



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO.208 OF 2011

GABRIEL ONGA & 30 OTHERS.....PLAINTIFF

VERSUS

1. MBUKONI HOLDINGS LTD.

2. ANGELA KITOSI

3. MULI KOLI.....DEFENDANTS

RULING

John Kitosi Kibondo, deceased (hereafter referred to only as “the deceased”) was at all material times the registered owner of all that parcel of land known as L.R. No. Mavoko Town Block 12/58 (hereinafter referred to as “the suit property”). The 2nd Defendant is the widow of the deceased while the 1st Defendant is said to be a land buying company. The 3rd Defendant on the other hand is said to be a former advocate of the deceased. No grant of letters of administration has been obtained in respect of the estate of the deceased. The Plaintiffs brought this suit against the Defendants seeking; a permanent injunction restraining the Defendants from transferring, selling, alienating or in any other manner interfering with the Plaintiffs’ peaceful possession of the suit property. The Plaintiffs also sought an order compelling the Defendants to survey the suit property and transfer to the Plaintiffs the portions thereof which they had acquired from the 1st Defendant. In the alternative, the Plaintiffs sought payment of the market value of the said portions of the suit property which they had acquired from the 1st defendant, the cost of the structures which they had put up on the suit property and general damages for breach of contract, trust and deceit.

Together with the plaint, the Plaintiffs brought an application by way of Notice of Motion dated 12th August 2011 under Certificate of Urgency seeking a temporary injunction restraining the Defendants from evicting them, surveying, trespassing on, alienating, transferring and/or interfering with their possession of the suit property pending the hearing and determination of this suit. On 8th December 2011, the court ordered that the said application be argued by way of written submissions. From the record, none of the parties filed submissions. The said application is still pending hearing and determination.

What is now before me is yet another application under certificate of urgency brought by the plaintiffs by way of Chamber Summons dated 10th September 2015. The orders sought in the present application are in the same terms as those which were sought in the Notice of Motion dated 12th August 2011 referred to above with minor variations. The plaintiffs have sought a temporary injunction to restrain the Registrar of Land, Machakos from transferring, registering and/or in any manner dealing with the suit property pending the hearing and determination of this suit. The Plaintiffs have also sought an injunction

restraining the 2nd Defendant from sub-dividing, transferring, selling, offering for sale, registering and/or in any other manner interfering with the Plaintiffs' peaceful and quiet occupation and possession of the suit property pending the hearing and determination of this suit.

The Plaintiffs' application which was supported by the affidavit of Erastus Mwangi Macharia sworn on 10th September 2015 was brought on the grounds that the Plaintiffs in good faith purchased portions of the suit property from the 1st Defendant who had acquired the suit property from the 3rd Defendant. The 3rd defendant is said to have acquired the suit property from the members of the deceased's family. The Plaintiffs contended that the 2nd Defendant in her capacity as the widow and administrator of the estate of the deceased had threatened to evict them from the suit property and have the structures they had put up thereon demolished and the property sold to third parties. The Plaintiffs annexed to the supporting affidavit of Erastus Mwangi Macharia copies of receipts, share certificates and beacon certificates which were issued to them by the 1st Defendant upon purchase of the said portions of the suit property. The Plaintiffs contended that they had occupied the said portions peacefully from the year 2001 until the year 2011 when they were issued with quit notices by the 2nd Defendant's advocates. The Plaintiffs averred that they had developed their respective portions of the suit property at great expense and that they were the lawful owners thereof. The Plaintiffs annexed photographs showing the residential houses they claimed to have constructed on the suit property. The Plaintiffs contended that their threatened eviction from the suit property was causing them mental anguish and distress against which they were seeking this court's protection. The Plaintiffs contended that they had established a prima facie case against the Defendants with a probability of success and that unless the orders sought are granted, they would suffer irreparable harm which cannot be compensated in damages. The Plaintiffs contended further that the balance of convenience was in favour of granting the orders sought.

The application was opposed by the 2nd Defendant through affidavit sworn on 27th October 2015. The 2nd Defendant stated that the suit property was registered in the name of the deceased and that grant of letters of administration in respect of the estate of the deceased had not been obtained. The 2nd Defendant stated that while she was in the process of applying for grant of letters of administration in respect of the estate of the deceased, she noted that there were strangers carrying out construction on the suit property. The 2nd Defendant stated that she had never had any dealings with the other Defendants or the Plaintiffs in respect of the suit property. The 2nd Defendant stated that she had no capacity to sell the suit property and was a stranger to the alleged sale of the suit property to the 3rd Defendant. The 2nd Defendant denounced the documents attached to the affidavit in support of the application as evidence of the sale transaction between members of her family and the 3rd defendant and termed them forgeries. The 2nd Defendant stated that the Plaintiffs and the 1st and 3rd Defendants were intermeddling with the estate of the deceased and were trespassers on the suit property. The 2nd Defendant stated that the beneficiaries of the estate of the deceased had been denied access and the right to use the suit property. The 2nd Defendant contended that the Plaintiffs had not established a prima facie case with a probability of success. The 2nd Defendant took issue with the Plaintiffs' failure to prosecute the earlier application for injunction and termed the present application as frivolous and vexatious.

The application was argued by way of written submissions. The Plaintiffs filed their submissions on 15th January 2016 while the 2nd Defendant filed her submissions on 10th February 2016. I have considered the Plaintiffs' application and the response thereto by the 2nd Defendant. I have also considered the parties' respective submissions and the cases which were cited in support thereof. The principles upon which this court exercises its discretion in applications of this nature are now well-settled. An applicant for a temporary injunction must show a prima facie case with probability of success and demonstrate that he will suffer irreparable injury which cannot be compensated in damages if the order is not granted. If the court is in doubt, the application would be determined on a balance of convenience. See, the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E. A 358 which was cited by both parties. On the material before me, I am not satisfied that the Plaintiffs have established a prima facie case with a probability of success against the 2nd Defendant. In my view, the Plaintiffs have not established the proprietorship interests which they claim to have over the suit property. The Plaintiffs who claim to have acquired

portions of the suit property from Mbukoni Holdings Limited (hereinafter referred to only as “Mbukoni”) have not demonstrated that Mbukoni had owned the suit property or any part thereof. The Plaintiffs have not established their interests in the portions of the suit property which they claim to be under their occupation. I am not persuaded that the documents annexed to the affidavit in support of the plaintiffs’ application have met the evidentiary threshold for proof of title to land. I am also not satisfied that the Plaintiffs will suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted. I have noted that in their amended plaint dated 15th May 2015, the Plaintiffs have sought damages as an alternative relief. This means that the loss which the Plaintiffs may suffer if the injunction sought is not granted can be quantified and compensated by an award of damages.

Due to the foregoing, I am not satisfied that the Plaintiffs have met the conditions for granting a temporary injunction. The Plaintiffs’ application dated 10th September 2015 is therefore not for granting. The same is accordingly dismissed with costs to the 2nd Defendant. I order further that this file be taken back to the Environment and Land Court at Machakos for hearing and final determination.

Delivered and Signed at Nairobi this 27th day of June, 2017

S. OKONG’O

JUDGE

Ruling delivered in open court in the presence of:

Ms. Serem h/b for Wangira	for the Plaintiffs
N/A	for the 1 st Defendant
Ms. Lipwop h/b for Senteo	for the 2 nd Defendant
N/A	for the 3 rd Defendant
Kajuju	Court Assistant