



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO.10 OF 2014

JAPHET NOTI CHARO.....PLAINTIFF/APPLICANT

=VERSUS=

MICHAEL TINGA JEFWA.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Plaintiff's Application dated 30th January, 2014 seeking for the following relief;
 - (a) **THAT a temporary injunction be issued restraining the Defendant/Respondent by himself, his agents, servants, workmen, legal representatives or any other person claiming interest through him for trespassing, entering, remaining, constructing, alienating, working on or dealing with the suit property being portion 14035 Cr 52003 in any manner whatsoever pending the hearing and determination of this Application inter partes.**
 - (b) **THAT upon inter parties hearing, an injunction be issued in terms of prayer (2) above pending the hearing and determination of the suit.**
 - (c) **THAT costs to this Application be provided for.**
2. The Application is premised on the grounds that the Plaintiff is the registered owner of the suit property; that the Defendant has trespassed into the Plaintiff's land and he has started sinking a well and that the Defendant's act is intended to unlawfully disposes the Plaintiff of his property.

The Plaintiff's/Applicant's case:

3. According to the deposition of the Plaintiff, he is the registered owner of the land known as portion 14035 which he acquired after following the laid down procedures.
4. The Plaintiff has deponed that the County Government of Kilifi has all along recognised him as the owner of the said property and has been demanding rates from him and not from the Defendant.

The Defendant's/Respondent's case:

5. According to the Defendant, he is a tenant on portion number 29315/4 Malindi Municipality and registered as CR34880 currently known as market village which is owned by Melo Twenty Seven Holdings Limited; that his landlady is the one who has a power of attorney from the said Melo Twenty Seven Holdings and that he has been a tenant since 24th September 2005.
6. The Defendant deponed that he has no interest in the suit property and that it was the Plaintiff who trespassed on the land that he has leased.

Submissions:

7. The Plaintiff's advocate submitted that although the Defendant alleged that he was a tenant on portion number 29315/4, he did not produce an agreement between himself and Melo Twenty Seven Holding Co. Ltd and that from the mix up of the documents presented by the Defendant, it is clear that the Defendant does not know the parcel of land he is dealing with.
8. The Defendant's advocate on the other hand submitted that the Plaintiff's claim is founded on the land known as portion number 14035; that the Defendant has denied interfering with the said land; that the two parties occupy two distinct parcels of land and that the Plaintiff may obtain an order using a title number that is different from the land occupied by the Defendant.

Analysis and findings:

9. The Plaintiff's claim is that he is the registered proprietor of land known as portion number 14035 and registered as CR.52003. The said land measures 1.215 Ha. The search certificate has been annexed on the Supporting Affidavit showing that the Plaintiff is indeed the registered proprietor of the said land.
10. The Defendant has denied that he has trespassed on land known as portion number 14035. It is his case that it is the Plaintiff who has interfered with land known as CR 34880 portion number CR 29315/14 Malindi which he has leased from Melo Twenty Seven Holdings Ltd.
11. The Defendant has annexed on the Replying Affidavit a Certificate of Title in respect of land registered as CR.34880. The portion of land in respect of that land is 10594/9 and not 29315/4.
12. The Plaintiff did not place any evidence before me to show that indeed the Defendant is sinking a well on portion number 14035 and registered as CR.52003 in his name.
13. In view of the claim by the Defendant that he has never occupied portion of land known as 14035, the Plaintiff should have filed an affidavit and annexed a surveyors report to show that indeed the Defendant is occupying his land.
14. It does not matter that the Defendant does not have a lease agreement with the proprietor of portion number 10594/9 (Cr.29315/4) and registered as CR.34880. The burden of proving that the Defendant has indeed trespassed on portion number 14035 and not portion number 10594/9 Malindi or any other land lies on the Plaintiff. The Plaintiff cannot shift that burden on the Defendant.
15. In the circumstances, I find that the Plaintiff has not shown, prima facie, that the land the Defendant has trespassed on is portion number 14035 which is registered in his name.
16. For those reasons, I dismiss the Plaintiff's Application dated 30th January, 2014 with costs.

Dated and delivered in Malindi this 26th day of September 2014.

O. A. Angote

Judge