



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC CASE NO. 238 OF 2015**

1. MIRIAM MBEKE NYAMASYO.....1ST PLAINTIFF  
2. STEPHEN MUINDI MUTISYA.....2ND PLAINTIFF  
3. DR. EDWARD MWARINGA.....3RD PLAINTIFF

-VERSUS-

1. DISHON ODHIAMBO.....1ST DEFENDANT  
2. PETER MUNTINDA.....2ND DEFENDANT  
3. JOSEPH MUTISO..... 3RD DEFENDANT  
4. SALIM MRUCHE.....4TH DEFENDANT  
5. SAID MBUJA.....5TH DEFENDANT  
6. MUDZO MDUDZA.....6TH DEFENDANT  
7. COUNTY GOVERNMENT OF MOMBASA.....7TH  
DEFENDANT

**RULING**

1. The plaintiffs notice of motion dated 25<sup>th</sup> September 2015 is premised under the provisions of Order 40 rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Act. It sought the following ;

1. Spent

2. That the defendant by themselves, their agents, servants and or assignees be restrained by an order of injunction from trespassing, constructing, selling or in any way dealing with plot No. 622, 628, 629, 721 and 734 or any other plots which is not allocated to them in MIRITINI SITE SERVICE SCHEME till the suit is heard and determined.

3. That the county police commander through the O.C.P.D Changamwe ensure the

## **plot owners access their plots.**

### **4. Spent**

### **5. That the costs of this application be provided for.**

2. The application is supported by the grounds listed on the face of it and the affidavits of the 1st and 2nd Applicants. The 2<sup>nd</sup> Applicant deposed that the 1<sup>st</sup> – 6<sup>th</sup> Defendants/Respondents have encroached on their plots thus denying them access. The 2nd Applicant deposes that these defendants have sold the plots to 3rd parties who are building and fencing the plots and unless the defendants are restrained, their plots shall be alienated.
3. The application is not opposed by the 7th Defendant who says the orders do not affect their client. The 1st – 6th Defendants have opposed the application. They have filed both replying affidavits and grounds of opposition. The replying affidavit was sworn by the 1st defendant on behalf of his co-defendants.
4. The 1st – 6th defendants aver that the applicants have not shown to the Court certificate of title to confirm that they own the suit plot. It is their case that the averment of encroachment is not true since the defendants have erected both commercial and residential houses on the land which are fully occupied before the allocation was made to the plaintiffs.
5. The 1st – 6th defendants have denied that they are goons and have stated that they belong to Matopeni Community self – help group. That the prayer for injunction is ambiguous since the defendants have been living there for a long time and are likely to suffer irreparable loss/harm. The defendants annexed copies of utility bills receipts issued by Kenya Power and the 7th Defendant. It is the defendants case that the plaintiffs have not laid out a prima facie case and the balance of convenience is not in their favour.
6. Both parties filed written submissions. The plaintiffs submitted that they have annexed documents issued to them by the 7<sup>th</sup> Defendant to prove their ownership of the suit plots. They submit further that people should not be allowed to trespass on private property under the guise that it is public land and the defendants should not get sympathy of this Court on the basis that they have developed the plots. It is their contention that they have established a prima facie case and urged the Court to grant the orders sought.
7. The 1st – 6th Defendants submit that the Applicants have not established a prima facie case because they lack conclusive proof of ownership and have also not met the conditions contained in the allotment letter. Secondly that the 2nd plaintiff was misled into believing the land was free yet there were families living on the land before the alleged purchase. The Defendants aver that the 3<sup>rd</sup> plaintiff's agreement is void as it is not signed. Lastly that the balance of convenience tilts in their favour as they have permanent houses on the land. They urged the Court to dismiss the application.
8. I have considered the issues raised by the pleadings in the application and the submissions rendered. The applicants are laying claim to the suit plots on basis of letter of allotment from the County Government who is the 7th Defendant. The 7<sup>th</sup> Defendant in the replying affidavit filed on 18.1.2016 confirmed the plaintiffs names appears in their list of beneficiaries marked *CMK – 1*. The applicants have annexed letter of allotment as *SMM1* and *MM1* to buttress this fact. The 1st defendant on his part annexed an application dated 5.10.2015 requesting to be allotted the land.
9. These documents show that the Applicants have a better title to the land since they already have allotment letter hence giving them a probability of their case succeeding. Does this entitle them to be granted the orders sought? The defendants stated that they were in occupation long before the plaintiffs purchased/were allotted the plots.

10. Some of the documents annexed by the Applicants show they were allotted the land on 16.5.2013 and 10th July 2008. Annexure *SMM3* shows photographs of completely built houses. In the supporting affidavits, none of the applicants stated when these houses were constructed. They have also not denied the 1<sup>st</sup> – 6<sup>th</sup> Defendants averment that they have been living on the suit plots. Thus the houses are inferred to be owned by the 1<sup>st</sup> – 6<sup>th</sup> Defendants.

11. The orders sought are to restrain the defendants from trespassing, constructing or selling or in any way dealing with the suit plots. The order of injunction cannot stop an action which has already taken place. The construction was already completed when this suit was filed. Since the 1st – 6th defendants and/or their servants have been living on the land, their acts of trespass can only be stopped after full hearing and not at an interlocutory stage. To this extent, I can only grant the Applicants an order stopping the Defendants from disposing off the suit property while the suit is pending.

12. The balance of convenience in the circumstances tilts in favour of the 1st – 6th Defendants who are in possession. In any event the applicants have not sought mandatory injunction. The nature of the loss to be suffered if any has also not been demonstrated as irreparable and not compensatable by an award of damages.

13. In conclusion, I allow the application partially by granting Order 2 that the Defendants are directed not to sell or in any way dispose of the suit property pending the hearing and determination of this suit. They are also ordered not to put up any new buildings. The nature of the orders given does not require the grant of prayer 3 of the motion. The costs of this motion to await the out come of the main suit.

**Ruling dated and delivered at Mombasa this 10<sup>th</sup> day of May 2016**

**A. OMOLLO**

**JUDGE**