



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.67 OF 2017**

**PRISCILLA CHARI BANDARI.....PLAINTIFF**

**-VS-**

**TUNJE JAVE TUNJE & OTHERS.....DEFENDANTS**

**RULING**

1. The Application for determination is the Amended Notice of Motion dated 18<sup>th</sup> April, 2017 brought under Order 40 Rules 1, 2 and 4 and Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Application seeks an order that pending hearing and determination of this suit, the Defendants their servants/associates, their buyers and/or agents or otherwise howsoever, be restrained by Temporary Injunction from occupying/dwelling, renting out vacant rooms, entering, trespassing into or continuing to trespass/dwell into, alienating, physically assaulting, disposing off buildings, erecting new buildings on or in any other way interfering with the Plaintiff's ownership of the piece of land **PLOT NO. MN/JUNDA/5** measuring approximately 0.5Ha.

2. The Application is based on the grounds on the face of the motion and supported by the affidavit of Priscilla Chari Bandari, the Applicant, sworn on 18<sup>th</sup> April 2017. The Applicant avers that she is the registered owner of the Suit Property and has been living peacefully on it since 2004 while operating an Academy known as Oasis Academy and a school for the elderly until sometime in 2008 when the Defendants jointly with some villagers trespassed into the said plot and physically assaulted the Applicant and burnt down the school and her residential houses, households and vegetation among others. That she was detained at Shimo la Tewa prison for 3 months before she was released on bond. The Applicant depones that she spent some years nursing the injuries she sustained until sometime in 2012 when she went to see her plot and found that the Defendants had sold off part of the said plot and upon making inquiry she was assaulted and locked up in prison again. That upon her release, she sought assistance from the area chief who was not ready to assist. That in 2015, she found the 2<sup>nd</sup> Defendant on the plot and when she asked him to vacate, the Applicant was severely beaten and was taken to hospital for treatment. The Applicant was also charged in Shanzu Law Courts, with the offence of creating disturbance and was released on cash bail and advised to seek assistance from the administration who referred her to Muhuri, a human rights group, and that since then she has been fighting for justice in vain. She was later advised to this file suit.

3. The Plaintiff avers that she entirely depends on the suit property which she states she bought from the late Kachia Dzombo, Late Lwambi Benzaka and Mbaji Gege at consideration of Kshs.95,000 which she paid in full in 2004. She states that all the relevant documents for that transaction were burnt down in her house by the Defendants. The Applicant states that she had settled on the suit property and has nowhere else to go. The Applicant has attached various documents including correspondence from various offices in both the national and county governments.

4. The Application is opposed by the Defendants, save for the 7<sup>th</sup> Defendant who never entered appearance. The Defendants filed a Replying Affidavit sworn by the 3<sup>rd</sup> Defendant on 10<sup>th</sup> May, 2017 in which he depones that the Defendants are owners and occupy various plots in Junda area, Mombasa where they have constructed their respective homes and has given particulars of the plot numbers and attached various ownership documents including sale agreements. That the Applicant is known to them and is the occupant of a portion granted to her in 2006 by one Mbaji Gede and Dzombo Kanga that lies between the Suit Property and the property known as plot number **MN/JUNDA/13**. That it is within that portion that the Plaintiff had built a temporary structure that later collapsed due to poor state and heavy rains. It is their contention that the Plaintiff is now claiming the whole Suit Property including the ones with different owners. That the Plaintiff is a habitual trouble maker and nuisance in their neighbourhood denying the Defendants quiet enjoyment and possession of their individual portions resulting in several criminal cases against her at Shanzu Law Courts. The Defendants have denied trespassing on the Plaintiff's portion or assaulting her, alleging that the injuries she sustained resulted from epileptic attacks which she frequently suffers from. That reconciliation meetings including survey exercise to resolve the dispute has borne no fruit due to disruptions by the Plaintiff.

5. Both parties filed written submissions which I have read and I need not reproduce their contents herein.

6. I have considered the Application, the affidavits in supports and against and the rival submissions made. The principles to be applied when considering an Application for Temporary Injunction are well settled. In the famous case of **Giella – v – Cassman Brown & Co (1973)EA 358**, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage; and if the court is in doubt, it will decide the matter on a balance of convenience.

7. The Plaintiff claims that she is the registered owner of the Suit Property measuring 0.5 hectares and seeks a Temporary Injunction restraining the Defendants with her ownership over the Suit Property. On the other hand, the Defendants acknowledge that the Plaintiff is the owner of a smaller portion and that it is the Plaintiff who is interfering with the Defendants' portions. From the documents on record, it is apparent that this is a dispute that has persisted for some time, even resulting in criminal charges having been preferred against the Plaintiff. The dispute seems to be about boundaries. It appears an order for survey to be undertaken on the disputed land was even made by the criminal court at Shanzu but it is not clear whether the same was undertaken or not. In this case, both the Plaintiff and the Defendants are accusing each other of encroaching and interfering with the other's portion. It is common ground that there is no agreement of the boundary

where the Plaintiff's portion and the Defendants' portion is. Before this court, it has emerged that both the Plaintiff and the Defendants are claiming that they are occupying their rightful portions. There is a no clear evidence as to who is and who is not right. This is a dispute that has to be determined at the main trial. If the court were to grant the injunction sought, it may well turn out that the Defendants are being enjoined from their rightful portion. The most appropriate thing to do in the circumstances is to expedite the trial so the boundary is ascertained and each party gets to know their rightful portion. This may require the services of a surveyor to ascertain the boundaries of each of the parties.

8. Having carefully considered the material before me, I am not satisfied that the Plaintiff has established a prima facie case with a probability of success to warrant the injunction order sought. The Plaintiff has also not shown what irreparable injury she will suffer in the event the injunction is not granted. The Defendants may be evicted and their structures demolished in the event they are found to be in the Plaintiff's portion in the end. Damages can also be adequate compensation to the Plaintiff if the Defendants are found to have encroached on her portion.

9. The upshot of this is that the notice of motion dated 18<sup>th</sup> April, 2018 lacks merit and the same is hereby dismissed. Each party to bear their own costs.

10. I have also considered the value of the subject matter herein. The Plaintiff alleges it is measuring 0.5 hectares and that she bought it for Kshs.95,000. I am of the view that this is a matter that falls within the jurisdiction of the Magistrate's Court. Accordingly, I suo motto transfer this matter forthwith to the Chief Magistrate's Court, Mombasa for trial and determination.

**Delivered, signed and dated at Mombasa this 24<sup>th</sup> September, 2018.**

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**C. YANO**

**JUDGE**