



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL SUIT NO. 5 OF 2012**

**NICHOLAS PATRICE TABUCHE .....PLAINTIFF**

**VERSUS**

**ANSAZI GAMBO TINGA**

**SAFARI GAMBO TINGA**

**THE REGISTRAR OF TITLES, KILIFI .....DEFENDANTS**

**RULING**

1. On 3rd September, 2012, I delivered a ruling dismissing the plaintiff's Notice of Motion dated 20th January, 2012 which sought an injunction to restrain the 1st and 2nd defendants with regard to their dealings in respect of land parcels No. LR KILIFI/MTWAPA 3543, 3544 and 3545. The original file disappeared thereafter and on 2nd October, 2012 I authorized a skeleton file be opened to facilitate the filing of the plaintiff's application dated 26th September, 2012 brought under certificate of urgency.

2. The application had been received in the registry on 1st October, 2012 and is expressed to be brought principally under Order 40 rule 1, 2, 3, and 9 of the Civil Procedure Rules. Prayer 3 is in the following terms:

***“THAT this honourable Court be pleased to issue a temporary order of injunction against the 1st and 2nd defendants, their agents, servants or whomsoever from selling, transferring, alienating and/or disposing off the property registered in their names as KILIFI/MTWAPA/3543, KILIFI/MTWAPA/3544 and KILIFI/MTWAPA/3545 pending the hearing and determination of an intended appeal in the court of appeal”***

3. The application is supported by the affidavit of the plaintiff. Two of the main concerns disclosed in the grounds and affidavit supporting the application are that:

a) the 1st and 2nd defendants have threatened to evict the plaintiff from the suit property.

b) the suit property is at risk of being disposed of by the said defendants, an eventuality that would occasion the plaintiff substantial loss as the substratum of this appeal would be lost.

4. In their response, the 1st and 2nd defendants put in a replying affidavit and filed grounds of opposition. So far as I can discern, the main grounds are nos. 1, 3, 6 and 9 which are in the following terms:

***“1. The application is bad in law, fundamentally defective and lacks any legal foundation.***

***That the issues raised are res judicata.***

***That the application lacks any merit in law, fact and or substance.***

***9. That the plaintiff's entire suit and the application are bad in law and in breach of the express provisions of the Limitations of Actions Act, Chapter 22 of the Laws of Kenya, the Law of Succession Act, Chapter 160 of the Laws of Kenya, the Environment and Land Court Act, Act No. 19 of 2011, the Registered land Act, Chapter 300 of the Laws of Kenya (repealed) as read with Article 40 of the Constitution of Kenya, and the provision of the Land Act, Act No. 6 of 2012 and the Land Registration Act, Act No. 3 of 2012.”***

5. As with the previous application the instant notice of motion was by consent canvassed by way of written submissions. I have now looked at all the material presented with respect to the notice of motion.
6. I have read the parties' affidavits. The parties have rehashed the factual basis of their respective positions as canvassed at the hearing of the first (dismissed) application for injunction. Basically, the applicant claims to have purchased the suit property from the deceased and occupied it since 1984. He claims that the 1st and 2nd defendants, the heirs of the deceased have fraudulently obtained titles thereto and have threatened to evict him as well as to sell the suit property. The 1st and 2nd defendants assert their right to the suit land as heirs and they dispute the alleged sale of the same as alleged between the applicant and the deceased.
7. Whereas it is correctly argued by both parties that this court has the necessary jurisdiction to consider an application for injunction pending appeal (following dismissal of an application for an interlocutory injunction), what remains unclear is whether that jurisdiction is invoked via Order 42 rule 6 or Order 40 rule 1, 2, 3 of the Civil Procedure Rules. In this regard, I agree with Mr. Adhoch's submissions on behalf of the plaintiff that order 42 rule 6(6) of the Civil Procedure Rules does not seem appropriate in this case.
8. Authority for the first proposition on jurisdiction is found in **Madhupaper International Limited vs Kerr (1985) KLR 840**. But in an indirect way the said case appears to suggest the applicability of Order XXXIX (now 40) of the Civil Procedure Rules in such a situation. The legal dilemma regarding the applicable provisions ought not to be a bar where the Court of Appeal has clearly expressed the view that the court has jurisdiction. Further, I think the stated purpose for that jurisdiction should guide the court in the exercise of its said jurisdiction.

The court stated in the Madhupaper case:

***“Where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed.”***

9. In this case, the plaintiff/applicant moved the court under Order 40 of the Civil Procedure rules. He has also invoked the inherent jurisdiction of the court under Section 3A and could have equally invoked Section 63(e) of the Civil Procedure Act. I confess I am unable to find any authority that expressly addresses the question regarding the correct provision to be invoked with regard to the application of the nature before me. I however, find assurance in the following facts:

- a) Order 40 of the Civil Procedure Rules provides for injunction, and
- b) the injunction in the previous application related to the period pending hearing of the suit, while the present one for the period pending appeal.
10. Besides, the Madhupaper case refers only to OXXXIX r1,2,3 (presently Order 40) while affirming the High Court's jurisdiction to grant injunction pending appeal. Some of the considerations proposed in the Madhupaper case include the examination of the possibility that the appeal may be rendered nugatory. Conversely, the court stated that where an appeal is frivolous (not relevant for our case) or where greater hardship would be inflicted such injunctive orders ought not to be granted.
11. Mr. Onyango for the defendants referred the court to the decision of the Court of Appeal in **Yego v Tuiya & Anor (1986) KLR** wherein the court frowned upon a trespasser's attempt to preserve the status quo. That according to the defendants is the status of the present applicant. The defendants are admittedly the registered owners of the suit property upon which they claim the applicant forcefully trespassed in 2011. As before, no evidence of previous prolonged possession as alleged by the applicant has been tendered.
12. In my considered view, granting an order of injunction to the plaintiff in the present circumstances would visit more hardship upon the defendants, and possibly, innocent 3rd parties against whom no *prima facie* case of fraud or other wrong doing has been made. Secondly, there is patent incongruity between the particulars of the land parcel that the applicant allegedly bought from the deceased and those related to the parcels which are the subject matter of this application.
13. Finally, on the question whether the appeal will be rendered nugatory should the injunction sought be denied, the defendants assert that they have already sold off two of the disputed parcels to 3rd parties and that the plaintiff entered the portion he is occupying as a trespasser in 2011 – and not earlier. Besides, it has not been shown that the damages would not suffice in the event the applicant's appeal is successful.

Having considered all the matters canvassed, I am not persuaded that the notice of motion is merited and will dismiss it with costs.

Delivered and signed at Malindi this **19th** day of **April, 2013** in the absence of:

court clerk – Evans

**C. W. Meoli**

**JUDGE**