



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL CASE NO. 124 OF 2015

VINCENT MWANGO.....1ST PLAINTIFF/APPLICANT
DAVID MBARU.....2ND PLAINTIFF/APPLICANT
SAID SWALEH.....3RD LAINTIFF/APPLICANT

VERSUS

ALBERT MAONGA.....1ST DEFENDANT/RESPONDENT
COUNTY GOVERNMENT OF MSA.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicants filed their application brought under Order 40 Rule 1 and 2 seeking for the following orders ;

a) Spent

b) Spent

c) That an injunction be granted to prohibit and restrain the 1st and 2nd Defendant/Respondents from evicting, demolishing, selling, sub-dividing, charging, or dealing with property known as land Plot No. 410/I/MAINLAND NORTH situate at Mlaleo off old Malindi Road Mombasa within Mombasa County and or from dealing with suit property in any manner detrimental to the Plaintiff/Applicant, until the hearing and determination of this suit.

d) Cost of this application to be provided.

2. The application is supported by the six (6) grounds listed on the face of it and the affidavit sworn by the 1st plaintiff Mr Vincent Mwango. The 1st applicant deposed that the 1st defendant is the registered owner of the suit property. That the 1st defendant has obtained an eviction/demolition order without their knowledge or participation. That 1st applicant deposed further that the house he bought was constructed with the consent of the 1st defendant in 1996 and todate they have been paying ground rents.

3. The 1st applicant avers that he applied and obtained permission to carry out general repairs in October

2011. That given the conduct of the defendants, they are apprehensive that they may be evicted or their houses demolished anytime. He urged the Court to grant the orders sought.

4. The application is opposed by both defendants. In a 30 paragraph affidavit Mr Albert Maonga the 1st defendant deposed to the facts that urged the Court not to grant the orders. He admitted owing the suit plot having bought the same in 1976. The 1st defendant deposed that at the time of purchase he found five or six people who had built temporary structures and which according to him were built without consent of the vendor or the Municipal Council of Mombasa. He gave the names of the six which included the 3rd applicant.

5. The 1st defendant denied knowing the 1st and 2nd applicants and denied that his consent before their purchase was obtained therefore the sale is void. He also deposed that the six were to continue living on the suit property as they looked for a place to relocate to but in the meantime pay ground rent and which rent fell in arrears. He alleges the receipts annexed by the applicants have been manufactured since he only authorized Omwitsa & Mwacharo advocates to receive rent on his behalf. He deposes that the owners of these structures were given notice to demolish the structures.

6. That the owners to wit **Kahindi Pishi, Kanze Ngoro and Amina Binti Ali** did not heed to the said notice. Further that the owners were charged and a demolition order was issued by a Court of law but they failed to appear in Court as a result of which he was arraigned in Court and he pleaded guilty. He deposed that he knows of his own knowledge that the order of eviction/demolition was given because the structures were built without approval of the 2nd defendant.

7. The 2nd defendant vide a replying affidavit sworn by Mr Jimmy Waliaula the director of legal services stated that the application and the suit is frivolous incompetent and an abuse of the process of the Court as it discloses no cause of action against the 2nd defendant. He deposes that this is so because the 2nd defendant has no interest in the suit property and secondly the apprehension of the applicants derives from a Court order which has not been appealed or varied.

8. Mr Waliaula deposes that the orders sought herein would have the effect of reversing the orders issued by the Municipal Court. He further deposed that the applicants do not merit the orders as they have not shown any ownership interest on the suit property. Neither were the defendants privy to the sale agreements exhibited by the applicants in addition to the applicants being in arrears of ground rent as the receipts do not bear their names.

9. The 2nd defendant deposed that the approvals purported to have been granted did not extend to the carrying of illegal repairs and no evidence of compliance has been shown that the repairs were supervised. It is the 2nd defendant's case that allowing this application will create an imbroglio to the obedience of the order issued in criminal case No M3497 of 2011. For the foregoing reasons, he urged the Court to disallow the motion.

10. The application before Court seeks temporary orders of injunction. The applicants are therefore required to satisfy this Court that they have a prima facie case with a probability of succeeding or that they are likely to suffer irreparable loss that cannot be compensated by payment of damages and if in doubt the Court to consider in whose favour the balance of convenience should tilt.

11. The advocates made oral submissions which I have considered and will make references to within the body of this ruling where necessary. It is not in dispute that the 1st defendant is the owner of the suited land. It is also not in dispute that there are some structures on this land. According to the 1st defendant, they were there even at the time when he purchased the land in 1976. He mentions the 3rd applicant as one of the persons owning the structures by then. He also recognises Kahindi Pishi Muhira who sold his structures to the 1st applicant as among the six.

12. The 1st defendant however brings out three issues as regards the presence of the structures. First that

they were built without approval of the 2nd defendant. Secondly that the six owners of those structures agreed to continue living on the land but on condition that they would search for alternative residence. Lastly that the ground rents are in arrears as the receipts annexed confirming payment are fabricated. The 1st defendant also deposed that before he was charged with the criminal case, 3 of the previous owners were charged but they failed to appear in Court to defend themselves.

13. The 2nd Respondent on its part deposed that they have been wrongly sued as they have no interest in the suited property. However despite their lack of interest in the property, they feel the orders should not be granted as the same would amount to reversing the orders issued in criminal case No M 3497 of 2011 which has not been appealed against or varied.

14. In these circumstances, have the applicants proved they have a prima facie case? The order issued in Municipal criminal case No 3497/11 emanated in a case between the 2nd defendant as the complainant and the 1st defendant as the accused. From the 1st defendant's own deposition, the structures on the suited land and which ought to be demolished do not belong to him. The order was directed to the Town Clerk of Mombasa for execution. The first question is whether the structures on the land that were to be demolished included the applicants' structures and if so whether they were entitled to be heard before the same can be demolished.

15 Secondly if the structures included the applicants' structures whether the notice issued by the Chief Building Inspector referred to in the order was indeed served upon the applicants. The 1st defendant alleged that the structures were illegal as they were built without approval of the 2nd defendant. Yet by his own response he deposed that he found the structures when he purchased the land in 1976. All these are issues that can only be clarified at the trial of the suit. There was no evidence shown that the 3 owners were charged by the 2nd defendant.

16. The 2nd defendant deposed that they are wrongly sued. Yet the order causing the apprehension to the applicants is to be executed by their officers. Secondly they were the complainants in the criminal proceedings before Municipal Court and the notice which resulted in the complaint emanated from their office. I am alive to the fact that I am not sitting on appeal from the decision rendered in the criminal trial. But it is necessary to pin point these issues since the 2nd defendant moved the Court to have the suit against them struck out. The 2nd defendant is breathing hot and cold at the same. If they have no interest in the suit property why do they want the structures demolished.

17. The threat that the applicants' structures will be demolished is real. The issue of whether they are illegal or whether a consent was reached for the initial occupiers to move out or whether ground rent are in arrears are issues which cannot be determined at an interlocutory stage. They are issues for determination in a full trial. I am therefore satisfied the applicants have established a prima facie case with a probability of succeeding as their property is likely to be demolished without being afforded an opportunity of a hearing.

18. None of the parties addressed me on the principle of irreparable loss that cannot be compensated by an award of damages. The applicants merely deposed that this is where they live and that they have nowhere else to go. The 1st defendant on his part deposed that as the owner of the suit property, he needs to develop the same but which he cannot do with the presence of the plaintiffs on the land. The 2nd defendant have no interest on the land.

19 The facts of this case also show that the balance of convenience tilts in favour of the applicants who have had structures on the land for a very long time. The 1st applicant even obtained approval from the 2nd defendant to repair some of the structures although the 2nd defendant tried to give a different meaning to that approval. The case law of **Ahmed Ibrahim & Another vs Noor Khamisi Surur (2013) eKLR** cited by the 1st defendant is different as there is nothing shown to this Court that the applicants had given an undertaking to vacate. Further the applicants herein were paying ground rents to the 1st defendant.

20. In conclusion I find merit in the motion dated 8th June 2016 for meeting two of the principles to be considered while granting a temporary order of injunction I allow it in terms of prayers 3 and 4. The 2nd defendant's application dated 4th May 2016 is dismissed for the reasons contained in paragraph 16 of this ruling.

Ruling dated and delivered at Mombasa this 4th day of October 2016.

A. OMOLLO

JUDGE