



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO.6 OF 2021**

**ALEXANDER M'MIRIANGA M'MAUTA .....APPELLANT**

**VERSUS**

**SEBASTIAN MUYE.....RESPONDENT**

*(Being an appeal from the Ruling delivered by Hon. Chepseba Chief Magistrate delivered on 7<sup>th</sup> June, 2021 in Malindi CMCC No. E002 OF 2021)*

**JUDGMENT**

This Appeal arises from the ruling dated 7<sup>th</sup> June 2021 by Hon. Chepseba Chief Magistrate Malindi delivered in *Malindi CMCC Land Case No E002 of 2021*. The Appellant herein being aggrieved by the ruling lodged a Memorandum of Appeal dated 15<sup>th</sup> June 2021 on the following grounds:

- 1. The Honourable Chief Magistrate erred in both facts and law in holding that the Appellant has not discharged the burden of showing a prima facie case.***
- 2. The Honourable Chief Magistrate erred in law and in fact in holding that the Appellant has not proved a prima facie case with chances of success.***
- 3. The Honourable Chief Magistrate erred and in fact in holding that there was no proof that PLOT NUMBER 84 is the same as PLOT NUMBER 12182 when that was not the issue.***
- 4. The Learned Honourable Magistrate erred in law and in fact in not finding that the balance of convenience lies in favour of the Plaintiff who has documents vis a vis the Defendant did not have a single document leave alone building permit necessary for development/construction.***
- 5. The Honourable Learned Magistrate failed to analyze the evidence placed before the Honourable court by the Appellant vis a vis the mere supported allegation of ownership contrary to the known requirement as prove of ownership actual or beneficial.***
- 6. The Learned Magistrate failed and erred in holding that the balance of convenience lay in favour of the Respondent/Defendant and for reason that he was in possession and that he was already undertaking development without considering that the Defendant/Respondent has recently trespassed into the suit property giving it a fictitious No. 84.***
- 7. The Honourable Magistrate erred in holding the Plaintiff/Appellant did not prove that he would suffer irreparable loss when it was clear that the Defendant was putting up permanent multistory building on the suit property without a single document nor approval from the County Government of Kilifi.***
- 8. The Learned Magistrate erred in the application of the condition for granting a temporary injunction and misapplied the same.***
- 9. The Learned Honourable Magistrate erred in failing to consider the effect that dismissal will cause on the ground and accordingly failed to preserve the suit property pending hearing of the main suit which is likely to be rendered nugatory.***

Counsel agreed to canvas the appeal vide written submissions which were duly filed.

## APPELLANT'S SUBMISSIONS

Counsel for the appellant largely reiterated the contents of the parties' pleadings in the trial court and submitted that the Appellant had established a prima facie case with the probability of success.

Counsel referred the court to an excerpt of the ruling at page 88 which informed the Learned Magistrates dismissal of the Appellant's application for injunction and stated as follows:

***“The reply by the Defendant is that he is the owner of Plot No. 84 and not Plot No. 12182. The further affidavit introduced and seem to change this claim and admits that Plot No. 84 exists but he got it from one Anne. Looking at the Plaintiff's/Applicant's averments it has not made a prima facie case with a probability of success. He has not come out clearly to prove whether Plot No. 12182 and Plot No. 84 are one and the same or whether he owns both. Having failed to show a prima facie case with a probability of success, he has not shown the court how he will suffer if an injunction is not given nor that the Defendant will not be able to compensate him for the loss. Similarly, the balance of convenience tilts in favour of the Defendant who is already in occupation and has started construction.”***

Mr. Sumba counsel for the Appellant submitted that the pleadings and the averments in the trial court supported Appellant's claim that he was the owner of the suit plot. Further that the Appellant exhibited a letter dated 23<sup>rd</sup> October 2006 from the Municipal Council of Malindi allocating him parcel of Land No. 84 Malindi New Bus Park together with a plan approved by Malindi Municipal Council dated 26<sup>th</sup> October 2006 for the same parcel of Land Number 84 new Malindi bus Park.

