



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 61 OF 2017

MWENDA KENGA MLAMBA.....PLAINTIFF

=VERSUS=

NYEVU CHANGAWA

LENOX BAKARI YERI.....DEFENDANTS

RULING

1. This is a Notice of Motion dated 20th March 2017 and filed in court the same day. It is expressed to be brought under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 40 Rule 7 of the Civil Procedure Rules. The Applicant Mwenda Kenga Mlamba prays for orders as follows: -

(i) Spent

(ii) Spent

(iii) THAT pending the hearing and determination of the main suit, this Honourable Court be pleased to issue an injunction (order) restraining the Respondents either by themselves, their agents, servants and/or any person acting on their instructions from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with the property Title No. KILIFI/NGERENYI/569

(iv) THAT the costs for and incidental to the application be provided for.

2. The Application is premised on a number of grounds and is further supported by the Applicants' Affidavit sworn on 20th March 2017. It is the Applicant's case that he bought a portion measuring 6 acres of all that parcel of land known as Kilifi/Ngerenyi/569 from one Jonathan Changawa Nyale(now deceased) in 1994. The Plaintiff further avers that on an undisclosed date, the Estate of the said Jonathan Changawa and the 2nd Respondent who is said to be the Chief of the area started interfering with the suit land and now intend to revoke the agreement made between the Plaintiff and the said Jonathan Changawa Nyale. It is therefore the Plaintiff's prayer that the Respondents be restrained from visiting, transferring, selling, leasing, sub-dividing and/or charging the suit property.

3. The Respondent is opposed to the grant of the orders sought. In a Replying Affidavit sworn by Nyevu Changawa on 4th April 2017, the Defendant vehemently denies that the 6 acres were sold to the Plaintiff.

Describing himself as the owner and intended administrator of plot No Kilifi/Ngerenyi/569, the Defendant further contends that the Plaintiff was summoned on an undisclosed date by the Area Chief who is the 2nd Defendant herein but he failed to appear as a result whereof the 2nd Defendant resolved that the plot belongs to the 1st Defendant as the intended administrator.

4. I have read both the application and the Replying Affidavit. In ***Giella versus Cassman Brown Company Ltd (1973) EA 358***, the conditions for the grant of an interlocutory injunction were settled as follows: -

First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 the balance of convenience.

5. Has the Plaintiff made a prima facie case with a probability of success? In ***Mrao versus First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, a prima facie case was described as follows:

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‘A prima facie case in a Civil Application 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter.’

6. Looking at the facts of this case, it is evident that the 1st Respondent Nyevu Changawa is sued as the administrator of the Estate of the late Jonathan Changawa Nyale who is said to have been the registered owner of all that parcel of land reference Number Kilifi/Ngerenyi/569. The main grounds why this suit has been filed against the two Defendants can be gleaned from paragraphs 4,5, and 6 of the Plaintiff.

7. Without bothering to indicate who the 2nd Defendant is, the Plaintiff avers at paragraph 4 and 5 of the Plaintiff as follows:

4. The Plaintiff states that the 2nd Defendant in blatant abuse of office caused the 1st Defendant to interfere(with) the said 6 acres under an irregular process which the Plaintiff came to learn about.

5. The Plaintiff avers that the interfering to the 1st and 2nd Defendant(sic) was fraudulent and without the free consent of the Plaintiff.

8. While a reading of the Replying Affidavit filed by the 1st Defendant reveals that the 2nd Defendant is the Area Chief, I am unable to discern both from the Supporting and the Replying Affidavits to the application, what this so-called “interference” amounted to. It would however appear from the wording of the prayers sought as well as Ground No. ‘b’ of the application that the Applicant is apprehensive that the Estate of the Late Jonathan Changawa Nyale may want to dispose of the suitland.

9. While the 1st Respondent is sued as the administrator of the Estate, it is evident that no Grant of Letters of Administration has issued. That must be the reason the 1st Defendant avers at paragraph 4 of his Replying Affidavit that he is the “lawful owner and intended administrator(sic) of Plot No. Kilifi/Ngerenyi/569. He is not therefore the right person to sue. Secondly, while the agreement annexed to the Supporting Affidavit in support of the Plaintiff’s case was executed on 7th April 1994, there is nothing else to show that the Plaintiff advanced his interest in the land either by concluding the acquisition process and/or utilizing any portion thereof.

10. From the Affidavits placed before me, the Plaintiff has in my view failed to show that he has a prima facie case with a probability of success as against the two Defendants. While he may have some claim against the Estate of the late Jonathan Changawa Nyale, I am not persuaded that he stands to suffer

irreparable loss which may not be compensated by an award of damages. It is actually evident from his alternative claim at paragraph 7 of the Plaint (which incidentally is a little more clear in comparison to the Motion before me) that he is willing to be paid a compensation at current market prices “if the 1st Defendants persists in having the suit plot irregularly and unlawfully registered in their name.”

11. The upshot is that the Application dated 20th March 2017 is dismissed with costs to the Respondent.

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

J.O. OLOLA

JUDGE