



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC LAND CASE NO. 123 OF 2015

BARAKA JAPHET KITI aka BARAKA KAYAA.....1ST PLAINTIFF

LIWALI KOMBE KITI aka RANDU KOMBE.....2ND PLAINTIFF

-VERSUS-

JAMES KAZUNGU NGOA.....1ST DEFENDANT

KACHE KOMBE.....2ND DEFENDANT

SIDI MWANDUMA.....3RD DEFENDANT

RULING

1. The plaintiff/applicant moved this Court under the provisions of order 40 and 50 of the Civil Procedure Rules and Section 1A, 1B, 3, and 63 (c) of Civil Procedure Act and Article 159 2(d) of the Constitution. In the motion, they sought the following orders ;

1. Spent

2. That pending the hearing and determination of this suit the defendants, their servants and/or agents or otherwise be restrained from alienating, disposing, selling, constructing structures, misusing, damaging, destroying or in any manner dealing with the suit property.

3. A declaration that the plaintiffs are the lawful owners of the undemarcated suit property.

4. An order of vacant possession of the suit property and/or pay the purchase price as agreed.

5. An order of eviction of the defendants jointly and severally, their servants and/or agents or any third party who may have acquired illegal possession of the property through the defendants and/or their servants or agents.

6. That the OCS Bamburi Police Station give security in effecting this Order.

7. That the costs of this application be provided for.

2. The application is supported by the five grounds listed on the face of it and the affidavit of Baraka Japhet Kiti. The grounds include inter alia that the defendants requested for a portion of the plaintiff's undemarcated land which they have settled on but have since failed to sign for the consideration agreed. Secondly that on account of the continued illegal stay and occupation and selling of parts of the land to unsuspecting third parties, the plaintiffs have suffered loss by being deprived of their land.

3. In the affidavit in support of the motion, the applicants aver that they are the legal and beneficial owners of the undemarcated land in Majaoni by inheritance. The applicants depose that on 7th March 2007 they reduced into writing what had hitherto been an oral agreement allowing the defendants occupation of certain portions of the land upon payment of the purchase price agreed upon. The applicants depose that the defendants have failed to pay despite demands made.

4. The applicants further depose that the defendants are encroaching on other portions of the suit property by building structures and selling off portions to third parties. The applicants aver they have a prima facie case against the defendants and urged the Court to grant the reliefs sought.

5. The application is opposed by the defendants through a replying affidavit sworn by the 1st defendant. The 1st defendant deposes that the land solely belongs to their father Ngowa Ziro – deceased who acquired the same through Majaoni Farmers Co – operative Society Limited. The defendants depose that the agreement of 9th March 2007 was entered through co-ercion. They have denied encroaching or trespassing on other portions of the suit property.

6. The defendants depose that the suit property is government land and that parties were advised to maintain peace until the adjudication exercise is over. The defendants aver that the application is brought in bad faith, lacks merit and ought to be dismissed with costs.

7. The plaintiffs/applicants filed their submissions on 7th October 2015. The submissions reiterated the facts contained in the affidavit sworn in support of the application. There are no submissions on record filed by the defendants despite being given time to do so.

8. I have perused the pleadings filed and note that prayers 3, 4 and 5, of the application are seeking final orders. They are not available at an interlocutory stage. Prayer No 6 is an administrative order. Consequently and in my view, am only required to determine merits of prayer 2 of the motion.

9. The applicants in prayer 2 are seeking an order restraining the defendants or their agents from alienating, disposing, selling, constructing structures, misusing, damaging, destroying or in any manner dealing with the suit property pending determination of the suit. The applicants have admitted that the defendants had requested for and received portions of the undemarcated land to settle on. This request was oral but the applicants subsequently reduced the arrangement into writing on 7th March 2007. The copy of this agreement was annexed as BJK – 2 and 3.

10. Besides the agreement, the applicants have not shown to this Court how, the defendants are misusing/destroying the land or evidence that they are disposing the portions of the suit land to 3rd parties. The purpose of Order 40 is to prevent a party from carrying out an activity that would damage or dispose the subject matter so that at the conclusion of the suit, the execution of the decree would be defeated. For a party to enjoy the relief provided under this order, he/she must establish that he has a prima facie case or that he will suffer irreparable loss or that the balance of convenience tilts in his favour.

11. The applicant's affidavit annexed documents that relate to the final orders. They failed to show acts of the defendants that would render their decree unexcusable were their suit to succeed. They have also told this Court that the defendants have been on this land prior to 2007. For an order of injunction to issue, there was need to show what has changed that has destabilised the status quo. None has been

shown.

12. Whether or not the defendants are entitled to use and remain on the land are questions that can only be answered during the full trial. Consequently I find this application is thus premature, and lacks merit. The same is dismissed with costs to the defendants.

Ruling dated and delivered at Mombasa this 8th day of September 2016

A. OMOLLO

JUDGE