



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**LAND CASE NO. 277 OF 2016**

**1. ALI SHARIFF SAGAAF**

**2. MOHAMED MAHFUDH.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**1. JOSHUA KAZUNGU**

**2. ADAM KADHENGI**

**3. ANTHONY TUYE & 33 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

1. Before me is a Notice of Motion Application dated and filed herein on 13<sup>th</sup> October 2016. The Plaintiffs/Applicants are seeking for Orders:-

***1. Spent***

***2. Spent***

***3. THAT the Respondents, their servants, agents, employees and/or any other person claiming under them be restrained by way of temporary injunction from dealing, leasing, constructing, selling, cultivating, wasting, damaging, intruding, trespassing, developing and/or interfering with Subdivision Number 1588 and 1587(Orig. No. 265 Section III M.N.) pending the hearing and determination of this suit.***

***4. THAT a mandatory injunction be issued to order the Defendants to forthwith pull down and/or remove from the Applicants' parcels, being Subdivision Number 1588 and 1587(Orig. No. 265 Section III M.N.) buildings, structures, constructions and developments erected by the Respondents on the said parcels and/or give vacant possession by removing from the said land all their properties of whatever nature as well as their workmen, servants and agents.***

***5. THAT an eviction order do issue against the Respondents directing them to give vacant possession to the Applicants of the parcels known as Subdivision Number 1587 and Subdivision Number 1588(Original Number 265 Section III M.N.)***

***6. THAT the County Police Commander (Kilifi) (Officer Commanding Station-Kijipwa Police***

**Station do ensure compliance with the said Orders of the Court to the latter.**

**7. THAT costs be in the cause.**

2. The Application is supported by the annexed affidavit of Ali Sharrif Sagaaf the 1<sup>st</sup> Plaintiff herein sworn on 13<sup>th</sup> October 2016 and is premised inter alia, on the following grounds:-

(a) That the Applicants are the legal, registered and/or beneficial owners of all those parcels of land known as Subdivision No. 1587 and 1588(Original No. 265 Section III M.N).

(b) That the Respondents are trespassers on the land and are putting up permanent structures on the same.

(c) That there is real danger that the Respondents may proceed to transfer the land to 3<sup>rd</sup> parties on the purport that they are the proprietors thereof.

(d) That the various efforts to have the Respondents vacate the suit premises have so far been unsuccessful.

(e) The continued stay and occupation of the land infringes on the Applicants' interest and right to the premises and the Applicants stand to suffer irreparable loss and damage unless the orders sought herein are granted.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents are however opposed to the grant of the orders sought. In a Replying Affidavit sworn on 22<sup>nd</sup> December 2016, by Adam Kadhengi, the 2<sup>nd</sup> Defendant, on behalf of the himself and the 1<sup>st</sup> Defendant the Respondents contend that the application before me is bad in law and an abuse of the Court process. It is their case that they have lived in the suit properties for more than 100 years and that their grandfathers were born and buried on the land.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further aver that they have lived peacefully in the suit properties with all other members of their clan and they have no other home other than the disputed land. They contend that the said land is their ancestral land and state that the Applicants are desirous of evicting them therefrom by using illegal documents.

5. I have considered the application and the response thereto. I have also considered the written submissions placed before me by the Advocates for the parties.

6. The principles for the grant of injunctions are now well-settled. In the often-cited case of **Giella –vs- Cassman Brown & Co Ltd (1973) EA 358**, the Court stated that:-

*“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 Applicants 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 the balance of convenience.”*

7. Accordingly it behoves the Court to first consider whether the Applicant has established a prima facie case with a probability of success. A prima facie case as was stated in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR (Civil Appeal No. 39 of 2002)**;

*“.....includes but is not confined to a “genuine and arguable case”. 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 or rebuttal from the latter....”*

8. In the matter before me, the Applicants have brought this suit against people named respectively in the

pleadings as Chengo Kadenge, Adam Kadhengi, Anthony Tuye and 33 Others. While Orders are being sought herein against all, the 33 others are neither named in the application before me nor in the Plaint that originated this suit. In the Applicants' Supporting Affidavit, they have attached at least 23 photographs of different structures, permanent and semi-permanent houses.

9. According to the Applicants the trespass by the Respondents has been there since the 1980s and various attempts to get them off the property including an offer to purchase for them land elsewhere with a view to resettling them have been unsuccessful. This is what necessitated the suit herein.

10. In *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR*, the Court of Appeal stated in its definition of a prima facie case that:-

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”*

11. In the circumstances of this case, it is evident that the invasion sought to be restrained, by the Plaintiff's own submissions occurred in the 1980s. The 23 photos attached to the Plaintiffs' Supporting Affidavit clearly evidence the fact that the named and unnamed Defendants are presently in occupation of the suitland.

12. According to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the disputed land is their ancestral land and they claim to have lived therein for more than 100 years. In support of their case, they have annexed photographs of tombstones purporting to show that they have buried their dead relatives in the suitland in the 1980s and 1990s. If this Court were to issue the orders of injunction sought, that would amount to an eviction of the Defendants from the parcel of land whose ownership is yet to be fully determined.

13. I think it is only fair and just that such orders await the final determination of the suit. In the meantime, I shall disallow the application dated 13<sup>th</sup> October 2016.

14. The cost of the Application shall abide the outcome of the suit.

**Dated, signed and delivered at Malindi this 15th day of November, 2017.**

**J.O. OLOLA**

**JUDGE**