Counsel submitted that there was a dispute which was determined by consent in his favour in Malindi Chief Magistrate's Court **Land Case No. E32 of 2020** which consent order was annexed as an exhibit in the Notice of Motion Application dated 15<sup>th</sup> June 2021 filed and was presented before the Magistrate's Court in this matter by way of a supplementary affidavit before the delivery of the contested ruling of 7<sup>th</sup> June 2021.

It was Mr. Sumbá's submission that it was not understandable why the Honourable Magistrate held that the Appellant had not established a prima facie case when the Appellant exhibited a title for the suit property in the name of Mwalimu Kazungu Ngandu who he purchased parcel number 12182 Malindi from and who had executed a transfer in his favour, which transfer has since been effected in the Appellant's name. Further that the Appellant also produced all other relevant documents, including land rate receipts.

Counsel relied on the case of **Hesbon K. Limisi v Delilah Achieng Mathews & 2 others [2015] eKLR** where the Court of Appeal held that all the court needs to consider for the grant of an injunction order is whether the Applicant's documentation is sufficient enough to establish that he has a claim over the suit property. Counsel further submitted that the fact that the Appellant acquired the suit property Plot No. 12182 on 1<sup>st</sup> February 2002 and the Respondent on 30<sup>th</sup> June 2007 through the Municipal Council of Malindi under Plot No. 84, the Appellant's claim should prevail as was held in the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR**

Counsel also cited the case of **Nyals Kenya Ltd v United Housing Estate Limited, Court of Appeal Nbi Civil Application No. 129 of 1995**, and urged the court to allow the Appeal and order the preservation of the suit land by an order of status quo to be maintained pending the hearing of the case.

Counsel relied on the case of **Elijah Kiong'eno Arap Bii v Samuel Mwesia Gitau & another, Court of Appeal Civil Application No. 243 of 2004** where it was held that the principle in land matters was to preserve the suit premises pending the hearing and determination.

## RESPONDENT'S SUBMISSIONS

Counsel also reiterated the parties evidence in the trial court and submitted that the Appellant failed to establish a prima facie case with probability of success as required by law and procedure. Counsel submitted that the that the Appellant exhibited a copy of a grant of a lease of the suit property No. 12182 dated 26<sup>th</sup> June 2008 in favour of one Mwalimu Kazungu Ng'andu and a copy of a transfer dated 27<sup>th</sup> February 29 made by the said Mwalimu in favour of the Appellant but there was nothing to show that it had been registered at the registry or legally transferred to the Appellant.

Counsel submitted that the Appeal has since been overtaken by events as the construction on the suit Plot No. 84 had since been completed and urged the court to dismiss it with costs.

## ANALYSIS AND DETERMINATION

This is an Appeal against a ruling in which the trial court declined to issue an interlocutory injunction. The Applicant filed an application for injunction vide a Notice of Motion dated 15<sup>th</sup> June 2021 which application was heard and a ruling delivered on 12<sup>th</sup> October 2021 whereby the court dismissed the application.

The court elaborately dealt with the issue whether the Appellant met the threshold for grant of injunctions. This being a first Appeal, the court alive to the fact that its primary role is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions can stand or not with reasons for both as was held in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**,

The contention of the Appellant was that Plot No. 12182 was not the same as Plot No. 84 as was held in the impugned ruling of the trial

Magistrate and that the Appellant had produced evidence of a transfer and a titled deed in the name of a Mr. Kazungu. This was juxtaposed with the evidence of the Respondent who claimed that Plot No. 12182 no longer existed having been nullified after the said portion was identified and set aside for the construction of the Malindi Bus Park. The Respondent's case was that he was constructing on Plot No. 84 situated near the said Malindi Bus Park having been offered the same by the then Municipal Council of Malindi.

This court having rendered a ruling in the subject matter of whether to grant an injunction of not, it would be an exercise in futility to render another contrary verdict in this Appeal. However, this matter being a matter that is still pending in the trial court, it would be in the interest of justice to order that the status quo obtaining as at the time of delivery of this Judgment be maintained pending the hearing and determination of the suit in the trial court.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***