, the Plaintiff approached the Defendants' uncle, one Mbarak Ali Gadim (deceased) who was the caretaker and general overseer and manager of the Defendants' property and was granted permission on condition that they share the produce from thereon. He avers that the Plaintiff is known to live in a neighbouring area known as Mzambarauni. He has also attached affidavit sworn by one Hassan Hamisi Kishungi who he states used to occupy an adjacent portion of the same property and carrying out poultry farming, affidavit by Mohamed Mahfudi Said, the former driver of the Defendants' uncle and the affidavit of Zaki Ali Mohamed, an in-law of the Applicant all of whom depone that they were aware that the Plaintiff was given permission to occupy the Suit Property by the Defendants' uncle. The 2nd Defendant further denies writing the alleged leaflets threatening the Plaintiff. He states that the title to the property got lost sometime in 2005/2006 and they re-applied for issuance of a new title deed which was re-issued on 18/12/2006. It is the Defendants' contention that the Plaintiff has never erected structures or lived on the Suit Land and allege that the structures shown were erected by Hassan Hamisi Kishungi who has deposed to that effect. The Defendants have also attached a letter from the Chief of Mtwapa Location confirming that the Plaintiff is a resident of Mzambarauni area where he owns a house and that he has no structure on the Suit Property. The Defendants further contend that the Plaintiff has only brought the suit after learning of the subdivision process that the Defendants' are undertaking on the suit property.

3. The advocates for both parties agreed to dispose of the Application by written submissions and filed their respective submissions. I have carefully considered the Application. This being an Application for Interlocutory Injunction, the Plaintiff must satisfy the conditions laid down in the case of **Giella – v- Cassman Brown & Co Ltd (1973) EA 358**. The Plaintiff must show that he has a *prima facie* case with probability of success and that he stands to suffer irreparable damage. If the Court however is in doubt on the foregoing, it will decide the matter on the balance of convenience.

4. Both the Plaintiff and the Defendants are in agreement that the Suit Property is registered in the Defendants' names. The Defendants have demonstrated their ownership of the Suit Property by producing to this Court their title deed. The Plaintiff's case is based on the doctrine of adverse possession. So far as I can tell, the title deed produced by the Defendants holds sway at this interlocutory stage of these proceedings. Section 26 (1) of the Land Registration Act states as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as proprietor of the land is the

absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a. on the grounds of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificated of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

5. There is no doubt that the Defendants/Respondents have produced a title deed. The above legal provision binds this Court to take that as *prima facie* evidence of ownership unless it can be challenged on the grounds of fraud or misrepresentation or where the title deed has been acquired illegally, unprocedurally or through a corrupt scheme. From what I can see, the Applicant has not been able to demonstrate to this Court albeit at this interlocutory state, that the title deed produced by the Defendants can be challenged on any of those grounds. The Plaintiff's claim which is based on adverse possession will have to await the main trial. If the Court were inclined to grant the orders sought, it would mean that the Defendants are restrained from what they rightly regard as their land. This may mean the Court will have made a final decision on the issue of the Plaintiff's claim which is yet to be determined and which can only be determined at the main trial.

6. Having considered the Plaintiff's Application, I am not satisfied on the material before me that the Plaintiff has established a *prima facie* case with a probability of success. In any event, the Plaintiff has not shown that damages will not adequately compensate him in the event of his case succeeding in the end as the value of the land can be ascertained. I am also of the view that the balance of convenience tilts in favour of the Defendants who are the registered owners of the suit property.

7. The upshot of the foregoing is that the Plaintiff has failed to satisfy the conditions for granting the interlocutory injunction sought. In the circumstances, I find no merit in Notice of Motion dated 23rd October 2017 and the same is hereby dismissed. I order that costs shall be in the cause.

It is so ordered.

Ruling dated, signed and delivered at Mombasa this 18th day of July 2018.

C. YANO

JUDGE