



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO.321 OF 2016

1. ISAIAH NJOGU NGATARA

2. JOSEPH IRUNGU NJOGU.....PLANTIIF

VERSUS

SALIM MWAKALELA MAZERA.....DEFENDANT

RULING

1. By Notice of Motion application dated 31st October 2016 and brought under Section 3 and 3A of the Civil Procedure Act, Order 40 Rules 1,2, 3,4,5,6,7,8 and 9 of the Civil Procedure Rules and Article 40 of the Constitution of Kenya, the plaintiffs are seeking the following orders:

a. Spent

b. Spent

c. **That a temporary injunction be issued restraining the defendant by himself, his servants, workmen, agents or any other person whatsoever and whomsoever from encroaching and/or trespassing, selling, alienating or doing any act causing annoyance to the plaintiffs/applicants suit property being un-adjudicated land at Mitangoni- Kafumbuni Village Mariakani measuring 8.2 arcres or thereabout pending the hearing and determination of this application and or this suit.**

d. **That this Honourable Court do make a declaration that the suit land at Mitangoni-Kafumbuni Village Mariakani is the property of the plaintiffs/applicants herein.**

2. The application is based on the grounds set out in the Notice of Motion and supported by the affidavit of Isaiah Wanjogu Ngatara, the 1st applicant sworn on 31st October 2016. The plaintiffs aver that they are the lawful owners of the suit land having bought it from Meri Kumbu Bimba, Bimba Kombo Nyasi, Said Bimba Zuma, Kombo Tsuma, Kombo Bimba Kombo, Meli Bimba Kombo and Wilson Kombo Chidzungwe on 30th June 2009. The plaintiffs attached a copy of the sale agreement. It is the plaintiffs' case that sometimes in the year 2009, the defendant made a complaint to the District Officer Mariakani claiming ownership of the said land and after hearing the parties the District Officer made a decision in the plaintiffs' favour. A copy of the proceedings and the decision by the D.O. was also attached.

The plaintiffs aver that they have been in occupation of the suit land since 2009 and have put up a

perimeter fence, a house, a water tank and are in the process of constructing a school on the land. Photographs showing the various developments on the land have been attached to the Supporting Affidavit. The plaintiffs depones that the defendant is still persistent in his claim over the suit land and has been trespassing trying to sell it to strangers and threatening the plaintiffs, resulting in some criminal cases. The plaintiffs state that unless the defendant is restrained by the court, he will continue interfering and threatening the plaintiffs’.

3. There was no opposition to the application. The defendant was served with summons to enter appearance as well as the application herein and he filed a Memorandum of Appearance through the firm of B.W. Kenzi and Company Advocates. When the application came up for inter-partes hearing on 27th February 2017, the defendant’s counsel sought for more time to file a response to the application and the court duly granted him 14 days to do so and the matter was adjourned to 11th April 2017 for inter-partes hearing. On 11th April 2017, only the plaintiffs’ counsel was in court. The defendant’s counsel was not in court and had not filed any response; hence the application proceeded ex-parte.

4. In his submissions, counsel for the plaintiffs reiterated the grounds on the face of the application as well as the contents of the supporting affidavit.

5. I have carefully considered the applications herein. The main issue that I now have to determine is whether the plaintiffs have satisfied the conditions for grant of interlocutory injunctions as laid down in the **GIELLA –VS- CASSMAN BROWN & CO LTD** case.

First, an applicant must show a prima facie case with a probability of success; secondly an injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

6. In the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA LTD (2003) KLR 125**, the Court of Appeal held that “.....a prima facie case is more than arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant’s case upon trial”. The court went on to state that “a prima facie case in civil application includes but is not confined to “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...”

7. The plaintiffs have exhibited documentary evidence on how they acquired the suit property. A previous dispute over the suit land before the local provincial administration was resolved in the applicants’ favour. The facts presented have not been controverted by the defendant. Applying the first principle in the **GIELLA –VS- CASSMAN BROWN & CO LTD** case,

8. I find that the plaintiffs have established, on a balance of probability a prima facie case against the defendant.

9. On whether or not the plaintiffs would suffer irreparable harm if the orders sought are not granted, I take the view that should the defendant not be restrained and goes ahead to sell the suit land to unsuspecting third parties, the loss that may result may not be quantified in damages. The plaintiffs have stated that they were in the process of constructing a school but defendant’s unlawful actions have prevented them from doing so. My view is that the inconvenience arising from such an action might equally not be quantifiable in damages. Consequently I find that the applicants have satisfied this condition too.

10. As a result of the foregoing analysis, I find merit in the present application and proceed to grant the orders in terms of prayer (c).

11. Prayer (d) cannot issue at this stage as the same can only be granted upon full trial.

12. The costs of the application is granted to the applicants.

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

.....for the applicant

.....for the respondent

C. YANO

JUDGE