



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 98 OF 2016

1. TSUMA MWANGALA.....1ST PLAINTIFF/APPLICANT
2. JAPHETH M. TSUMA.....2ND PLAINTIFF/APPLICANT
3. FREDRICK TSUMA.....3RD PLAINTIFF/APPLICANT
4. JOSEPH TSUMA.....4TH PLAINTIFF/APPLICANT
5. SAMWEL TSUMA.....5TH PLAINTIFF/APPLICANT
6. WILSON TSUMA.....6TH PLAINTIFF/APPLICANT'

-VERSUS-

JULIUS KARISA DECHE.....DEFENDANT/RESPONDENT

RULING

1. For my determination is the plaintiffs' application dated 9th May 2016. The application is brought under the provisions of Order 40 of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act. The applicant sought four orders two of which are spent. The remainder order for determination are ;

3. The Court be pleased to issue an order of temporary injunction restraining the defendant, his heirs, legal representatives or agents or anybody authorized by him from evicting, removing or interfering with the plaintiffs' peaceful possession and enjoyment of the suit property pending the hearing and determination of this suit.

4. The costs of the application be provided for.

2. The application is premised on the grounds listed on the face of it and the affidavit of Fredrick Tsuma. The grounds states inter alia that on 2nd May 2006, the police from Mtwapa Police Station in the company of the defendant and other hired people went and demolished the p'aintiffs' houses and cut down their trees leaving them in the cold. The plaintiffs were arrested and arraigned before Court charged with the offence of forcible detainer. The plaintiffs aver that they have lived on this land for over 40 years.

3. The grounds include the fact of arrest of the plaintiffs in 2004 but the charge was dismissed. The

plaintiffs aver further that the suit property belonged to his grandfather yet the defendant misled the police to believe that they entered the land in 2014. The plaintiff pleaded that there was no Court Order sanctioning the eviction and demolition of the plaintiffs' properties. They have urged the Court to grant the order to protect them from harm.

4. In the affidavit deposed by Mr Tsuma, the applicants have reiterated the facts contained on the grounds. He deposed that they have no other place they call home. He deposed that he is informed by the 1st plaintiff that it is only the first plaintiff who has lived on this land since 1950s to date. He deposed on information from the 1st plaintiff of other people who have also come and showed copies of the title but in all occasions the 1st plaintiff refused to vacate.

5. Mr Tsuma denied the averment that the defendant's grandfather lived on this land, titled it or done any development. Instead deposes that the defendant took advantage of the 1st plaintiff's illiteracy and applied for the title in 1996. That this registration was done without material disclosure therefore the title ought to be revoked. Lastly that they are entitled to be registered as owners of this land by virtue of the duration they have lived on this land. He urged the Court to grant the orders so that they get an opportunity to address the Court.

6. The application is opposed by the defendant vide his replying affidavit and grounds of opposition filed. The defendant avers the suit and the application is scandalous, vexatious and flagrant affront to the provisions of section 7 of the Civil Procedure Act. That the orders sought are incapable of being granted given the factual. Circumstances of this case particularly that the motion is a ploy to defeat or sanctify the plaintiffs' criminal conduct in the case pending before Shanzu Law Courts. Secondly that the defendant's right to own property will be violated.

7. In his replying affidavit, Mr Deche deposes that he is the bonafide registered proprietor of the suit land and has been in quite possession and enjoyment. He deposed to his title being cancelled by a third party but which was later re-instated after recommendations were made by the Director of Criminal Investigations. He also deposed to being served with pleadings in Malindi ELC No 69 of 2016 on 1st April 2016 which he has aptly replied to.

8. The defendant deposes that he has been unable to dispose of the suit land because of the presence of the plaintiffs and other persons not before Court on the land. Further that the plaintiffs have never challenged his title with the National Land Commission. That the plaintiffs have no interest in the land and have not shown that they will suffer irreparable loss. Lastly that there can never be parallel proceedings over the same subject matter hence these proceedings are abuse of the Court process by virtue of the existence of Malindi ELC No 69 of 2016. He urged the Court to refuse the orders sought.

9. The advocates rendered oral submissions for and against the application. Mr Gekonde re-iterated the facts contained in affidavit. He submitted that during the arrest, the houses of the plaintiffs were burnt down and now they are staying in tents. He submits that from 2003 when the defendant acquired title, the plaintiffs had lived on the land for over 12 years. That their arrest should not be used to deny them their rights. He added that the plaintiffs are not parties in the case at Malindi ELC No 69 of 2016. He urged the Court to grant the orders.

10. Mr Njuguna advocate for the defendant submitted that principles for granting injunctions are settled. That the plaintiffs are not on the land as they were removed after the complaint to the police. He submits that once the plaintiffs were charged with trespass they can only pray for mandatory injunction and which has not been sought. It is his argument that the applicant has not proved that he has a prima facie case.

