



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CASE NO. 64 OF 2017

HANNINGTON MWAMBURI MASESE.....PLAINTIFF/APPLICANT

- VERSUS -

1. APPOLO MWASENT KMWONGE

2. MNJALA MWANGURE.....DEFENDANTS/RESPONDENTS

RULING

1. The plaintiff/applicant moved the Court vide an application dated 1st March 2017 seeking the following prayers:

1. Spent

2. Spent

3. That at the inter-parties hearing a Temporary Injunction be issued against the Defendants restraining the Defendants either by themselves, their servants, agents or any other person claiming through them from trespassing, encroaching, occupying, cultivating, erecting boundaries upon, or constructing any structures transferring, alienating, disposing and/or having any or dealing with ALL THAT registered portion of land known as plot No. 979/Rong'e/Nyika

Wundnyi within the Taita Taveta County, measuring 1.05 Ha or thereabouts.

4. That the OCS Wundanyi Police Station effect the order of eviction.

5. That the costs of this application be costs in the cause.

2. The grounds upon which the application is premised includes amongst others that the plaintiff is entitled to possession of plot Not 979/Rong'e/Nyika which he has owned since the time of demarcation. This land borders the land of the 1st defendant. That sometime in December 2016 the 1st defendant sold a portion of the suit land measuring ½ acre to the 2nd defendant without consent or authority of the plaintiff. Consequently to the sale, the 2nd defendant began putting up houses on the disputed portion. This action, the plaintiff describes as causing havoc to him and an attempt to dispossess him of his land. Therefore the defendants ought to be stopped. The applicant annexed photographs to his affidavit in support of his application.

3. The application is opposed by the defendants via a replying affidavit sworn on 15th March 2017. The 1st defendant deposed that he was born and brought up on plot No Rong'e/Nyika/950. He continued that the land in dispute together with their ancestral lands comprised in three family plots 995, 996 and 950 were established about 1916 – 17 and adjudication carried out in 1986 and they collected their title deeds as per copies annexed.

4. The 1st defendant deposed further that later the plaintiff & a surveyor visited their aforesaid land and purported that his land had been encroached on yet the plaintiff was a stranger to them. He admitted that he sold a portion of plot No 995 to the 2nd defendant. Therefore it is argument that the plaintiff's claim is fictitious, and fraudulent. He urged the Court to dismiss the prayers.

5. The advocates for both parties filed written submissions which were highlighted. Mr Murzin advocate for the plaintiff stated that the orders sought are meant to preserve the suit property. That the allegation of fraud by the 1st defendant was not supported by any tangible evidence. He also prayed for an order of joint survey. Mr Mwanyumba advocate for the defendants submitted that the defendants have given a history on how they acquired their land but no history is given by the plaintiff. I have considered all the issues raised in the submissions.

6. From the pleadings, both parties have annexed title deeds in respect of their portions. All the title deeds were issued in August 2006. The 1st defendant admitted selling a portion to his parcel No 995 to the 2nd defendant. The plaintiff on his part is claiming this portion that was sold to the 2nd defendant. Since both parties have exhibited titles to support their respective claims, it is evident there is a prima facie case. As to whether it will succeed, that will be a matter to be determined during the trial. On the second principle of irreparable loss, none was pleaded by the applicant. The plaintiff submitted that the property was in danger of being wasted to his detriment without specifying the nature of the wastage. As at the time this application was filed, the 2nd defendant was already put in occupation of the suit premises. It is not enough to merely state the property is in danger of being wasted without offering any explanation.

7. On the balance of convenience, I am not satisfied the applicant has discharged this principle to his favour. Both parties have title deeds. If I deny the 2nd defendant access without first hearing evidence it would be altering the status quo by assuming that the plaintiff's claim over the land super sedes that of the 1st defendant. Therefore the justifiable status quo to be maintained is what was existing prior to the filing of this application. The orders of restraining the defendants from trespassing on, encroaching, occupying, cultivating cannot lie. However in the interest of justice, I shall grant an order of temporary injunction to restrain the defendants from transferring, alienating and or disposing the disputed portion of comprised in a portion of L.R 979/Rong'e/Nyika and or L.R. 995/Rong'e/Nyika measuring 1.05 ha pending the hearing and determination of this suit.

8. The prayer No 4 for eviction orders do not lie as the order sought were not mandatory. The services of the OCS Wundany Police Station are therefore not required as an eviction exercise shall be carried out. The order prohibit alienation and or transfer may however be registered on both title deeds. Each party to bear their respective costs of the application.

Dated, signed and delivered at Mombasa this 31st day of July 2017

A. OMOLLO

JUDGE