



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 202 OF 2016

HAMISI TSUMA MWERO & 9 OTHERS..... PLAINTIFF/APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1st DEFENDANT/RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY..... 2nd DEFENDANT/RESPONDENT

COLFAX HOLDINGS LIMITED.....3rd DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 21st July 2016. It is brought under order 40 Rules 1, 2 4(1) and (2), section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the Law.

It seeks orders;

1. Spent

2. Spent

3. That pending the hearing and determination of the issues the 1st, 2nd respondents be restrained by way of a temporary injunction from paying any compensation to the 3rd defendant/respondent in respect of acquisition of Plot Numbers; LR Numbers 29437/63, 29437/65, 29437/66, 29437/67, 29437/68, 29437/69, 29437/70, 29437/71, 29437/72 pursuant to Gazette Notice No 4672 of 2016.

4. That costs of this application be provided for.

2. That grounds relied upon are on the face of the application.

1. That the 1st defendant/respondent has given notice of intention to acquire land on behalf of the 2nd defendant/respondent for construction of the Mombasa southern by pass as follows;

Plot Numbers 29437/63, 29437/65, 29437/66, 29437/67, 29437/68, 29437/69, 29437/70, 29437/71, 29437/72

2. The above named Plots are sub divisions of the larger Plot Number MN/VI/4526 (CR 8727)

which is the subject of a pending court case being Mombasa HCCC No. 632 of 2011, Hamisi Tsuma Mwero and others versus Colfax Holdings and Another.

3. That the land case is a claim for adverse possession of the land hence the 1st defendant/respondent is not entitled to the compensation until the case is heard and determined.

4. It is on the interest of Justice that the Honourable Court makes the necessary orders as the looming acquisition will effectively dispose of part of the subject matter of the suit which will render the suit nugatory.

5. That there is need to protect the interests of the Applicants in the suit land until the suit is heard and determined.

3. The application is supported by the affidavit of Hamisi Tsuma Mwero the 1st Plaintiff/Applicant sworn on the 20/7/2016.

The application is opposed. There are grounds of opposition dated 14/11/2016 filed by the 1st defendant/respondent on 16/11/2016. There is also a replying affidavit sworn by Engineer Kungu Ndungu the 2nd defendant/respondent manager, special projects on the 16/9/2016.

There is also a replying affidavit sworn by Divyanshu Panchal the project manager of the 1st defendant/respondent sworn on the 27/8/2016.

4. I have considered the Notice of Motion dated 21/7/2016, the supporting affidavit, and the supplementary affidavit dated 27/9/2016/

I have also considered the replying affidavit in opposition to the application. I have also considered the grounds of opposition and the submissions of Counsel.

5. It is the Plaintiffs/Applicants' contention that they are parties to an adverse possession claim in HCCC No. 632 of 2011 against the 3rd Respondent and the matter is still pending determination. That the 1st defendant/respondent intends to use public funds allocated for compensation by the 2nd defendant/respondent to pay the 3rd defendant/respondent which shall be to the detriment of the Plaintiffs/Applications. Further that the plaintiffs/Applicants have a proprietary interest in Plot Number MN/VI/4526 where they have resided peacefully, openly, continuously, uninterrupted and with actual knowledge of the 3rd defendant/respondent for a period of more than 12 years.

6. That the Plot was subsequently subdivided into the above parcel Numbers 29437/63 29437/65, 29437/66, 29437/67, 29437/68, 29437/69, 29437/70, 29437/71, 29437/72 situated at Bonje area Miritiri Mombasa. That they have filed a case being HCCC No 632 of 2011. They have relied on the case of **Adam versus Earl of Sand wich (1877) 2GBD 485**. Further that Article 40 of the Constitution 2010 guarantees every person the right to property, section 26 of the Land Registration Act 2012 recognizes overriding interests under section 28 (h)- Rights acquired by virtue of any written law relating to the Limitation of Actions or by prescription. That by virtue Article 27 of the constitution the 1st and 2nd respondents have a role to ensure every person is treated equally before the Law. They have put forward the case of **Kahindi Ngala Mwangendi Versus Mtanalewa Malindi ELC No. 108 of 2011**.

7. Mr. Mbuthia learned Counsel for the 1st defendant/respondent submitted that Article 40 (3) of the Constitution is emphatic that the state shall not deprive a person of property of any description or any interest in land, unless the deprivation is carried out in accordance with this constitution and any act of parliament that requires prompt payment in full of just compensation. Further that the process of compulsory acquisition/s complete

That the plaintiffs/Applicants herein have no proprietary interest over the suit land as at now capable of

protection by this court. Further that the claim for adverse possession in HCCC No. 632 of 2016 if yet to crystallise hence this suit is prematurely before court.

