



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 348 OF 2015

KUPHA DENGGE MWACHIREMA.....PLAINTIFF/APPLICANT

VERSUS

1. SAID MUNGA NDEGWA

2. ZUHURA MPHA NDEGWA

3. KAHOZI BAYA

4. MBODZE NDEGWA.....RESPONDENTS/DEFENDANTS

RULING

1. This is the Notice of Motion dated 17th December 2015. It is brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rules 1,2, 3, 4 and 9, Orders 51 Rule 1, 2 Order 1. Rule 10, 13 of the Civil Procedure Rules 10, Section 23 (2) of the Land Adjudication Act Cap 284 Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders,

1. Spent

2. Spent

3. That the Honourable Court be pleased to issue an injunction restraining the respondents either by themselves or their authorized servants, agents, employees and/or any other person acting under their instructions from trespassing, dealing, constructing, erecting, wasting , damaging intruding, developing, selling, disposing, alienating or in any manner dealing with the applicant's property known as unsurveyed land at the proposed Majaoni Settlement Adjudication Scheme and/or in any way trespassing onto and/or interfering with the aforesaid property pending the hearing and determination of the instant suit.

4. THAT the County Commander of Police Mombasa County and the OCS Bamburi Police Station within Mombasa County does enforce compliance of the orders above.

5. THAT the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of the case.

6. THAT costs of this application be provided for.

3. The main grounds upon which the application is based are on the face of the application.

1. THAT the applicant is the legal and beneficial owner of the suit premises being unsurveyed land at the Proposed Majaoni Settlement Adjudication Scheme measuring approximately one decimal eight naught (1.80) acres on plot no.384 Section II/mainland north. Having acquired the same by purchasing it from one Karisa Mwaro and the same has been in her possession and/or use until when the proposed Majaoni Settlement Scheme Adjudication Scheme started preparing and taking names of persons/groups to be registered under the said section as required by the land adjudication Act Cap 284 Laws of Kenya.

2. THAT the Applicant is the legal and beneficial owner of the suit property having had her name go through the first sitting of the Tribunal of the Proposed Majaoni Settlement Adjudication Scheme Committee as required by the Land Adjudication Act Cap 284 Laws of Kenya. The 1st, 2nd, 3rd and 4th respondents acts of trespass are wrongful and illegal and thus should be restrained from continuing to cultivate, constructing and/or dealing with the Applicant's property.

4. The Application is supported by the affidavit sworn by Kupha Denge Mwachirema the plaintiff/applicant herein on the 17th December 2015.

5. The Application is opposed. There is a Replying Affidavit sworn by Said Munga Ndegwa the 1st defendant/respondent on the 7th April 2016. There is also another Replying Affidavit sworn by Zuhuri Mpha Ndegwa the 2nd defendant/respondent on the 7th April 2016.

6. I have considered the pleadings, the application, submissions, of counsel and authorities cited. In the written submissions counsel substantiated their client's respective positions stated in their respective affidavits.

7. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **GIELLA VERSUS CASSMAN BROWN & CO LTD (1973) EA 358**. First the applicant must show a prima facie case with a probability of success.

Secondly, that 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 by if the court is in doubt it should act and balance of convenience.

8. It is the plaintiff/applicant's case that the defendants/respondents are trespassers on her plot. She stated that she purchased the same from Karisa Mwaro in 1967.

I have gone through the annexures to the applicants supporting affidavit. It appears there have been attempts to have the respondents leave the suit property. There has been no success.

The respondents are the wife and children of the applicant's son. They are claiming that Ndegwa Mwachirema bought the plot. The said Ndegwa Mwachirema is now deceased. Since the respondents have not provided proof that he bought the land, he is the only one who could have told the court how he acquired the suit land. Unfortunately he is deceased. It is clear from the annexures to the applicant's affidavit that she is the legal and beneficial owner of the suit land. The respondents have admitted they are on the said land and that there have been attempt to make them leave.

9. I find that the applicant has demonstrated that she has a prima facie case with a probability of success. I also find that she is likely to suffer irreparably if these orders are not granted. The reason being the respondent's intend to dispose the suit land to third parties. There is need to preserve the suit land. I find merit in this application and I grant the orders sought namely;

1. THAT an injunction do hereby issue restraining the respondents either by themselves or their authorized servants, agents, employees and/or any other person acting under their instructions from trespassing, dealing, constructing, erecting, wasting, damaging, intruding, developing, selling, disposing, alienating or in any manner dealing with the applicants property known as unsurveyed land at the Proposed Majaoni Settlement Adjudication Scheme and/or any way trespassing unto and/or interfering with the aforesaid property pending the hearing and determination of this suit.

2. The County Commander of Police Mombasa County and the OCS Bamburi Police Station within Mombasa County do enforce compliance of the above orders.

3. THAT costs of this application do abide the outcome of the main suit.

Orders accordingly.

Dated and signed on the 11th day of July 2017 at Mombasa.

L. KOMINGOI

JUDGE

11/7/17

Ruling dated and delivered in open court on the 11th day of July 2017 in the presence Mr. Kingere for Bosire for the defendants and the court assistant Koitamet.

L. KOMINGOI

JUDGE

11/7/17