



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE NO.216 OF 2016

KAINGU SHEHI.....PLANTIFF

VERSUS

ONESMUS KAMBI RAI

MWAJOTO NYAMAWI

NYAWA MORRIS.....DEFENDANTS

RULING

INTRODUCTION

1. The notice of motion before me is the one dated 21st September 2016 by the plaintiff seeking for the following orders:-

1. THAT the defendant by themselves, their servants and/or agents or otherwise be restrained by temporary injunction from entering, trespassing into, or continuing to trespass into, alienating, disposing or building on or in any other way interfering with the plaintiff's ownership of the piece of land situated at Mwembeni, Samburu pending the hearing and determination of this application.

2. THAT the defendant by themselves, their servants and/or agents or otherwise however, be restrained by temporary injunction from entering, trespassing into or continuing to trespass into, alienating, disposing or building on or in any other way interfering with the plaintiff's ownership of the piece of land situated at Mwembeni, Samburu pending hearing and determination of this suit.

3. THAT the sale transaction entered into between the defendants and one Abdile Hassa Duwale be cancelled and set aside.

4. THAT costs of this application be provided for.

The applicant's case

2. The application is premised on the grounds that the plaintiff is a beneficial owner of the piece of land situated at Mwembeni, Samburu, that defendants have without any lawful excuse and/or authority from the plaintiff trespassed into the suit land and have purported and are in the process of trying to sell portions thereof to third parties without the plaintiff's consent or authority; that on 31st August, 2016the

defendants unlawfully and illegally sold 14 acres of the plaintiff's land to one Abdille Hassan Duwale, and that the defendants acts of trespass ought to be stopped forthwith as they are inimical to the plaintiff's right title and interest in the said land.

3. According to the plaintiff, he is the proprietor and entitled to possession of all that unsurveyed piece or parcel of land situated at Mwembeni in Samburu, Kwale County measuring approximately 100 acres, and that the process of land adjudication has not been carried out in that area. The plaintiff avers that he fears and there is real danger of him losing his entire land by the time this suit is heard and determined unless the defendants are restrained by an order of the court.

The respondents' case

4. In the replying affidavit sworn by Onesmus Kambi Rai on 2nd November, 2016, the defendants describe themselves as the Chairman, Treasurer and Secretary of a committee formed by the family members of the entire Shehi Chigaulo family and that they were appointed so to safeguard their Mwembeni Chitesi land which is family property. According to the defendants, the suit land belongs to the Shehi Chigaulo family of which the plaintiff is a member. In paragraph 9 of their Replying Affidavit, the defendants admit having sold a portion of the said land as per annexure "KSM1" in the affidavit of plaintiff sworn on 21st September, 2016.

Submissions

5. In his submissions counsel for the applicant reiterated that the plaintiff is the owner of land situated at Mwembeni in Samburu, Kwale County measuring approximately 100 acres, but which land is still unregistered. Counsel submitted that the plaintiff has made out a prima facie case as set out in the celebrated case of **GIELA vs-CASSMAN BROWN**, and that if the defendants are allowed to continue with their actions, they will waste away practically all the plaintiff's land, and the plaintiff will suffer irreparable harm

It was further submitted on the part of the applicant that the replying affidavit dated 2nd November, 2016 and sworn by the 1st defendant should be struck out as there was no authority from the 2nd and 3rd defendants annexed to it.

6. On his part, counsel for the defendants/respondents submitted that the application has no foundation to stand on because the plaintiff has not exhibited any title documents in his name, and that the plaintiff as not adduced any evidence to support his contention that the defendants are alienating and/or selling any portion of the suit land. Further, the respondents' counsel submitted that the plaintiff has not proved that he is a beneficial owner of the suit land. It was the respondent's submission that the law only protects the rights of owners of land who have exhibited valid title documents such as a title deed or letter of allotment.

Analysis and findings

7. The orders sought by the applicant in this application are of temporary injunction and the courts apply the established principles as laid down in the case of **GIELLA -VS- CASSMAN BROWN (1973) EA 358**. At the introductory stage the court is not concerned with the merits and demerits of the case itself as filed in the suit. The principles are that:

- 1. The applicant must show a prima facie case with a probability of success**
- 2. The applicant must show that he would suffer irreparable injury which would not normally be compensated by an award of damages.**
- 3. When the court is in doubt it will decide the application on the balance of convenience.**

The procedure followed is to decide the issues by affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by a clear breach by another party. Where the dispute turns on a question of fact about which there is conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence.

8. Having gone through the facts and evidence, I would now like to apply them to these principles of the law. The subject matter of this suit consists of an unregistered parcel of land situated at Mwembeni, Samburu in Kwale County. The plaintiff claims that he has beneficial interest in about 100 acres of that land. On their part, the defendants allege that the whole land is family property and concede that the plaintiff is a member of that family. In my view, the defendant, having conceded that the plaintiff is a member of that family, are agreeable that the plaintiff is a beneficial owner of part of the family land. Consequently, I arrive at the conclusion that he plaintiff has established a prima facie case with a probability of success.

9. In the absence of an order for injunction, does the plaintiff stand to suffer irreparably and beyond compensation through an award of damages? It is the plaintiff's case that the defendants have alienated part of the suit property by way of sale to third parties and unless restrained, there is real danger of the plaintiff losing his entire land. There is an agreement for sale annexed to the plaintiff's affidavit in support of the application. The defendants have not denied selling part of the land as shown in that agreement for sale. If the property is disposed off during the pendency of the suit to unsuspecting innocent third parties, the same will be beyond the reach of the plaintiff. While the possibility of compensation in the form of damages is there, the suit land is unique in that the same is family land. I do not believe that monetary compensation would suffice in the present case.

10. In my view, an injunctive order would be the order that best lends itself to the present circumstances. I consequently allow the application in terms of prayers (2) and order that pending the hearing and determination of this suit the defendants by themselves, their servants and or agents are restrained from alienating, disposing and or interfering howsoever with the piece of land situated at Mwembeni, Samburu Kwale County.

11. I note that prayer (3) is in the form of a mandatory injunction. The same cannot issue at this stage and shall await the main hearing of the suit.

12. The plaintiff will have costs of the application.

13. Orders accordingly.

Dated, signed and delivered at Mombasa this 30th day of March 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE