



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC 226 OF 2016

SIGINON CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED....PLANTIFF

VERSUS

KIRIGA1ST DEFENDANT

KANJA.....2ND DEFENDANT

CHENGO.....3RD DEFENDANT

MUMBA4TH DEFENDANT

RULING

1. The application for determination is the notice of Motion dated 17th August 2016. It is brought under Order 40 Rules 1, 2, 4 & 10 of the Civil Procedure Rules. In the application, the plaintiff seeks the following orders: -

1. Spent

2. Spent

3. Spent

4. Pending hearing and determination of this suit a temporary injunction be and is hereby issued restraining the respondents either by themselves, their servants, agents or whomsoever from encroaching constructing, sand harvesting, undertaking and/or continuing to carry on quarrying or related works on the parcel of land known as sub-division Number 12914 (Orig. NO.405/3) of Section II Mainland North as delineated on land survey plan Number 333195 otherwise occasioning waste or damage.

5. Pending the hearing and determination of this suit conservatory Orders in terms of a Temporary Injunction be and is hereby issued restraining the defendants/respondents, their servants or agents from unlawfully subdividing, selling or otherwise disposing of the parcel of land known as sub-division number 12914 (orig.No.405/3) of Section II Mainland North as delineated on Land survey plan Number 333195.

6. Costs of this application be borne by the defendants.

7. Such further or other orders as the court may deem just and expedient in the

circumstances.

2. The application is made on the grounds on the face of the motion and supported by the affidavit of Boniface Mwakesi Sworn on 17th August 2016. Briefly, the applicant contends that on 21st April 2011 it purchased the suit property from one William Kamiti and to facilitate the purchase, the applicant applied for a financial facility from Bank of Africa Kenya Limited and offered the same as security and a legal charge was created over it in favour of Bank of Africa Kenya Limited. The applicant states that it was given vacant possession of the suit property whereafter it fenced around its boundaries as they await for its discharge in order to have it sub-divided amongst the plaintiff's members. The applicant has attached copies of the agreement for sale, letter of offer and transfer documents. It is the applicant's contention that in the recent past, the respondents among other unknown squatters without any justifiable reason or any colour of right invaded the suit property unlawfully occupied it and in the process damaged the erected fence, and have commenced unauthorized works thereon, such as construction of illegal and unapproved structures, harvesting sand and quarrying and other related works. The applicant avers that its efforts to invoke the office of the local chief and the police to evict the respondents has been met with defiance and violence. The applicant is apprehensive that the property is on the verge of being unlawfully sold, destroyed by the illegal sand harvesting and erection of unlawful structures by the defendants. The applicant states that the respondents' unlawful encroachment is intended to deprive them of their proprietary rights and interest on suit property and lay a basis for fictitious claims of adverse possession. The applicant is apprehensive that the suit property may lose its value yet it is charged to a bank.

3. In opposing the motion, the respondents filed a Replying Affidavit sworn by Chengo Karisa on 8th April 2017 in which he deposes that they have been in continuous and uninterrupted possession of the suit for over 12 years and that the land has been occupied by the families of indigenous communities in Kenya. The respondents aver that the applicant has only recently threatened to evict them from the suit property. They denied that the property was fenced off as no photographs have been shown by the applicant. It is the respondents' contention that the applicant has been colluding with the police to demolish their houses without any court order.

4. The advocates for both parties agreed to dispose of the application by written submissions and filed their respective submissions in which they outlined the facts as contained in their pleadings. The applicants added that it has established a prima facie case with a probability of success as it has demonstrated its ownership to the suit property by producing documentary evidence including a transfer from the previous registered owner. The applicant further submits that it is bound to suffer irreparable injury as it is unable to utilize the suit property as the rightful owner, and the land is in the verge of being unlawfully sub-divided, sold or destroyed by the illegal sand harvesting and erection of illegal structures by the respondents.

On behalf of the respondents, it was submitted that the orders cannot issue because the respondents were not trespassers and have been on the land for over 12 years.

5. I have carefully considered the application herein. This being an application for grant of interlocutory injunction, the plaintiff must satisfy the conditions laid down in the case of **GIELLA –V- CASSMAN BROWN LTD**. The plaintiff must show that it has a prima facie case with probability of success; that it stands to suffer irreparable damage, and that in the event of doubt, that the balance of convenience lies with it.

6. The plaintiff has exhibited documentary evidence on how it acquired the suit property, including a duly signed transfer form signed by the previous registered proprietor. The plaintiff has stated that it had taken possession and erected a fence along the boundary of the suit land but the defendants have invaded it and destroyed the same and that they have forcibly taken possession and erected structures and are busy harvesting sand. On the other hand, the defendants allege that they have been in occupation for over 12 years. The defendants have faulted the plaintiff for not annexing photographs showing the alleged fence. However, the defendants on their part have also not annexed any evidence of their occupation in form of photographs showing their alleged houses.

7. I have perused the pleadings herein. In their defence, the defence have merely denied the plaintiffs claim. There is no counter-claim set out by the defendants against the plaintiffs claim.

8. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the plaintiff has established a prima facie case with a probability of success against the defendants.

The defendants have no valid claim against the plaintiff as the defence filed does not raise any counter-claim. In the case of MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD (2003) eKLR, the court of Appeal held that “.....*a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicants case upon trial... 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 apparently been infringed by the opposite party as to call for an explanation from the latter...*”.

In my view it is clear that the plaintiff has shown its right over the suit property and which rights the defendants have infringed.

9. As regards irreparable damage, I take the view that the defendants unlawful actions on the suit property which have not been denied such as sand harvesting may result in a loss that might not be quantified in damages as the status of the property would have changed completely. The balance of convenience would tilt in favour of the plaintiff so that the status of the land is not changed through the defendants continued activities pending hearing of the suit.

10. Arising from all the above reasons, I find that the plaintiff has satisfied the threshold for grant of an interlocutory injunction. I therefore allow the application with costs to the Plaintiff/Applicant.

It is so ordered.

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

C. YANO

JUDGE