



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 13 OF 2014

IN THE MATTER OF: PARCEL NO. KILIFI/ROKA/1066

MEASURING APPROXIMATELY 12 ACRES

AND

IN THE MATTER OF: SECTION 38 OF THE LIMITATION

OF ACTIONS ACT CAP 22 LAWS OF KENYA

IN THE MATTR OF: AN APPLICATION FOR DECLARATION THAT

THE APPLICANTS/PLAINTIFFS HAVE OBTAINED OWNERSHIP OF

THE SAID PARCEL OF LAND KILIFI/ROKA/1066 MEASURING

APPROXIMATELY 12 ACRES BY WAY OF ADVERSE POSSESSION.

BETWEEN

1. SAMUEL KAHINDI KIRAO

2. KAHASO KAHINDI KIRAO

3. STEPHEN KENGA KIRAO

4. JAMES FONDO KIRAO

5. MARTIN KAZUNGU KONDE

6. JULIUS KINGI KIRAO.....PLAINTIFF/APPLICANTS

VERSUS

MWANAIIDI ISLAM BAKARI

MARTIN MUHISU JOHN TSUMA.....DEFENDANTS/RESPONDENTS

RULING

1. By an application dated 4th July 2017, the Plaintiff Martin Kazungu Konde prays for an order of injunction to issue restraining the Defendants and/or their authorized agents from trespassing into the Plaintiff's piece of land known as 1066, Matsangoni Kilifi/Roka/Settlement Scheme pending the hearing and determination of this suit.

2. The said application is supported by an affidavit sworn by the Plaintiff and annexed thereto and is premised on the grounds:-

a) *That the Plaintiff is the proprietor of the said parcel of land measuring approximately 12 acres;*

(b) *That sometimes in March 2006, the Defendants, their agents and/or servants trespassed into the land and are sub-dividing the same into portions with a view to selling them;*

c) *That the Plaintiff stands to suffer irreparable loss and damage and it is therefore necessary that the Defendants be restrained;*

d) *That the suit has high chances of success and it is therefore in the interest of justice that the orders sought be granted.*

3. By Grounds of Opposition filed herein on 12th July 2017, the Defendants are opposed to the grant of the orders sought on the grounds stated as follows:-

i) *That the application is vexatious, incompetent and an abuse of the Court process;*

ii) *That the Applicant is not the legal owner of the suit premises as he has not demonstrated that he has a title deed to the property;*

iii) *That the suit property is under a scheme under the agricultural land(sic) and as such no interest can be transferred unless and until the title is discharged under S.F.T(sic);*

iv) *That no evidence has been demonstrated by way of search that the title is not encumbered;*

v) *That the land in question is agricultural land and the applicant has not demonstrated that he obtained land control board consent as required by law;*

vi) *That the applicant has not demonstrated why it has taken over 20 years and yet he has been unable to process the title;*

vii) *That the applicant has admitted that he does not reside in the country and as such he shall not suffer any loss if the orders are not granted;*

viii) *That the orders sought at this stage, amount to substantive orders and if granted they will amount to an eviction order of the defendants; and*

ix) *That the application is a non-starter and without any basis in law.*

4. I have considered the application and the grounds field in opposition thereto. I have equally considered the submissions by the respective parties as well as the authorities they referred me to.

5. As Spry VP stated in *Giella –vs- Cassman Brown & Company Ltd(1973)EA*:-

“The conditions for the grant of an interlocutory injunction are now, I 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.”

6. In order to determine whether an applicant has set out a prima facie case, it is inevitable that a preliminary assessment of his case as laid out in the Plaint and in the supporting affidavit be made *vis-à-vis* the respondent’s case as laid out in the Defence and/or the reply filed to the application.

7. In the matter before me, the Plaintiff relies on a Sale Agreement executed between his now deceased father Martin Kazungu Konde with one Samuel Konde Masha dated 7th October 1989. According to the said Agreement (annexture MKK 1 in the Supporting Affidavit) the Plaintiff’s father bought the land described as Plot No 1066 Tezoroka and measuring 12 acres for a sum of Kshs 15,000/- after which he was to take immediate possession thereof.

8. The Plaintiff has also annexed a demand letter dated 9th August 1989 from the Settlement Fund Trustees demanding a sum of Kshs 11,292/- in respect of Plot No. 1066 Tezoroka being outstanding arrears in respect of loan repayment to the fund. While the said letter is addressed to one Samuel Kirao, the Plaintiff claims to have paid the same upon which he proceeded to take possession of the land sometime in 1990. In support of the alleged payment, the Plaintiff has annexed a copy of a letter dated 16th November 1989 addressed to himself and enquiring about the purpose of a cheque no. 27002 which the Plaintiff is said to have sent to the Ministry of Lands, Housing and Physical Planning.

9. In their response, the Defendants have generally in their Grounds of Opposition attacked the Plaintiff’s application as being incompetent. It is their case that the Plaintiff is not the owner of the land as he has not produced any title and/or search certificate to support his case.

10. From the material placed before me, it is evident that the Plaintiff has had the control of the suit property for more than 20 years having purchased the same from his father. The Defendants have not denied that they invaded the land in 2016 as stated by the Plaintiff and their contention that the Plaintiff shall not suffer any loss and/or damage since he resides out of the country does not make sense in the very least.

11. I think as the owner of the land, even though the land is not yet registered in his name, he has all the rights that a registered owner would be vested with and it is not open for the defendants to cite his failure to obtain the title deed to justify their invasion of his parcel of land.

12. As it were, on the material placed before me, I am satisfied that the Plaintiff has made out a case with a probability of success at the trial. His application dated 4th July 2017 has merit and the same is hereby allowed with costs.

Dated, signed and delivered at Malindi this 11th day of October, 2018.

J.O. OLOLA

JUDGE