



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 108 OF 2017

KAHINDI BIRYA FONDO & 19 OTHERS.....PLAINTIFFS

VERSUS

KABWERE KARISA

CHARLES SAJIN

ALFRED MONDA.....DEFENDANTS

RULING

1. By a Notice of Motion application dated and filed herein on 10th May 2017, the 20 Plaintiffs herein pray for an order of injunction restraining the three Defendants, their servants and/or agents from trespassing, cultivating, alienating, selling, transferring and/or dealing in any manner whatsoever with the Applicant's parcel of land being Title No. Minyenzeni/Minye-14/Kilifi pending the hearing and determination of this suit. In addition they urge the Court to order the OCS Mariakani Police Station to assist in ensuring compliance with the said orders.

2. The application is supported by the annexed affidavit of the 1st Plaintiff-Kahindi Biryra Fondo and is premised on a number of grounds listed on the body thereof as follows:-

a) That the Applicants are the beneficial and/or legal owners of the parcel of land being Title No. Minyenzeni-14/Kilifi having occupied the same and utilized it since time immemorial and it being their only home;

b) That sometimes in 2014 the 1st Respondent trespassed on the Applicant's parcel of land and began planting sisal on the same;

c) That the Applicants reported the invasion to the local authorities but the 1st Respondent failed to attend the meeting instead opting to use the police to intimidate the Applicants;

d) That in 2015 the 1st Respondent in conjunction with the 2nd Respondent sold a portion of the parcel of land measuring approximately 6 acres to the 3rd Respondent albeit unlawfully.

e) That the Respondents continue to cultivate the Applicants parcel of land and trespassing on the same;

f) That unless the Respondents are stopped by an order of this Court, they will continue with their illegal acts and may continue selling and/or transferring the parcel of land to the detriment of the Applicants; and

g) That it is in the interest of justice that the application be allowed.

3. But in a Replying Affidavit sworn on their behalf by the 3rd Respondent Alfred Monda and filed herein on 11th July 2017, the Respondents contend that the 1st Respondent was the legal and beneficial owner of an unsurveyed plot of land measuring approximately 13 acres at Munyenzeni Sub-location within Tsangatsini Location having bought the same from one Nzikali Kalinga.

4. It is the Respondents' case that the said 1st Respondent's plot of land neighbours that of the Plaintiff but the ownership thereof is separate and distinct.

5. The 3rd Respondent avers that by Sale Agreements dated 5th and 14th April respectively, he acquired 13 acres of the 1st Respondent's land for a sum of Kshs 600,000/=. It is the 3rd Respondent's case that the said Agreements were witnessed by the Assistant Chief Munyizeni Sub-Location as well as the 4th Plaintiff/Applicant herein one Francis Kasiwa Birya.

6. I have considered the application and the Replying Affidavit thereto. I have also taken into consideration the written submissions filed by the Learned Advocates representing the parties herein as well as the authorities they referred me to.

7. In an application for an interlocutory injunction such as this one the onus is on the Applicants to satisfy the Court that it should grant an injunction. Being a discretionary remedy, an injunction ought to be granted on the basis of evidence placed before the Court.

8. In the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*, the Court set out the principles for the grant of such injunction. These are:-

- i) That the Plaintiff must establish that he has a prima facie case with a high chance of success;
- ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages; and
- iii) That if the Court is in doubt, it will decide the matter on a balance of convenience.

9. Turning on the facts of this case, the first question to be addressed is whether the Applicants have disclosed in their pleadings a prima facie case with a reasonable probability of success. It is the Plaintiffs case that they are the beneficial and/or legal owners of the parcel of land known as Minyizeni/Minye-14/Kilifi having occupied the same and utilized it since time immemorial. The Plaintiffs do not give the extent or acreage of their said parcel of land. They accuse the 1st and 2nd Defendants of encroaching on portions thereof since 2014 and even selling a portion thereof to the 3rd Defendant in 2015.

10. The defendants on their part also claim that the parcel of land in dispute belongs to the 1st Defendant and that even though the Plaintiffs' land and that of the 1st Defendant neighbour each other, they are separate and distinct.

11. As it were, it emerges that the parcel of land is an unsurveyed parcel of land and each party to this dispute appears to have their own interpretations as to the boundaries thereof. Neither party has placed before the Court any documentation and/or other evidence as to how the Plaintiffs and the 1st Defendant came to be beneficial owners of the portions they claim.

12. I note however that the Plaintiffs concede that the Defendants have used the land since 2014. No explanation was given as to why no action was taken urgently to restrain them from using the same. It is also interesting to note that the 4th Plaintiff Francis Kasiwa Birya does not contest the 3rd Defendant's contention that he was present and witnessed when the Plaintiff bought a portion of the disputed parcel of land from the 1st Defendant.

13. As the Court of Appeal stated in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125:-*

“...The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion....”

14. In the matter before me I did not find any urgent necessity to restrain the Defendant/Respondents as the acts complained of occurred some three years before the suit and the Application was filed. It was also unclear at this stage whether the Plaintiffs' indeed had a clear and unmistakable right to the parcel of land in dispute which would require this Court's protection.

15. Arising from the foregoing, I did not find merit in the Plaintiffs application dated 10th May 2017. The same is dismissed with costs to the Defendants/Respondents.

Dated, signed and delivered at Malindi this 21st day of September, 2018.

J.O. OLOLA

JUDGE