



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

CIVIL SUIT NO. 10 OF 2017

KARISA CHARO KARISA.....PLAINTIFF

VERSUS

1. ANAS HASSAN MUSA

2. MACKSTON KARISA GARAMA

3. RACHEL DAMA KADENGE MASHA

4. DISTRICT LAND REGISTRAR KILIFI.....DEFENDANTS

RULING

1. The application before me is a Notice of Motion dated 23rd January 2017 brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as well as Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The Application drawn by the Plaintiff Karisa Charo Karisa in person seeks for an order that this Honourable court be pleased to grant temporary orders of injunction restraining the Defendants, their agents, servants and/or employees and/or whomsoever acting under their instructions from claiming ownership, trespassing, sub-dividing and/or transferring or in any other way interfering with the Plaintiff's property known as Kilifi/Mtondia/469 measuring 1.30 acres pending the hearing and determination of this suit.

2. The application is supported by the Plaintiff's Affidavit sworn on 23rd January 2017. The gist of the application is that the Applicant is the lawful administrator of the said parcel of land having obtained a Grant of Letters of Administration intestate in Malindi High Court Succession Cause Nos 155 of 2016 and No. 1 of 2017. It is the Plaintiff's case that the suit property originally belonged to his grandparents and that since their death, he has lived on the land and has never sold, transferred or sub-divided the same.

3. The Plaintiff further avers that the 1st Defendant has built a perimeter wall on the plot while the 2nd and 3rd Defendants have built houses and are living on the plot without his permission. He has since reported the matter to Kilifi Police Station as a result whereof the 3rd Defendant was charged in court.

4. The Application is opposed. The 2nd and 3rd Defendants have filed near similar Replying Affidavits in opposition to the Application while the 4th Defendant-the District Land Registrar Kilifi has also put in Grounds of Opposition. From the Affidavits filed, it would appear the 3rd Defendant Rachael Dama

Kadenge Masha has had a longer interaction with the land in dispute as compared to the other Defendants.

5. In her Replying Affidavit sworn on 9th February 2017, the 3rd Defendant avers that the Plaintiffs have never been in possession of the suit property since the time she bought her portion on 10th September 1998. She gives a long history of the land and states that the original parcel of land relating to the suit property was Title No. Kilifi/Mtondia/99 and was owned by the Plaintiff's grandfather one Karisa Mweri. Upon the death of the said Karisa Mweri, the estate devolved to his three sons and a widow all of whom were given their own portions of land within the original parcel. To facilitate the allocation to each beneficiary of the estate, the family embarked on succession proceedings and sub-divided the land into four parcels, namely Kilifi/Mtondia/467, 468, 469 and 470. She has produced copies of green cards and mutation forms evidencing the sub-divisions.

6. It is further the Defendant's case that parcel No. Kilifi/Mtondia/469 (the suit property) was allocated to one Kenga Karisa Mweri an uncle to the Plaintiff who proceeded to sub-divide it into parcel Nos. Kilifi/Mtondia/709, 710 and 711. The said Kenga Karisa Mweri later on 10th September 1998 sold to the 3rd Defendant portion No. Kilifi/Mtondia/709 and the 3rd Defendant went through the relevant processes and has now acquired Title in her own name.

7. The 2nd Defendant Markstone Karisa Garama repeats the same history in his Replying Affidavit sworn on 9th February 2017 save for the fact that he states that he bought his portion from one Mwanahawa Adam Mohamed on 30th January 2017. The said Mwanahawa had bought the portion now known as Kilifi/Mtondia/725 from the same Kenga Karisa Mweri. The 2nd Defendant is now the registered owner of the said Kilifi/Mtondia/725.

8. While the 1st Defendant did not file an Affidavit in response to the application, I note from the Statement of Defence and the Witness Statement both filed herein on 31st March 2017 that the position is more or less that taken by the 3rd Defendant.

9. I have considered the application and the pleadings filed in response. I have also considered the submissions filed herein by the Plaintiff in person and those filed by counsel for the 2nd and 3rd Defendant/Respondent. The conditions for the grant of an interlocutory injunction were long settled in ***East Africa in the case of Giella -vs- Cassman Brown & Company Ltd (1973) EA 358*** wherein Spry VP, stated as follows: -

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

10. Arising from the foregoing, this court must first and foremost consider whether on the facts presented by the Plaintiff, a prima facie case with a probability of success has been made out. The Plaintiff has pleaded that he is the administrator of the Estate of his grandparents the late Karisa Mweri and Dama Karisa Mweri, who were the registered owners of title No. Kilifi/Mtondia/469. He has also pleaded that he has been living on the suit property and growing maize thereon since his time of birth.

11. It is noteworthy that the green card attached to the Plaintiff's Supporting Affidavit and marked as Exhibit “KCK-5” discloses the fact that Title No. Kilifi/Mtondia/469 is a sub-division of Title No. Kilifi/Mtondia/99. It is also evident that on 14th May 1997, Title No. Kilifi/Mtondia/469 was closed upon sub-division and two new sub-divisions, namely, Kilifi/Mtondia/709 and 710 were created. The Plaintiff acknowledges that these sub-divisions occurred at paragraph 10 of his Plaintiff although he attributes them and the subsequent registration in the Defendants' names to fraud and collusion between the 1st, 2nd and 3rd Defendants on the one hand and the 4th Defendant on the other.

12. In Paragraph 6 and 7 of the Supporting Affidavit, the Plaintiff avers that the 1st Defendant has built a wall on his land while the 2nd and 3rd Defendants have built houses on their portions and are currently residing thereon. Arising from the foregoing, it is not conceivable that the Plaintiff is still residing on Title No. Kilifi/Mtondia/469 as he purports in his pleadings.

13. From the Affidavits of the 2nd and 3rd Defendants, it is manifest that the Defendants are the registered owners of their portions of land as evidenced by the titles attached to their respective affidavits. The fact that the Defendants are in possession of different parcels of land and not Kilifi/Mtondia/469 is not in doubt. They have built their respective residences on these parcels, a fact admitted by the Plaintiff at Paragraph 7 of the Supporting Affidavit.

14. From a copy of the Letters of Administration attached to the Plaintiffs Supporting Affidavit, it is disclosed that Charo Karisa Mweri died on 23rd May 2003 while Dama Karisa Mweri died on 7th August 1999. The sub-divisions complained of were done in 1997 during the lifetime of the then registered owners and I find it strange that the Plaintiff now feigns shock that it was done and attributes it to collusion when his grandparents never complained thereabout.

15. Whatever the case, this court is being invited to act in vain. The green card attached to the Plaintiff's application and marked Exhibit "KCK-5" shows that Title No. Kilifi/Mtondia/469 was closed upon subdivision on 14th May 1997 and that it does not exist anymore. This court cannot issue orders to restrain the Defendants from dealing with a non-existent parcel of land.

16. Finally, I note that the Plaintiff has not alluded to any loss or damage that is likely to be occasioned to him in the event the orders sought are not granted at this or another stage. No evidence was placed before me tending to show that the suit property (in whichever form it exists) is in danger of being wasted, damaged, or wrongfully alienated to third Parties or that it will be out of the Plaintiff's reach at the conclusion of the main suit.

17. The upshot is that the Plaintiff's application dated 23rd January 2017 is dismissed with costs to the 2nd, 3rd and 4th Defendants/Respondents.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J.O. OLOLA

JUDGE