



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO.296 OF 2014
DAVID GEORGE MDACHI & 44 OTHERS.....REPOENDENTS
-VERSUS-
(1) KATANA CHEMBE KARISA
(2) CHENGO CHEMBE
(3) CHARO CHEMBE KARISA
(4) CHEMBE KARISA (All sued on their own behalf and also
beneficiaries and administrators of the estate of
CHEMBE KARISA (DECEASED).....APPLICANTS

RULING

1. The defendants have moved this court vide their notice of motion dated 19th May 2015. The application is brought under the provision of order 40 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act. In the applicants sees the following orders;

1. Spent

2. Spent

3. That the Plaintiffs by themselves, their agents or employees or anybody claiming through their be restrained from ploughing and/or cultivating and/or trespassing or do any activity on the applicants parcel of land title no.Kaloleni/Chalani/698 pending hearing and determination of this suit.

4. That the OCS Kaloleni Police Station to be ordered to supervise and/or implement to these orders.

5. That the cost of this application be awarded to the applicants.

2. The application is founded on the grounds on the face of it and the affidavit of Charo Chembe Karisa. In the affidavit, Mr. Charo says they are the bonafide owners of the said land having inherited the same

from their father in 1963. He deposed that the plaintiffs had a maize meal in the adjacent parcel of land where they built houses and have been staying on at material times.

3. That the plaintiffs have mistaken their boundaries and trespassed into their parcel of land whereby they are now ploughing and cultivating on the same. They warned the plaintiffs but to no avail. Further that they have invested their money, time and effort on the said parcel and unless Respondents are restrained, they are bound to suffer immense loss and damage. He prayed for the orders to be granted.

4. The application is opposed by the plaintiffs vide an affidavit sworn by the 1st plaintiff George Benjamin Mdachi. In the replying affidavit, it is deposed that the plaintiffs have homesteads on the suit land and they have been cultivating the same from the time of their grandfathers. Mr. Mdachi deposed that the defendants are not on the parcel of land neither do they have any structures on it. That if the orders are allowed, it is the plaintiffs who stand to suffer irreparable loss as they will be denied access to their homesteads. He urged the court to dismiss the application.

5. The advocates for the parties filed brief written submissions which I have read and considered while reading my decision. The defendant submitted that the orders cannot be granted because there is no prayer made in the defence. To support this submission, they quoted the case of Nairobi City Council as Thabiti Enterprises limited (1995 – 98) 2 EA 231 where it was held that

“there was an error apparent on the face of the record in that there was a glaring inconsistency in the decree ordering the appellant to pay the Respondent the value of the suit land when this was not claimed.”

6. The applicants submitted on the case of **Griella vs Cassman Brown** saying that the plaintiffs ought not to put permanent structures therein yet they have embarked on cultivation without prior consent of the defendants/applicants. The defendants have used a past tense by submitting that the plaintiffs have deliberately “**trespassed**” and are busy cultivating the land. That because the defendants have a title deed, their chances of succeeding is high.

7. As pointed out by the plaintiffs the defendants have not counter-claimed against the plaintiffs. The plaintiffs deposed that they have been on the land for a long time. The defendants have not specified whether the acts of trespass complained of began before the filing of the suit or not.

8. The purpose of order 40 rule 1 is preserve the property the subject of the suit from being damaged during the pendency of a suit so that the decree is not frustrated. The defendants herein have not pleaded that if the orders are not granted this suit will be rendered nugatory. Further they did not elaborate on the nature of the loss that they will suffer which cannot be compensated by an award of damages.

9. The defendants came filed this application merely because they are the registered owners. However the pleadings reveal the plaintiffs are in occupation. Since the plaintiffs are challenging the title of the defendants, the balance of convenience dictates that the plaintiffs be allowed to continue using the land until the suit is determined.

10. In conclusion, I find the application to be without merit and hereby dismiss it with costs to the plaintiffs.

Dated and Delivered at Mombasa this 20th day of January 2017.

A.OMOLLO

JUDGE