



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 16 OF 2018

ASHA ALI ABDALLA

ABDALLA ALI ABDALLA.....PLAINTIFFS

VERSUS

MOMBASA CEMENT LIMITED.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion Application dated 22nd January 2018 but filed herein on 24th January 2018. By the said Application, the Plaintiffs pray for orders as follows:-

(c) That pending the hearing and determination of this suit, an order of injunction do issue against the Defendant by themselves, their agents, servants or employees restraining them from destroying, entering, trespassing, erecting structures, digging, excavating, quarrying or in any other manner dealing with Plot No. 706 Takaungu in a manner detrimental to the Plaintiffs' interest.

(d) That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by Asha Ali Abdalla, the 1st Plaintiff herein and is premised on the grounds that:-

i. The applicants are the legal representatives of the estate of Ali Abdalla Mwahunzi (deceased).

ii. The deceased was the legally registered owner of Plot No. 706 Takaunga having been allocated the same in the year 2002 after living thereon since time immemorial.

iii. That sometime in July 2006 after the deceased passed on, the Defendant sent its representatives demanding to take the land and they attempted to destroy the perimeter fence. The Defendants continue to threaten the Plaintiffs with destruction and forceful eviction.

3. In a Replying Affidavit sworn by its Operations Manager Jareed Mohamed Sidik and filed herein on 22nd May 2018, Mombasa Cement Ltd(the Defendant) avers that the suit parcel is part of the original certificate of ownership number 409 dated 6th April 1914 which was declared to be a Wakf to the Mazruis and the Successor of Salim Bin Khamis.

4. The Defendant further avers that following the repeal of the Mazrui Lands Trust Act in 1989, the land became Trust Land and the same was subsequently allocated to Kilifi Town Council and not the deceased Ali Abdalla Mwahunzi as the Plaintiffs claim.

5. The Defendant further avers that following the repeal of the Mazrui Lands Trust Act, the Mazruis filed Mombasa High Court Constitutional Petition No. 185 of 1991 and on 19th July 2012, the High Court declared the repeal unconstitutional. It is the Defendant's case that the effect of the declaration was that the Mazruis got back their land and the Takaungu Adjudication Register which had been created after the repeal were nullified.

6. The Defendant states that thereafter on 30th March 2014 it entered into a formal lease agreement with the Trustees of Mazrui Trust Land for a total of 1000 acres which was carved out of the total of 2,716 Acres of Wakf Land at Takaungu for a consideration of Kshs 40,000/- per acre. It is accordingly the Defendant's case that the land in question does not belong to the Plaintiffs and that the application herein ought to be dismissed.

7. I have considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the Parties.

8. As the Court of Appeal stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others CA No. 77 of 2012:-*

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

- a. Establish his case only at a prima facie level;**
- b. Demonstrate irreparable injury if the temporary injunction is not granted, and**
- c. Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.**

9. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, a prima facie case was defined in the following words:-

“In civil cases a prima facie case is a case in which on the material presented to Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

10. In the matter before me, the Applicants are the legal representatives of the estate of the late Ali Abdalla Mwahunzi. It is their case that the deceased was the legally registered owner of Plot No. 706 Takaungu, the same having been allocated to him in the year 2002. They accuse the Defendant of invading the parcel of land and trying to forcefully take over the same after the death of the said Ali Abdalla Mwahunzi.

11. In support of their case the Plaintiffs have annexed a letter dated 9th March 2010 (Annexure “AAA-2’) from the Kilifi District Land Adjudication and Settlement Officer which letter identifies the said Ali Abdalla Mwahunzi as the bona fide owner of Plot No. 706 situated at Takaungu Land Adjudication Section.

12. As it were, it is evident from another letter dated 23rd August 2018 emanating from the Land Adjudication and Settlement Officer Kilifi (Annexure JUD 5) that the said Takaungu Adjudication Section was later nullified. The said letter reads at paragraph 2 as follows:-

“Takaungu Adjudication Section was declared as per Cap 284 Land Adjudication Act and later nullified through Civil Case No. 185 of 1991. This led to cancellation of allocation which was being undertaken within Takaungu Adjudication Section. Hence the property is now under the ownership of the Mazrui family.

13. The said letter appears to me to lend credence to the Defendant’s case that the land in issue initially belonged to the Mazrui family. The same was allocated to the Plaintiff upon the creation of the Takaungu Adjudication Section after the repeal of the Mazrui Lands Trust Act (Cap 286) by the Mazrui Lands Trust (Repeal) Act in 1989. From the material placed before me, it was evident that the repeal of the Act was challenged vide Mombasa High Court Constitutional Petition No. 185 of 1991. After the hearing of the said case, a Judgment was delivered on 19th July 2012 which declared the repeal unconstitutional. That decision thus reverted the land to its original owners and the Takaungu Adjudication register was by implication nullified.

14. The Plaintiffs did not deny that the land in question fell under the Mazrui Lands Trust Act. Neither did they contest the effect of the decision made in Mombasa Constitutional Petition No. 185 of 1991. As it were, the Defendants have demonstrated that they leased the portion of land in dispute from the Trustees of the Mazrui family who are *ipso facto*, the owners of the land in dispute.

15. Arising from the foregoing, I did not find merit in the Plaintiffs’ application dated 22nd January 2018. The same is accordingly dismissed.

16. Arising from the confusion created by the initial repeal and subsequent reinstatement of the Mazrui Lands Trust Act, I think it is fair that each party should bear their own costs.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE