



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 68 OF 2016

HUBUU SEIF MOHAMED.....PLAINTIFF

=VERSUS=

SULTANA FADHIL & OTHERS.....DEFENDANTS

RULING

1. Before me are two applications. The Plaintiff Hubuu Seif Mohamed filed the first application dated 22nd March 2016 praying for the following orders:

(a) Spent

(b) THAT this Honourable Court be pleased to issue an order of injunction restraining the Respondents by themselves and/or their agents, servants and or any person working for them from dealing, leasing, constructing, selling, wasting, damaging, intruding, trespassing, developing and/or interfering with land registration number CR. 65740 measuring 7.927 Hectares situated at Takaungu Trading Center in Kilifi County pending hearing and determination of this application inter-parties.

(c) THAT this Honourable Court be pleased to issue an order of injunction restraining the Respondents by themselves and/or their agents, servants and or any person working for them from dealing, leasing, constructing, selling, wasting, damaging, intruding, trespassing, developing and/or interfering with land registration number CR. 65740 measuring 7.927 Hectares situated at Takaungu Trading Centre in Kilifi County pending hearing and determination of this suit.

2. The Plaintiff's application is supported by her affidavit sworn on 22nd March 2016 and is based on the following grounds: -

(a) That the two Defendants have hired squatters and/or goons to invade the Applicant's land being CR. No 65740 and unless stopped by the order of this court, her proprietary right stands to be compromised.

(b) That the Plaintiff has been reliably informed that the Defendants intend to dispose off the Suitland to Third Parties and are only using the squatters to intimidate the Plaintiff so as to grab her land.

(c) That the Defendants have threatened the Plaintiff with violence and she stands to suffer damage if the said intrusion is not restrained.

3. The Defendants opposed the Plaintiff's application. In a Replying Affidavit sworn on 5th April, 2016 by one Fatima Sarifudin Musaji who states that she is the 2nd Defendant wrongly sued herein as Fatemi Tayabal Abdul Hussein, the Defendants aver that they are total strangers to both the suitland and even the Plaintiff. It is however the defendants' case that from documents annexed to the Plaintiff's Affidavit, in particular the Deed Plan No. 93539, they are able to identify the shape of Plot No. 1/75 which belonged to the 2nd Defendant's brother, one Shablehusein Tayabali Abdulhusein Noorbhai(now deceased).

4. It is the 2nd Defendant's case that her deceased brother aforesaid passed away in 1985 and as the Executor of his will, she kept the Original Certificate of Title No. CR 14387/1 which had been issued through the said Deed Plan No. 93539 to his brother. The 2nd Defendant further avers that she completed distribution of the Estate of her brother to the heirs of the Estate. It is further her case that she is aware the Beneficiaries of the Estate later sold and transferred the land to the present owner one Nahla Fadhil.

5. While denying that they have any interest and/or dealings in the suitland to warrant their hiring the so-called goons to invade the land, the defendants nevertheless contend that they are aware the Plaintiff's Certificate of Title (CR 65740) was issued in error which error was identified and acknowledged by the Registrar of Titles vide his letter dated 3rd March 2016 wherein he called upon the Plaintiff to surrender the title for cancellation. The Defendants conclude that indeed the Plaintiff's title was cancelled when she failed to appear before the Registrar of Titles as instructed in the letter dated 3rd March 2016.

6. When the Plaintiff's application first came up for hearing ex-parte before the Honourable Justice Angote on 23rd March 2016, the Learned Judge granted temporary orders of injunction restraining the defendants from dealing with the suitland which measures approximately 7.927 hectares. The defendants were subsequently served and on 25th April 2016, they filed the Replying Affidavit whose contents I have referred to hereinabove.

7. Not being content however with merely replying to the Plaintiff's application, the defendants on the same 5th day of April 2016 filed a Notice of Motion application under certificate of urgency seeking the following orders:-

1.

2. That the orders of this Honourable Court dated 23rd March 2016, be vacated, discharged, varied or set aside.

3. That the entire suit brought by way of plaint dated 22nd March 2016 be dismissed for lack of merits.

4. That the Honourable Court do grant any other orders it may deem fit and just to grant.

8. The Defendant's application is supported by an Affidavit sworn on 5th April 2017 by Sultana Fadhil, the 1st Defendant and is based on the following grounds, *inter alia*; _

(a) That the application dated 22/3/2016 made by the Plaintiff was in bad faith, frivolous and vexatious.

(b) That while making the Application the Plaintiff failed to give the correct facts regarding the parcel of land allegedly stating that it is hers.

(c) That the defendants have evidence showing that the Plaintiff has no proprietary rights over the property as the Certificate of Title produced by the Plaintiff was fraudulently obtained and the same had been cancelled as at the time the Plaintiff filed this case.

(d) That the said parcel of land was on 27th May 2010 transferred to one NAHLA FADHIL who is

totate the lawful and registered owner and therefore this court erroneously issued the orders of 23rd March 2016 as the title relied on as the basis of the claim had been cancelled.

(e) That the Plaintiff has not come to court with clean hands and is actually using the Judicial System to steal the suitland from its rightful owner.

9. In response to the defendants' application, the Plaintiff swore a Replying Affidavit filed in court on 16th June 2016 in which she contends that even through the Registrar of Titles cancelled her title as stated by the defendants, such action was ultra vires the powers of the Registrar and her title remains valid unless otherwise cancelled by the court.

10. When the parties subsequently appeared in court, this court directed that both applications be concurrently argued and disposed of with the defendants' Notice of Motion dated 5th April 2017 being treated as a response to the Plaintiff's Notice of Motion dated 22nd March 2016. Parties thereafter filed written submissions in support of their respective positions. I have carefully considered the two applications and the submissions and authorities filed by respective counsels for the Parties.

11. As the Court of Appeal stated in *Nguruman Ltd -vs- Jan Bonde Nielsen & 2 Others (2014) eKL* in an interlocutory injunction application such as this one, the applicant has to satisfy the triple requirements laid out earlier on in *Giella -vs- Cassman Brown Co Ltd & (1973) EA 358* that is to:

(a) Establish her 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.

12. In *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, the Court of Appeal fashioned a definition for the term "Prima facie Case" in civil cases in the following words: -

"In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial."

13. In the *Nguruman* case (supra), the Court of Appeal adopted the above definition in what constitutes a "prima facie case" and proceeded to add the following conditions by way of explaining it.

"The party on whom the burden of proving a 'prima facie case' lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

14. It is the Plaintiff's case that the 1st and 2nd Respondents have hired squatters and/or goons to invade her parcel of land being CR No. 65740. It is further her case that she has been reliably informed that the 1st and 2nd Respondents intend to dispose of the said land to 3rd Parties and are only using the squatters to intimidate the Plaintiff with a view to taking over her land. I have looked at both the Plaintiff's application and the Affidavit filed in support of the Plaintiff's application and I am unable to find any evidence to demonstrate that the 1st and 2nd Defendants hired the people described as 'goons' who are said to have invaded the suitland and occupied it as squatters. Indeed, while annexure "HSM 3" attached to the affidavit is stated to be photographs showing the 'invasion' all that is visible is a cleared foreground with some houses visible from the background. It is not clear whether the said houses are newly -built or old.

15. While it is not very clear from the Plaintiff's documents as to why she has sued the defendants and/or the nexus between the defendants and the alleged invasion of the suitland, it is however clear that the defendants indeed know quite a lot about the land. As it turned out from the two affidavits filed by the Defendants in reply to the Plaintiff's application and in support of their own application, it is apparent that the 1st Defendant is the Executor of the Estate of one Shabir Hussein Tayabali Abdulhussein Noorbhai(deceased). The beneficiaries of the said Estate are the ones said by the defendants to have sold the suitland to one NAHLA FADHIL who according to the defendants is the registered owner of the suitland. The 2nd Defendant on the other hand is the Advocate who was engaged sometimes in the year 2010 to carry out the conveyance on behalf of the Executors of the Estate.