8. That the Plaintiffs/Applicants stand to suffer no prejudice if money is paid to the 3rd defendant/respondent as they can easily recover the same through the Civil Proceedings. That no security or undertaking has been made to the 3rd defendant/respondent who stands to suffer if they are not paid.

He also submitted that the application does not meet the conditions set out in the case **Giella Versus Cassman Brown & Co. Ltd (1973) EA 358.**

9. M/s Oregio and Odhiambo for the 2nd defendant/respondent submitted that the plaintiffs/Applicants have failed to satisfy the conditions set out in the **Giella case** for grant of temporary injunctions. They also relied on the case of **Mrao versus First American Bank of Kenya Limited And 2 others (2003) KLR 125.** Further that the recognized registered owners are the 3rd defendant/respondent and relied on the section 26(1) of the Land Registration Act.

They also relied on the case of **Panari Enterprises Limited versus Lijoodi And 2 others, Nairobi ELC No. 779 of 2013** where it was held that, “There is no doubt that the Plaintiff/Applicant has produced its title deed. The above legal provision binds this court to take that as prima facie evidence of ownership unless it can be challenged on the grounds of fraud or misrepresentation or where the title deed has been acquired illegally, unprocedurally or through a corrupt scheme. From what I can see the Respondents have not been able to demonstrate to this court albeit at this interlocutory stage that the title deed produced by the plaintiff can be challenged on any of these grounds”.

They also put forward the case of **Kenya National Union of Nurses Versus County Government of Mombasa And 2 others (2015) eKLR.** They pray that this application be dismissed.

10. M/s A. B. Patel & Patel Advocates for the 3rd defendant/respondent submitted that the Plaintiffs/Applicants have no interest in the 3rd defendant's property they have put forward the case of **Kitur Versus Standard Chartered Bank And 2 others (2002) eKLR.** They further submitted that the Plaintiffs/Applicants have failed to satisfy the court that they deserve the orders sought.

11. The issues for determination are;

i) Whether or not the Plaintiffs/Applicants' application is merited.

ii) Who should bear the costs of this application.

12. There is no doubt that there exists HCCC No 632 of 2011 (OS) between the Plaintiffs/Applicants and the 3rd defendant/respondent. It is the Plaintiffs/Applicants claim by virtue of adverse possession.

The gist of the present application is that Plot Number MN/VI/4626 which is the subject matter in HCCC No. 632 of 2011, has been subdivided into Plot Numbers shown on the face of this application the same have been compulsorily acquired and the 3rd defendant/respondent who is the registered owner is due to receive compensation.

13. The conditions for grant of temporary injunctions were set out in the case of **Giella Versus Cassman Brown & Co Ltd (1973) EA 358.**

They require merits are that the Applicant has to demonstrate that he has a prima facie case with a probability of success.

Secondly, the applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted; that an award of damages will not adequately compensate the damage.

Thirdly, if the court is in doubt or the above requirements then it will decide the application on the balance of convenience.

14 As for now no evidence has been presented by the Plaintiffs/Applicants that they live on the portions of Land affected by the compulsory acquisition. They have not put forward any evidence to confirm that these Plots are a result of the suit division of Plot Number MN/VI/4526 the subject matter of HCCC 632 of 2011.

I find that they have not satisfied the court that they have a prima facie case with a probability of success.

15. The claim of adverse possession in HCCC No 632 of 2011 has not yet crystallised since the case is still pending determination. They are seeking to stop the payment of compensation due to the 3rd defendant/respondent. They have given a figure.

I find that they will suffer no irreparable loss if these orders are not granted. Should they succeed in their claim in the HCCC No 632 of 2011 they will sue the 3rd defendant for the amount.

I agree with Counsels for the defendants/Respondents that by asking this court to stop the compensation due to the 3rd defendant/respondent is to ask the court to speculate and the outcome of HCCC No 632 of 2011.

I also find that the balance of convenience to tilts in favour of the 3rd respondent who is registered owner of the said titles.

16. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit

It is so ordered.

Dated and signed at Mombasa on the **25th day of July 2017**.

L. KOMINGOI

JUDGE

18/7/2017

Ruling dated and delivered in open court on the 25th July 2017 in the presence of Ms. Onyango for Mr. Tindi for the Defendant/Applicants and Ondego for Khagram for the 3rd defendant/Respondent and the Court Assistant Koitamet.

L. KOMINGOI

JUDGE

18/7/2017