



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC LAND CASE NO. 249 OF 2016

LLYDIA WAMBUI GITAU.....1ST PLAINTIFF/APPLICANT

REGINA WAMBUI GITAU.....2ND PLAINTIFF/APPLICANT

-VERSUS-

SAID MWINYIKAI THOMAS.....DEFENDANT

RULING

1. The plaintiffs filed a suit against the defendant together with a notice of motion application dated 5th September 2016. The application is brought pursuant to the provisions of Order 40 of the Civil Procedure Rules and Section 1A, B & 3A of the Act. The plaintiffs seek orders:

1) Spent

2) Spent

3) That the defendant by himself, his servants, agents be restrained by an Order of injunction from constructing upon subdividing, disposing, transferring and/or in any other manner parting with the possession of portions of Plot No. Kwale/Diani S.S/33 pending the hearing and determination of this application inter parties.

4) That the cost of this application be in the cause.

2. The motion is premised on the grounds inter alia that the defendant has trespassed into their plot Kwale/Diani SS/33 and constructed structures thereon and is also selling portions of the land to 3rd parties. Secondly that the defendant is in the process of subdividing the suit property. The application is further supported by an affidavit jointly sworn by the applicants. They annexed copies of letters of administration of the estate of Peter Karanja issued to them and a title deed showing now they are the registered proprietors. Further the applicants annexed a survey report explaining the extent of the encroachments and photographs of complete and incomplete houses and temporary fences. They urged the Court to grant the orders to preserve the suit property.

3. The application is opposed by the grounds of opposition dated 24th October 2016. The defendant pleads that the application is premature as the ownership of the suit property has not been confirmed by a current search. Secondly that the application is an abuse of the Court process and is intended to embarrass the defendant. Lastly that the defendant is ready to defend his case.

4. Parties opted to argue the application by way of written submissions. In support of their application, the plaintiffs submitted that they have met the threshold for granting the orders sought. They have cited the case of **Giella vs Cassman Brown (1973) E.A 358**. The defendant also filed a one page submission titled as plaintiff/applicant's submissions. The defendant submitted that the application is misconceived, incompetent and bad in law without giving any reasons for the same.

5. The defendant has admitted that all the structures shown in the photographs annexed by the applicants as **LWG – 4** belong to him. He did not deny the facts set out in the affidavit particularly the deposition that he was selling portions of the suit land to third parties. The photographs also show clearly a beehive of activities in terms of new constructions coming up and the plots being fenced into portions. Given that the applicants have annexed a title in their name which is only being contested by the defendant that no current search was annexed, I am satisfied that the applicants have demonstrated that they have a prima facie case with probability of succeeding.

6. Further if the on-going constructions and sale are not stopped, the applicants will be dispossessed of their land unjustly without being given a lay. The defendant has not stated that he will compensate the applicants for the loss in the event their suit is successful. With many houses on the plot, execution of the decree would ALSO be near impossible hence the provisions of order 40 rule 1 (a) must be called into play. Rule 1 (a) provides thus:

1. Where in any suit it is proved by affidavit or otherwise –

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

7. In conclusion I am satisfied there is merit in the application dated 5th September 2016 and hereby do grant the order No 3 with costs in the cause.

Dated, signed and delivered in Mombasa this 11th day of May 2017.

A. OMOLLO

JUDGE