11. The issues to be considered whether or not to grant an injunction are settled in law vide the celebrated case of **Giella vs Cassman Brown**. The applicant is required to demonstrate that he has a prima facie case with a probability of succeeding. Secondly that if the order is not given then they shall suffer irreparable loss that cannot be compensated by award or damages. Lastly if in doubt to consider in whose favour the balance of convenience tilts.

12. Have the applicants demonstrated a prima facie case? The plaintiffs pleaded that they have been on the land for over 12 years and that their grandfathers were here since 1950s. They aver that it is because of their presence on the land that in the year 2004 the 1st plaintiff was arrested and charged with offence of trespass in Criminal case No 586 of 2004 but he was acquitted.

13. The applicants continued that to prove that they are on the land, they were again arrested on 2nd May 2016 on complaint made by the defendant. They are facing the offence of forcible detainer before Shanzu Law Courts. The applicants aver that during the arrest, their houses were demolished and now they are living in tents. The defendant admitted the charge facing the applicants and stated that if the orders of injunction should not be granted as it would amount to legalise the applicants stay on the land. The defendant submitted that the applicants have not sought a mandatory injunction therefore the orders sought are unavailable to them.

14. It therefore comes out clearly from the pleadings that the applicants were on the land before the arrest on 2nd May 2016. The defendant in paragraph 2 (XV) of his affidavit deposed that he has been unable to sell the land because the plaintiffs and other persons not before the Court have continuously been trespassing on this land and he is now shocked they are claiming it to be bonafide owners. The defendant argues the plaintiffs have never challenged the validity of his title. Well now they have by the filing of this suit. Whether their suit will succeed will be determined after the hearing of evidence.

15. The plaintiffs also pleaded that although their houses were demolished, they are still on the land living in tents. They annexed photographs of themselves in those tents marked as 'F T 6' and dated 6th May 2016. The defendant did not contest this. The applicants also stated in their grounds that they had not been served with any eviction order from the Courts. Therefore the fact that the applicants have established that they have been living on the suit property and which is evidenced by the charge of forcible detainer in my view is a proof of prima facie case with a probability of succeeding. The applicants have thus demonstrated the first principle.

16. Is the injury to be suffered irreparable and cannot be compensated by an award of damages? The defendant submitted that the applicants have not shown that the loss if any cannot be compensated. In ground K, the applicants stated that they are one family and have lived on the suit property for over 40 years and in paragraph 6 of the affidavit in support Mr Tsuma deposed that ***“they have no other place we call home apart from the suit property”***. Rendering someone destitute or homeless without giving them an opportunity to be heard in my opinion is an irreparable loss. The cases referred to by the defendant particularly the cases of **Mrao Ltd vs First American Bank Ltd & 2 others (2003) eKLR** and **EADB vs Hyundai Motors Kenya Ltd (2006) eKLR** presented a different scenario to the present case as in those instances the suit property had been charged.

17. There are several articles in the Constitution that protect parties rights from being infringed. The defendant referred to his right under article 40. This right will be secured once he allows the applicants to present their case as provided under article 47 of the same Constitution. I am of the considered view that this principle has also been demonstrated. If in doubt the balance of convenience demands that the *status quo* be maintained. The applicants are on the land otherwise the charge of forcible detainer would have not been maintained by the defendant or the state.

18. The last issue I wish to consider that was brought up by the defendant is that this suit is subjudice Malindi ELC 69 of 2016 and that the applicants are guilty of misjoinder. The case was commenced by a Mr Yasser Ali Sheikh vs Julius K Deche (Defendant). The defendant pleaded that the interlocutory application filed in that suit was dismissed for want of prosecution so there are no orders in force.

19. In paragraph 3 of the plaint (ELC 69 of 2016), the plaintiff claimed to be the registered owner of the suit land. In paragraph 4, it is pleaded that there has been constant confrontations between the defendant and Mr Ali over the ownership of the land in dispute. Having gone through the plaint and the defence, I am not satisfied that it meets the threshold of section 6 as regards the plaintiffs' claim i.e.

i) **Whether the applicants can litigate through the plaintiff in Malindi E.L.C 69 of**

2016.

ii) The suits were filed almost concurrently. No evidence was laid to this Court that the applicants were aware of its existence before filing theirs.

20. As regards misjoinder, this suit is still at a preliminary stage since the pleadings have not closed. The plaintiffs will choose whether they want to add Yasser Ali or not. In conclusion I find merit in this application and allow it in terms of prayer 3. The costs shall abide the outcome of the main suit.

Ruling dated and delivered at Mombasa this 13th day of October 2016.

A.OMOLLO

JUDGE