



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT NO. 10 OF 2015 (O.S)

MASELINA KAZUNGU BAYA & 2 OTHERS.....PLAINTIFFS

-VERSUS-

HUSSEIN AHMED NAZERALI & 6 OTHERS.....DEFENDANTS

RULING

1. The plaintiff's notice of motion dated 22nd January 2015 is brought under Order 51, 1 and 40 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act and Section 68 (a) and 80 of the Land Registration Act. In the motion, the applicant sought the following orders :-

- 1) Spent
- 2) Spent
- 3) The honourable Court be pleased to grants orders prohibiting and/or injuncting against the Respondents their agents, servants, and/or such persons claiming under the transferring, dealing or interfering with in any way with the applicants occupation of Plot Number MN/6263 pending hearing and determination of this application
- 4) Cost be provided for

2. The application is premised on the three grounds on the face of it and the supporting affidavit of Maselina Kazungu Baya & other grounds to be adduced during the hearing. In the supporting affidavit, the applicants deposed that they are living on the plots mentioned in the orders sought together with their families. They cultivate the suit parcels and have constructed permanent and semi permanent houses on both plots and they know no other home other than here. The plot is registered in the names of the defendants but they are advised by their advocates on record that the land now belongs to them as they have lived there for more than 12 years. The applicants depones further that they stand to suffer irreparable loss as they will be rendered homeless if the orders sought are not granted.

3. The application is opposed by the 4th, 6th and 7th Respondents who filed affidavits in reply. In his affidavit Mr Anard Girish Bhatt deposed that the applicants supporting affidavit was based on untruths and distorted facts calculated to mislead the Court. The 4th respondent deposed that they purchased the suit property and found about eight (8) people in occupation and none of them had built any permanent

structures. After identifying himself to the occupants, they entered into an agreement on modalities of leaving. Three of these people left including the 3rd applicant.

4. The 4th respondent deposed further that based on the information received from the other occupants, none of them had lived on the land for 20 years as alleged by the plaintiffs and they only intend to reap where they have not sowed. He deposed that if the orders sought are granted, he will be greatly prejudiced as they used an overdraft facility to purchase the suit property and now they cannot enjoy its use. He urged the Court to dismiss the application.

5. In the 4th Respondent's replying affidavit was annexed a bundle of other affidavits as evidence and referred to as annexure "C". These consists of the affidavits sworn by Mercy Muthoni Njeru, Fransisca Nzisa Masha and Kadzo Kahindi. Mercy deposed that she built a structure in November 2008 having been given permission by the 2nd applicant who introduced himself as the care taker. Ms Fransisca entered the plot in 2005 while Kadzo entered in 2010 after getting permission from the 2nd applicant.

6. The 6th and 7th respondents filed a replying affidavit sworn by Dick Safari – the Land registrar Mombasa. He deposed that on receipt of the present motion, he perused their records and found the following

- a) The grant in respect of the suit property was issued to Hyjaf holding Ltd and registered as sub-division No 6262 and 6263
- b) In June 1991 both parcels of land were transferred to Husein Ahmed Nazerall and Maryan HUSEIN Nzerali as joint proprietors
- c) On 5th September 2013 the transfer to Girish Chandra, Girish

Bhatt, Niran Jana Girish was entered

He found the transfers as in order, properly executed and he therefore registered them and deposed that the present application as scandalous, frivolous and vexatious and ought to be dismissed.

7. In response to the averments put forth by the respondents the 3rd applicant swore another "replying affidavit". He deposed that they were summoned by the Deputy Commissioner for a meeting in his office. In attendance were strangers, the 4th defendant and Soheil Ranaa. They met the 3rd, 4th and 5th defendants for the first time in this meeting. In paragraph 7, he deposed that they did not voluntarily agree to vacate the plots and only signed because the DC threatened them with eviction. He deposed that Fransisca and Mercy were forcefully moved out and given money to relocate. Further that their affidavits are brought in to defeat their claim for adverse possession.

8. The 3rd applicant denied Husein Ahmed Nazerali has ever come to the disputed land. He also stated that the 2nd applicant has been on the land since 1990s and has never given out portions of this land for a fee. Further that Kadzo has only temporarily stayed on the plot and has been compromised. Mercy found them on the land and that the defendants took the law into their hands by continuously making forays into the land intent of forcing the occupants to move out. He concluded that this is a proper case for granting injunctions.

9. When this matter came for inter partes hearing, advocates for the parties filed written submissions to argue the motion. I have considered these submissions and case law cited. I will not reproduce their contents here but will make appropriate references in the body of this ruling as is necessary. The principles to be considered while granting injunctions is well set out in the renowned case of **Giella vs Cassman Brown**. The first and key is that an applicant must show a prima facie case with a probability

of success. Have these applicants met this threshold ?

10. The applicants submitted that they have lived on the land for over 20 years and have been carrying out business on it. Secondly that the applicants have constructed permanent and semi – permanent houses that they use as their shelter. In paragraph 4 of the supporting affidavit, it is deposed, “that we have lived in the suit property and developed it openly and without hindrance or interruption for more than 20 years”. The applicants in the replying affidavit (which ought to have been called further or supplementary affidavit) deposed that they had been on the land since 1990's on various dates. No specific dates is given when any of the applicants entered the land. Further the applicant deposed that the 1st defendant has never been on that land which then begs the question how was the occupation adverse to the interest of an owner who did not know of their presence on the land ?

11. The 3rd applicant admits his structure was demolished and timber carried away by the 4th respondent on 29th January 2015 in a motor vehicle registration number KBN 807 Y. The 3rd applicant states that he was ferried away to Kinangoni. Infact in paragraph 28 he deposed “that I verily believe that the defendants are guilty of taking the law into their hands and forcefully evicting us from the premises”. If this applicant's house was demolished, he does not state when he returned to the land to build again. In paragraph 39 he deposed the pictures annexed by the 4th respondent are misleading and skewed although they tell – a – tale of destruction are clearly visible where the former occupants had built structures. My understanding of the applicant's own pleadings infers that they are currently not in occupation of the suit premises by his averments in paragraph 39. How do they make out a prima facie case when they are not on the land ? The cases referred to by the applicant would be relevant/applicable as regards re-instatement had the applicant sought mandatory injunction.

12. On irreparable loss, the applicants admit signing annexure “B” in the 4th respondent's affidavit but avers they were threatened by the deputy commissioner to sign. The document shows the respondents agreed to facilitate their moving out. The applicants also agreed not to bring any claim once they were facilitated. Some of the people who signed this document already moved out and confirm such an agreement was reached without any coercion. It can be inferred that whatever the applicants have on the land if at all including the portion of the land they may claim has a value capable of being estimated and compensation paid. The applicants have alluded to this being their only home and if evicted therefrom as the loss they will suffer. This does not amount to irreparable loss as annexure “B” gave them an alternative of how to begin again. The balance of convenience tilts in favour of the respondents who have given the applicants an offer to re-settle them else where.

13. In conclusion I find the notice of motion dated 22.1.2015 not meeting the threshold for granting injunction. The same is hereby dismissed with costs abiding the outcome of this suit.

Ruling dated and delivered at Mombasa this **30th** day of **October 2015**

ANNE OMOLLO

JUDGE