



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL SUIT NO. 29 OF 2015

STELLA KUMBI MCHARO (Suing in her capacity as

Personal representative of the estate of

EVANS KAFUSI MCHARO (DECESED).....PLAINTIFF/APPLICANT

-VERSUS-

1. JOSEPH RUA.....1ST DEFENDANT/RESPONDENT

2. CHENGO.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant moved this Court vide an application dated 20th February 2015 under the provisions of Order 40 rule 1, 2, 3 (1) and 4 (1) of the Civil Procedure Rules and section 3A, 1A and 63 (e) of the Civil Procedure Act. The applicant seeks orders that;

1. Spent

2. Spent

3. That this Honourable Court be pleased to issue an injunction restraining the defendants by themselves, their servants or agents or otherwise howsoever from wrongfully and illegally trespassing and or selling and or alienating and or dealing in any manner with ALL THAT piece or parcel of land known as SUBDISION NUMBER 1095 (ORIG. NO. 547/7) SECTION III MAINLAND NORTH (hereinafter referred to as “the suit premises”) pending the hearing and final determination of the plaintiff’s suit herein.

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

2. The application is supported by the ten (10) grounds listed on its face and an affidavit deposed by the applicant. The applicant deposes that the suit property known as subdivision No 1095 (Original No 547/7 Section III MN) is owned by Evans Kafusi Mcharo – deceased and she is the legal representative of his estate. She deposes that sometime in December 2014 the defendants wrongfully entered the land and took possession of the same.

3. The applicant avers that the defendants have continued with their acts of trespass and have been selling

off portions of the suit property to third parties who are also in the process of putting up illegal structures on the land. The applicant deposed further that by reason of the defendants' actions, the dependants of the deceased estate have been unable to enjoy or use the suit premises and thus they have suffered and continue to suffer loss and damage. It is her case that she has made out a prima facie case and deserve the grant of orders of injunction. In support of these facts she annexed a copy of grant, certificate of title and certificate of search.

4. The application is opposed by an affidavit sworn by the 2nd defendant/respondent. He deposed of having authority to swear the same on behalf of the 1st Respondent as well. Mr Chengo deposes that the applicant does not know the exact spot where the suit property is and that her claim is on plot No 337/III/MN. The 2nd Respondent does not deny the applicant owns the land but avers ownership is on paper. He continued that the applicant has never lived on this land and only visited it when in the company of Kilifi senior resident magistrate during the criminal proceedings.

5. The 2nd respondent deposes that him and other Barani residents have lived and cultivated plot No 337/III/MN since 1968 except when their structures were razed down by hired goons. He feels that the purported sale to the applicant was wrong as their rights as squatters on this government land was never considered. He deposed further that because the applicant doesn't know the spot of her land, she chose to sue them being the officials of their self-help group. The defendants referred to some suits in Malindi regarding the same subject matter and annexed a copy of an order issued in Malindi ELC Nos 232 and 245 of 2014.

6. The advocates on record for the parties opted to argue the application by filing of written submissions. The applicants' counsel narrated to Court the principles set out in the case of **Giella vs Cassman Brown** and submitted that the application meets all these principles. According to him, this is so because the applicant has annexed a certificate of title which granted the deceased a lease for 999 years from 1927 and which the Respondents have not challenged. The advocate avers that the Respondents did not prove their contention that this was government land and which contention he submits does not justify their illegal settlement on the suit property.

7. The applicant submits further that the respondents having admitted to be illegally on the land is a breach of the applicant's constitutionally-guaranteed right under article 40. That if not stopped, the Respondents may dispose of the land thus unduly and illegally depriving the applicant of her land which injury is incapable of compensation by an award of damages.

8. The Respondents submit that the 1st Respondent is the chairman of a group of residents residing and cultivating plot No 337/III/MN since 1968. That this plot is government land hence was not free and could not be allocated or transferred. Further that this property was illegally subdivided. Based on the illegal subdivision the deceased was registered as the owner of subdivision No 1095. The Respondents submit that the plaintiff wants to enter into a portion of their property and carry out development yet their structures are standing thereon. They submit that this application is brought in bad faith and ought to be dismissed.

9. The defendants submit that the plaintiff has no prima facie case because she has no title for the entire portion of land No 337/III/MN and that there is no superior title to that of the government. Secondly that there is no evidence shown that the defendants cannot pay any damages.

10. I have taken into account all the matters brought out both in the

pleadings and the submissions. My part is to determine whether a case has been made out for the grant of temporary injunction based on the facts presented by parties through their pleadings and submissions. Both parties made reference to the case of **Giella vs Cassman Brown** as regards to what the Court should consider in reaching its decision.

11. The applicant avers that she has set out a prima facie case by virtue of demonstrating that she owns

the suit property. She avers that the defendants illegally entered the suit property and remained in possession and have begun selling off portions to 3rd parties. The Respondents on their part claim the land is government land and was therefore unavailable for allocation to the applicant or any other third parties. Secondly that they have always lived and cultivated this land since 1968 to date. The Respondents also deposed that they are sued as office bearers since the applicant does not know the location of her plot.

12. The Respondents however did not show Court any document that this land was previously government land therefore unavailable to be transferred to the deceased or any third parties. They also did not annex any photograph to show that they are living or cultivating the particular plot being claimed by the applicant. By their own admission, they deposed that their structures were razed down by hired goons on plot No 337/III/MN. The plaintiff on her part annexed photographs showing vacant land with a foundation being dug and bushes being cleared.

13. The Court is alive not to make any conclusive decisions at this stage but the applicant has annexed a certificate of title and postal search showing the plot in question is owned by her deceased relative. The Respondents have not contested their ownership only alleging that they own it on paper but nothing being shown to express the interest of the Respondents in the land. I am satisfied that indeed the applicant has established a prima facie case with a probability of succeeding.

14. On irreparable damage, the applicant avers that if the orders are not given, her constitutionally guaranteed right under article 40 of the Constitution will be breached. The Respondents in response submitted that the applicant has not shown that they are incapable of paying compensation if any is awarded. It is unlawful and unjustifiable to allow a party to continue with illegalities and or wrongful acts merely on the basis that they are capable of paying compensation to an aggrieved party. The purpose of an injunction is to stop the rights of a party from being infringed by the opposite party and to preserve the subject matter pending determination of suit on merits.

15. The defendants have stated that their structures if any were razed down by hired goons. No indication was made if new structures were put up before this suit was filed. The balance of convenience therefore would be to have the land remain in vacant state as shown by the applicant pending determination of suit. This would be cost effective to either of the parties at the conclusion of this case.

16. In conclusion, I am satisfied the applicant has shown there is merit in her application. I do grant her the orders as prayer in No 3 of the motion. The costs of the application do abide the outcome of this suit.

Ruling dated and delivered at Mombasa this 6th day of October 2016.

A. OMOLLO

JUDGE