



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 7 OF 2017

KHAMIS KOMBO GOGO.....PLAINTIFF/APPLICANT

(Suing as the legal Administrator of the Estate of the

Late MUHAMBI GOGO MWANGARI (DECEASED)

=VERSUS=

KHAMIS ANTHONY TSANGE.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of motion dated 12th January 2017. It is brought under Article 40 of the Constitution of Kenya 2010, section 1A,1B,3A and 63e of the Civil Procedure Act, Order 40,51 of the Civil Procedure rules, section 4(2) (b) of the Land Act 2012, section 24(a), 25 and 26 of the Land Registration Act 2012, and all enabling provisions of the Law.

2. It seeks orders:-

(a) Spent

(b) Spent

(c) That the Honourable court be pleased to issue an interim temporary injunction to restrain the defendant/respondent by himself, his servants, agents, assigns and any other person acting under his authority from trespassing on wasting, constructing on, alienating or in any other way interfering or dealing with the suit property known as Kilifi/Chasimba/374 pending the hearing and determination of this suit.

(d) That the officer commanding Kizurini police station to enforce compliance of the orders of the Honourable court.

(e) That costs of the application be borne by the defendant/respondent.

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

(a) That the Plaintiff/Applicant is the legal administrator of the estate of Muhambi Gogo Mwangari (deceased).

(b) That the late Muhambi Gogo Mwangari (deceased) is the registered proprietor of the suit property known as Kilifi/Chasimba/374.

(c) That the beneficiaries of the estate of Muhambi Gogo Mwangari (deceased) are in possession and occupation of the suit property.

(d) That the Defendant/Respondent has unlawfully and without just cause interfered with the beneficiaries' peaceful and lawful occupation of the suit property.

(e) That harassment and trespass by the Defendant/Respondent persists to date.

(f) That it is in the interest of justice and all fairness that the application is heard and determined.

4. The application is supported by the affidavit of Khamis Kombo Gogo, the Plaintiff/Applicant herein sworn on the 12.11.2017.

5. The application is opposed. There is a replying affidavit sworn by Khamis Anthony Tsanje the defendant/respondent sworn on the 20.3.2007.

6. I have considered the pleadings, the application, submissions of counsel and the authorities cited. In written submissions counsel substantiated their clients respective positions stated in their respective affidavits. The issue for determination is whether the Plaintiff/Applicant has satisfied the conditions for grant of temporary injunctions.

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 and Company Limited [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, if the court is in doubt, it should act on a balance of convenience.

8. It is the Plaintiff/Applicants case that he is the administrator of the estate of the late Muhambi Gogo Mwangari. That the deceased was the registered owner of land parcel number Kilifi/Chasimba/374. He relies on the title deed issued to the deceased, Muhambi Gogo Mwangari. The title deed was issued on 15th August 1990.

In paragraph 11 of the supporting affidavit the Plaintiff/Applicant states, “That the late Muhambi Gogo Mwangari and the late Tsanje Gogo Munga are brothers who together with other brothers lived on a large track of land partly comprised of the said property herein.”

In paragraph 12 he states “That they all lived on the track of land until it was demarcated in 1972 into several plots including Kilifi/Chasimba/374, Kilifi/Mwakwaya/295 and Kilifi/Chasimba/232”.

The allegation that the land was demarcated in 1972 cannot be true because the title deed for Kilifi/Chasimba/374 was issued on 15.8.1990.

9. On the other hand the defendant/respondent states that he and his family are in occupation of the suit property. That the title deed for Kilifi/Chasimba/374 was obtained by fraud. He has annexed a copy of what appears to be minutes of an elders meeting held on 23rd September, 2012 marked “KAT3”.

The elders seem to agree with the defendant/respondents assertion that the title deed for the suit property was obtained through fraud. He has also annexed copies of police bonds confirming that there is a dispute as to ownership of the suit land.

10. In the case of **Mrao Limited –versus- First American Bank Limited and 2 Others [2013]eKLR** the court in determining what amounts to a prima facie case stated, “so what is a prima facie case? I would say that in Civil cases it is a case in which on the material presented to the court, a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

I find that the Plaintiff/Applicant has not shown that he has a prima facie case with a probability of success.

11. Section 26(1) of the Land Registration Act provides that, “the certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named a proprietor of the land is the absolute and indefeasible owner”.

But there is an exception where the registration was obtained by fraud. In this case the defendant/respondent has alleged the Plaintiff/Applicants father obtained registration through fraud. The Defendant/Respondent also claims the land belongs to him and other beneficiaries. There is no doubt that this is ancestral land.

12. The applicant relies on the title deed to demonstrate prima facie case since the ownership is disputed, I find that the Applicant has failed to demonstrate that he and other Beneficiaries are residing on the suit property.

He has failed to show that he has a prima facie case with a probability of success. He has also not demonstrated what loss or damage he and the other Beneficiaries will suffer which cannot be compensated by way of damages should they succeed in their claim.

13. All in all, I find that the Plaintiff/Applicant has not satisfied the court that he has a prima facie case to warrant the orders sought.

I therefore decline to grant the orders but I would strongly urge the main suit be set down for hearing as soon as it is practically possible so that the issue of ownership can be sorted out, once and for all. The costs shall abide the outcome of the main suit.

It is so ordered.

Signed, Dated and Delivered in open court at Mombasa this 20th day of September 2017.

L. KOMINGOI

JUDGE