



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC CASE NO. 72 OF 2021

MAHADHI WABIRI MAHADHI.....PLAINTIFF

VS

HAFSWA ALI HAFIDH.....DEFENDANT

RULING

This ruling is in respect of an application brought by way of a Notice of Motion dated 9th August 2021 seeking the following orders;

a) Spent

b) This Honourable court do grant an injunction against the Defendant/Respondent, her agents, employees, servants, assignees and or any other person authorized by them restraining them from trespassing into and or from constructing or from remaining on Plot Number L.R 36 at Kipini (the suit property) or in any way from interfering with the suit property pending the hearing and determination of this application

c) This Honourable court do grant an injunction against the Defendant/Respondent, their agents, employees, servants, assignees and or any other person authorized by them restraining them from trespassing into and an order to demolish the structure erected on Plot No. L.R 36 by the Defendant pending the hearing and determination of this suit.

d) This Honourable court do grant in the alternative an order of eviction of the Defendant/Respondent from Plot Number L.R 36 at Kipini and for the demolition of structures thereon.

e) Costs of this application.

The Respondent filed a Notice of Preliminary Objection dated 14th September 2021 raising the following issues;

a) That this court lacks jurisdiction to hear and determine this suit.

b) The Plaintiff has no locus standi in this matter due to reason that he disposed of the suit property on 20th march 2015 to one Athumani Rashid (sic).

c) The issues raised in this suit are of inheritance and should address by Kadhi court (sic).

Applicant submitted that this court has jurisdiction to hear and determine the matter as he is the registered owner of the suit land known as Plot No. L.R 36 situated in Kipini hence has locus standi to institute the suit.

Counsel submitted that the Applicant has met the threshold for grant of orders of injunction as set out in the **Giella Vs Cassman Brown & Co. Ltd [1973] E.A (supra)**.

Counsel for Respondent submitted that the Plaintiff does not have locus standi to institute this suit having sold the same to a third party and further that the court does not have jurisdiction to hear and determine this matter on the ground that it involves Islamic inheritance within the jurisdiction of the Kadhi's court.

ANALYSIS AND DETERMINATION

When a Preliminary Objection is raised, the court has to deal with the issue first as it has an effect of terminating the case if the same is upheld.

Counsel for the Respondent submitted that the court does not have jurisdiction to hear the matter as it involves inheritance under the Islamic law. Article 170 establishes the Kadhi's courts and confers jurisdiction to the court, under clause 5, which is limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance relating to proceedings in which all parties profess Muslim religion and submit to the jurisdiction of the Kadhis courts.

From the Complaint it is clear that the issue for determination is trespass and an order of vacant possession which is within the jurisdiction of the Environment and Land Court. It follows that this is not an inheritance or Succession Cause which would be suitably handled by the Kadhi's court. I find that the Preliminary Objection on that limb fails.

Counsel also raised the issue that the Applicant does not have locus standi as he had sold the suit land to a third party hence has no interest in the suit land. The Complaint states at paragraph 4 that sometime on 20th March 2015 the Applicant sold a portion of the said piece of land on Plot No. LR No. 36 to Athumani Rashid but the Defendant's son encroached on the suit land.

This is a fact that must be established as a mere annexure of an agreement is not enough on the face of it to establish whether the sale went through or there were certain terms of the agreement not complied with. A Preliminary Objection should not be raised if any facts have to be ascertained and the court and the parties assume that the facts as pleaded are correct. I find that this limb of the Preliminary Objection also fails.

On the issue whether the Applicant has met the threshold for grant of injunction, a party must establish a prima facie case with a probability of success. The Plaintiff claims that the Defendant's son has trespassed on the suit land. There is no explanation why the Plaintiff has chosen to sue the Defendant and not the son whom he claims to be the trespasser. Further there is an element of sale to a known third party who is not a party to this suit.

In the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**, the court stated that:

*“In **HABIB BANK AG ZURICH V. EUGENE MARION YAKUB, CA NO. 43 OF 1982** this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:*

“Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

At this juncture the court will only gauge the strength of the Plaintiff's case and not go to the merits of the case. Having analyzed the Plaintiff's Complaint, the application and the submission I find that the Plaintiff has not established a prima facie case with a probability of success. Further the Plaintiff has not established that if the orders sought are not granted he will suffer irreparable harm incapable of being compensated by way of damages. The Application is hereby dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH 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 Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.