16. In support of her application for injunction, the Plaintiff avers that she is the owner of all that land measuring 7.927 Hectares situated at Takaungu Trading Centre and comprised in Certificate of Title No. CR 65740 and being sub-division Group 1/75 as delineated on land Survey Plan No. 93539. At paragraph 3 of the Supporting Affidavit, the Plaintiff avers that "She inherited the suit property from her late grandparent Hubuu Mohamed Khafan Al Mazrui by following due process". In support of her case, she has exhibited and marked as 'HSM 1' a copy of the Certificate of Title and a copy of Deed Plan No. 93539 dated 19th June 2015.

17. In their Replying Affidavits, the Defendants have exhibited copies marked as 'FMI 1' and 'FMI 2' respectively of a Certificate of Title No. 14387/1 and a similar Deed Plan No. 93539 dated 1st October 1973 respectively showing that the suit property is owned by the said NAHLA FADHIL who is not a party in this suit. In support of the claim that the suitland belongs to the said NAHLA FADHIL, the Defendants have also annexed a copy of a letter dated 3rd March 2016 (annexure FIM 4) from the Land Registrar Mombasa asking the Plaintiff to surrender her Title for cancellation. The said letter reads in part as follows:

"It has come to our notice that the above-mentioned parcel of land had been registered in this registry on 12th January 1974 as CR 14387. You are also aware that you presented a Certified true copy of the deed plan in respect of the same piece of land for registration(sic) this office on 18th August (2015) and a certificate of tile was issued in your name.

Take note that the registration in respect of the above-mentioned parcel of land has been rectified pursuant to Section 79 of the Land Registration Act to reflect the earlier title registered as CR No. 14387.

You are therefore required to surrender the Certificate of tile CR 65740 to this office for cancellation urgently but not later than 14 days from the date of this letter.

18. While it is not clear when the Plaintiff received this letter, it is evident from her Replying Affidavit sworn on 15th June 2016 in response to the Defendant's application that she was aware of the actions of the Registrar of Titles in regard to Certificate of Title No. CR 65740. At paragraph 2 ,3, and 4 of the replying Affidavit, the plaintiff avers thus:

2. That I am and continue being the only Legal Owner of parcel No. 65740, not NAHLA FADHIL, neither have I relinquished or surrendered my proprietary rights to anyone.

3. That Certificate of title No. CR 75740 was not erroneously issued, neither was a fake Duplicate Deed Plan No. 93539 used in executing and preparing the above certificate.

4. That I am reliably advised by my Advocate which information I believe to be true that though the Registrar of Titles cancelled my title, which in the above case he did vide a letter dated 3rd March 2016, his action was ultra vires as my title CR 65740 is genuine and that it is only the High Court that has the final authority in the matter.

19. Section 26(1) of the Land Registration Act 2012 provides as follows

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer on transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

20. I note from the Plaintiff’s Supporting Affidavit that her claim to the suitland is based on the fact that she inherited it from her late grandparent Hubuu Mohamed Khalfan Al Mazrui. While her title to the land has been challenged, she has not produced anything to show how the land was transmitted to her. Indeed, in spite of notification by the District Land Registrar vide the letter dated 3rd March 2016 about the need to rectify her title, she has not shown anything to validate the challenged title.

21. Section 79(1) of the Registration of Land Act gives the Registrar the power to rectify the register or any instrument presented for registration. Under Section 79(2), one of the reasons the Registrar may direct the rectification of a register or document is where the document in question has been obtained by fraud. While it does appear to me that the cancellation of the certificate of title is what prompted the filing of this suit, the Plaintiff has not taken any action to challenge the cancellation.

22. When the Plaintiff filed this case two weeks after the Registrar’s notification, she did not inform the court that her title had been challenged and/or cancelled by the Registrar. I find no evidence that she was either in occupation of the suitland or that she exercised any form of control thereon. She has not demonstrated that she has an unmistakable right which has been threatened by the Defendants and which requires the protection of this court.

23. Accordingly, I make the following orders:

(a) That the Plaintiff’s application dated 22nd March 2016 is hereby dismissed.

(b) The Interim Orders granted herein on 23rd March 2016 are hereby accordingly vacated.

(c) The Plaintiff shall bear the costs of the two applications.

Dated, signed and delivered in Malindi this 2nd day of June 2017.

J. O. OLOLA

JUDGE