



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO 287 OF 2016

HANIF SHAJI MUSENI

SHEELA HASSAN MUSENI.....PLAINTIFFS/APPLICANTS

VERSUS

MIRAJ MIGANYI SALIM

SAUMU MOHAMED

MUMA OMARI HASSAN

MARIAM MOHAMED

SAID CANDY

PUNGU FUEL

DEVELOPMENT ASSOCIATION...DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion Application dated 7th October 2016 and brought under Article 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 7 of the Civil Procedure Rules, the Plaintiffs/Applicants are seeking for orders:

- 1) THAT this Application be certified urgent and be heard ex-parte in the first instance.**
- 2) THAT pending inter-partes hearing of this Application, this Honourable Court be pleased to issue an Injunction restraining the Defendants/Respondents either by themselves, their agents, servants and/or any person acting on their instructions from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with the properties Title Numbers Kwale/Pungu Fuel Area/164, Kwale/Pungu Fuel Area/165 and Kwale/Pungu Fuel Area/544, the suit properties herein.**
- 3) THAT pending hearing and determination of the main suit, this Honourable Court be pleased to issue an Injunction restraining the Defendants/respondents either by themselves, their agents, servants and/or any person acting on their instructions from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with the properties Title Numbers Kwale/Pungu Fuel Area/164, Kwale/Pungu**

Fuel Area/165 and Kwale/Pungu Fuel Area/544, the Suit Properties herein.

4) This Honourable Court be pleased to issue order demolishing of structures on properties Title Numbers Kwale/Pungu Fuel Area/164, Kwale/Pungu Fuel Area/165 and Kwale/Pungu Fuel Area/544, the Suit Properties herein.

5) THAT the Officer Commanding Station at Kwale Police Station enforce the orders of this Honourable Court.

6) THAT costs for and incidental to the Application be provided for.

2. The Application is based on the grounds in the face of the Motion and supported by the Affidavit of **Hanif Shaji Museni**, the 1st plaintiff sworn on 7th October 2016. Briefly, it is the Plaintiffs contention that they are the absolute proprietors and indefeasible owners of the Suit Properties having acquired the same through a valid Sale Agreement from the original owners, namely Abdulsamad Mwangi Mucheru and Amina Hassan Museni. The Plaintiffs have exhibited copies of the transfers and title deeds in their names. The Plaintiffs aver that on or about 19th August 2016, the 1st Defendant, masquerading as the legal owner of the Suit Properties and with the authority of the 3rd, 4th, 5th and 6th Defendants purportedly sold portions of the Suit Properties to the 2nd Defendant who without any color of right entered into the said portions and started constructing a permanent house and a perimeter wall. It is the Plaintiffs' case that the Defendants are illegally attempting to interfere with their peaceful possession and enjoyment of the Suit Properties, hence this Application.

3. The Application is opposed by the 2nd and 3rd Defendants through a Replying Affidavit dated 29th November 2016 sworn by Saumu Mohamed, the 2nd Defendant in which they questioned the validity of the Plaintiffs title documents and alleged that the same were being investigated by the National Land Commission. The 2nd Defendant has deponed that he sought the services of a surveyor who in his report found that the house is falling on the **Title No. Mombasa/Pungu Fuel Area/109** and the **Title Number Mombasa/Block V/544** falls on totally different location.

4. On 30th November 2016, following an agreement between Counsel for the Plaintiffs and Counsel for the 2nd and 3rd Defendants, the Court made an order that the District Land Registrar and the District Land Surveyor, Kwale do visit **plot Numbers 164 and 165** for purposes of identifying if the 2nd Defendant's house is on either of the two plots and thereafter file their report.

5. The parties agreed to canvass the Application by way of Written Submissions and the Plaintiffs filed their submissions on 7th June 2017. When the matter came up for hearing on 13th July 2017 all the parties were represented but the Defendants had not filed their submissions and the Court gave them more time to do so and the matter was stood over to 10th October 2017. On 10th October 2017, only the Plaintiff's Counsel was present. The Defendants had not filed their Submissions as directed and none of their Counsels was present in Court on 10th October 2017. Mr. Bwire, learned Counsel for the Plaintiffs relied fully on the Submissions filed.

6. I have duly considered the Application, the Affidavits on record, the Submissions filed and the authorities cited. The Application is seeking both Prohibitory and Mandatory Injunctions. I now have to determine whether the Plaintiffs have satisfied the conditions for grant of Interlocutory Injunctions. In the celebrated case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**, the Applicant must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage; and in the event of doubt, the Court will decide on the balance of Convenience. In the case of **Kenya Breweries Ltd And Another –Vs- Washington Okeyo (2002)eKLR** the Court of Appeal had occasion to discuss and consider the principles governing grant of Mandatory Injunctions and held that the test was as correctly stated in Vol.24 Halsbury's Laws of England 4th Edition Paragraph 948 which reads:

“A Mandatory Injunction can be granted on an Interlocutory Application as well as at the

hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory Application. ”

Also in the case of **Locabail International Finance Ltd –Vs- Agro Export and Another (1986) ALL ER 901** at page 901 it was stated:

“A Mandatory Injunction ought not to be granted on an Interlocutory Application in the absence of special circumstance, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the Injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a Mandatory Injunction the Court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a Prohibitory Injunction. ”

7. The Plaintiffs have demonstrated by producing copies of title deeds that they are the registered owners of the Suit Property. They have also attached other documents showing how they acquired the property. From the surveyor’s report filed in Court on 29th March 2017 pursuant to the consent of the parties, it is clear that the Defendant’s buildings are within the cadastral boundary of **Title Number Kwale/Pungu Fuel Area/164**. From the 2nd and 3rd Defendants Replying Affidavit, the 2nd and 3rd Defendants are questioning the Plaintiffs title documents but also allege that the construction complained of falls under a different parcel of land. However, the surveyor’s report filed herein confirms that the construction is on **plot. No.164** which belong to the Plaintiffs.

8. The Plaintiffs, under the provisions of Section 24 of the Land Registration Act became vested with the absolute ownership of the Suit Property and further under Section 25 of the Said Act, the right of ownership acquired by the Plaintiffs is indefeasible except as provided under the Act.

Section 25(1) of the Land Registration Act provides as follows:

“25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belong, thereto, free from all other interests and claims whatsoever, but subject –

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) to such liabilities, rights and interest as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.”

Section 26(1) of the same Act provides as follows:

“26(1) 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 as proprietor of the Land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-

a) on grounds of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

9. The Plaintiffs having been registered as proprietors and having been issued with Title Deeds over the suit Property are in terms of Section 26(1) of the Land Registration Act entitled to the protection of the law. The Defendants have not stated under what basis they are carrying out constructions on the Plaintiffs property. It is my considered view that the Plaintiffs have established a *prima facie* case with probability of success and have passed the test for grant of both Interlocutory and a Mandatory Injunction. As regards irreparable damage, the effect of the refusal of the order of Injunction on this case is that the Defendants will continue with their impugned activities and alter the state of the Plaintiffs' land and the Plaintiffs may suffer irreparable loss as a result. The balance of convenience, if I had doubt in the matter, lies in favour of the Plaintiffs who are the registered owners rather than with the Defendants who have no claim over the Suit Property.

10. Accordingly, I find merit in the Application and grant orders in terms of prayers 3, 4, 5 and 6 of Notice of Motion dated 7th October 2016.

11. Costs of the Application are granted to the Plaintiffs.

It is so ordered

Ruling dated, signed and delivered at Mombasa this 5th day of December 2017

C. YANO

JUDGE