



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 243 OF 2016

BAHATI CHARO.....PLAINTIFF

=VERSUS=

JACKSON NZARO & OTHERS.....DEFENDANTS

RULING

1. By a Notice of Motion application dated 16th September 2016, brought under Orders 40 Rules 1, 2, and 4, and Order 51 rule 1 of the Civil Procedure Rules, the Applicant/Plaintiff prays for the following orders:

-

(i)

(ii) **THAT** pending the hearing and determination of this application inter-partes a temporary injunction be issued against the Defendants restraining them by themselves, their servants, agents and successors in Title or any person acting through them, from subdividing the Plaintiffs portion of land situated at Kibaoni area in Kilifi Town measuring 130 feet by 90 feet or thereabouts and known as Plot No. 364/84 and creating from it any portion of land and allocating the same to any person and from trespassing upon, selling, or erecting any buildings or structures upon the Plaintiff's said portion of land situated at Kibaoni area in Kilifi Town measuring 130 feet by 90 feet or thereabouts and known as Plot No 364/84 or the portion of land purportedly subdivided from the Plaintiffs Plot and now known as Plot No. 83 and from dealing with the said Plots in any manner whatsoever and/or interfering with the Plaintiff's quiet and peaceful occupation and enjoyment of the said plots.

(iii) **THAT** at the inter-parties hearing of this application a Temporary Injunction be issued against the defendants restraining them by themselves, their servants, agents and successors in Title or any person acting through them, from subdividing the Plaintiffs portion of land situated at Kibaoni area in Kilifi Town measuring 130 feet by 90 feet or thereabouts and known as Plot No. 374/84 and creating from it any portion of land and allocating the same to any person and from trespassing upon, selling, or erecting any buildings or structures upon the Plaintiffs said portion of land situated at Kibaoni area in Kilifi Town measuring 130 feet by 90 feet or thereabouts and known as Plot No. 364/84 or the portion of land purportedly subdivided from the Plaintiffs Plot and now known as Plot No. 83 and from dealing with the said Plots in any manner whatsoever and/or interfering with the Plaintiff's quiet and peaceful occupation and enjoyment of the said plots pending the hearing and determination of this case.

(iv) THAT the costs of this application be costs in the cause.

2. The main grounds upon which the application is based are that:

(i) The plaintiff is the beneficial owner of the suit property.

(ii) The 1st, 2nd and 3rd Defendants acting in their capacity as officials of an organization known as Kalolo Kibaoni Baya Magonzi Upgrading Project, have invaded the suit property and have purported to sub-divide the same and create a new plot which they have proceeded to alienate to the 4th Defendant.

(iii) The 4th Defendant has in turn purported to sell the newly created plot to the 5th Defendant-who in turn has now commissioned a surveyor to demarcate the new plot with a view to commencing construction of buildings thereon.

(iv) Consequently, the suit property is now in danger of being further alienated, wasted and/or damaged unless this court interferes and restrains the Defendants herein from any further encroachment and/or interference therewith.

3. The Defendants oppose the application and object to the grant of any orders as proposed by the Plaintiff. In a Replying Affidavit sworn on 13th October 2016 by one Salim Khamisi Fundi who describes himself as the Dispute Sub-Committee Chairman of the Kalolo Kibaoni Baya Magonzi Upgrading Project (also referred to in short as “KKB”), the Defendants state that from the agreement of sale annexed by the Plaintiff, the Plaintiff only bought Cashew nut trees planted on the Suitland and not the suit land itself. It is further their case that the annexed agreement does not state the particulars of the land and the Plaintiff allegedly bought and further that there is no parcel of land in the concerned area known as Plot No. 364/84 as the Suitland is described by the Plaintiff.

