



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 295 OF 2014

1. GEORGE MUKORA KABENA

2. MARK WERU MWAI PLAINTIFFS

VERSUS

MARTIN KALUME THOMAS RESPONDENT

RULING

1. The plaintiff's/applications bought, the present application dated 13.2.2015 under Order 40 r 1 of the Rules and Section 1A and 1B of the Act seeking the following order;

1. . . .

2. . . .

3. That pending the hearing and determination of this application inter parties this honourable court be pleased to issue an order of injunction restraining the defendant either in person through its agent, servant and/or employee from cutting down the trees, selling and/or effecting any further development on the plaintiffs property known as KWALE/DIANI BEACH BLOCK/1782 pending inter parties hearing and determination of this suit.

2. The application is supported by the grounds listed on the face of it and the affidavit of Mark Weru Mwai. Brief facts of this case is that the applicants hold a general power of attorney from Joseph Wamuturi Kigathi who is registered as owner of land parcel no. Kwale/Diani Beach Block/1782. It is admitted the defendant is in occupation of this land but as a trespasser. the 2nd applicant deposes that the defendant agreed to vacate this land upon payment of a sum of money of Kshs. 100000/- by the plaintiff. The defendant was paid on 28th May, 2012 but he has not moved out as per the agreement.

3. The 2nd applicant deposes further that the defendant is cutting down trees on the said land and has even threatened to sell this land hence the need for grant of the orders sought. The defendant/respondent opposed the application by filing a replying affidavit. The defendant deposes that the court is yet to determine whether the suit property belongs to Joseph Wamuturi Kigathi. he also stated that he is the one in physical occupation. The respondent denies agreeing to vacate the land on payment of the sum of Kshs. 100000 as alleged by the applicant, he denied cutting down the trees and also denied he has

intention to sell the land. The respondent deponed that it is the applicant who sent someone to cut the trees on the land. Finally the respondent deposes that the applicant filed the present motion to harass him with an intention of evicting him.

4. The principals for granting injunctions are settled in the renowned case of *Giella vs Cassman* Brown which are whether;

i) a prima facie case has been established.

ii) Balance of convenience tilts in whose favour

iii) Irreparable loss that cannot be compensated in damages.

The annexed documents in the supporting affidavit, clearly reveals that the donor of the Power of Attorney to the applicant is registered owner of the suit property. The pleadings also reveal that the defendant is in occupation albeit that he had agreed to vacate the land on payment of Kshs. 100,000. The defendant has not denied receipt of the said sum but contends the document is not a contract in the legal sense. These revelations in my view shows the applicants have established a prima facie case with a probability of success. The content of the prayer of injunction is stated in terms that are preserve to the suit property pending the determination of the suit. It merely seeks to stop the defendant from carrying further development and or cutting trees on the land which does not in anyway interfere with the respondents occupation. The respondent's allegation that the applicant is using this application to harass him is without any basis.

5. On the balance of convenience, I am also satisfied that it tilts in favor of the applicant because it is in the interest of the applicant that the suit property be preserved so that in the event his suit succeeds, he does not incur unnecessary costs in demolition of structures put up after the filing of this suit. Stopping the trees from being cut by whoever it is, is also necessary to preserve the land. The heading of irreparable loss is not proved by the pleadings. However given that the application has met the threshold of the two principles for granting injunction is good enough. In the result I do find the motion dated 13th February 2015 is merited and do allow prayer no 3 thereof. Costs shall be in the cause.

Dated and delivered in open court at Mombasa this 24th day of April 2015.

A. OMOLLO

JUDGE

24.4.2015