4. The Defendants state that KKB was formed in 1998 with the aim of undertaking the settlement of squatters residing in Kalolo, Kibaoni and Baya Magonzi areas of Kilifi Town upon which it did take up various tasks including identification of several areas for settlement of squatters. One of the Plots they identified was a large piece of land measuring about 0.2262 hectares which the Government had then allocated to the Mendeleo ya Wanawake Group in June 1991. This is one of the Plots which they said they subdivided upon consultation with various Government Departments and created Six Plots therefrom being Plot Nos. 81, 82, 83, 84, 87 and 514. At the time, it is the Defendant’s case that the Plaintiff was not present and when in 2007, she approached KKB and requested for consideration, she was allocated Plot No. 84 “after following due process and payment of the requisite fees”. The Maendeleo Ya Wanawake Group was then re-allocated Plot No. 81.

5. It is further the Defendant’s case that the Plaintiff was also “legally” allocated Plot No. 364 at Baya Magonzi Area and since KKB also allocated her this other Plot No 84 at Kibaoni Area, she was given the reference 364/84 of BM/KB which the Plaintiff was now using as the reference for the Suitland.

6. I have diligently read the Plaintiff’s application and the Response filed by the Defendants. I have also perused the rival submissions filed by the parties herein.

7. The principles on the grant of injunctions have long been settled. In the often cited case of **Giella-vs-Cassman Brown and Company Ltd (1973) EA 358** the Court held that: -

“The conditions for the grant of an interlocutory injunction are now 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 a balance of convenience.”

8. The Court of Appeal reiterated the need for an applicant seeking an injunction to establish those principles in *Nguruman Limited -vs- Jan Bonde Nielsen and 2 others*(2014) eKLR (Civil Appeal No. 77 of 2012) where it was held that:-

“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 a temporary injunction is not granted, and
- (c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

9. As was stated in *Mrao Ltd -vs-First American Bank of Kenya Ltd and 2 others* (2003) eKLR(Civil Appeal No. 39 of 2002) a “Prima facie case” includes:-

“But is not confined to a “genuine and arguable case.” It is a Case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. In the case before me, the Plaintiff avers that she is the beneficial owner of the suit property and is entitled to its exclusive possession. In support of her case, she has attached a Sale Agreement dated 2nd March 1978 between herself and one Kazungu Wamongo. While the agreement only mentions that she purchased 28 Cashew nut trees from the Vendor at a sum of Kshs 810, it would appear that she used the said agreement to also take possession of and occupy the land upon which the Cashew nuts stood. It is not in dispute that she has since put up some residential building on a portion of the land plus other structures including a pit latrine. Photos said to be of the residential building and the other structures are annexed to her supporting Affidavit.

11. It is apparent that when the Plaintiff occupied the land, the Kalolo Kibaoni Baya Magonzi Upgrading Project (or KKB in short) had not been formed. According to the Defendants, KKB was formed in the year 1998 with the aim of undertaking the settlement of squatters residing in Kalolo, Kibaoni and Baya Mangonzi areas of Kilifi Town.

12. It does appear to me that the idea of coming up with KKB was a good one aimed at settling all the squatters in the concerned region. It has however not been shown to me whether KKB had any land of its own qua KKB and/or on what mandate it proceeded to sub-divide the parcels of land that it did. Indeed, I have also seen attached to the Defendant’s documents a letter from the Provincial Administration which cautions the chairman of KKB from encroaching on the land allocated to the Mendeleo ya Wanawake Organisation. It is the Plaintiff’s case that the defendants invaded her land and purported to sub-divide the same and to create new plots one of which they proceeded to alienate to the 4th Defendant. It is not denied by the defendants jointly and/or severally that the pit latrine erected on the newly created Plot No. 83 was put up by the Plaintiff. The defendants have not demonstrated to this court that they had a legal mandate and/or authority to sub-divide the land and/or allocate it to Third Parties.

13. On the material presented before me, it is apparent that the Plaintiff’s right of ownership to the suit land, especially the section where her pit latrine is erected is in danger of being violated. Accordingly, I find merit in the Notice of Motion application dated 16th September 2016 and grant orders in terms of Prayer No.3 of the Application.

14. The Respondents will also bear the costs of this application.

Dated, signed and delivered in Malindi this 7th day of April 2017.

J. O. OLOLA

JUDGE