



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 19 OF 2013

MOMBASA AUTO CARE LTD.....PLAINTIFF

=VERSUS=

1. JAPHET PAIS KILONGA

2. ONESMUS MBOGA KIMERA.....DEFENDANTS

R U L I N G

1. The Notice of Motion before me is dated 12th February, 2013 seeking for the following orders;
 - a. **THAT, the Honourable court does issue a temporary injunction restraining the Defendants/Respondents by themselves, employees and/or agents from further trespassing onto, interfering and or destroying, obstructing and or restricting in whatever manner and whatsoever with the Plaintiff's parcel number PORTION NUMBER 123 MALINDI and undertaking any constructions and felling of trees thereon and/or using any of the illegal facilities thereon constructed within the Plaintiff's land and from any other manner whatsoever and however from interfering or blocking the Plaintiff's activities and operations thereon pending the hearing of this application inter-partes and thereafter pending the hearing and final determination of this suit.**
 - b. **THAT, in the alternative and without prejudice to the forgoing, the Honourable Court does**

order *status quo* to be maintained and especially so with regard to the wanton felling of trees on the parcel of land.

- c. THAT, there be a temporary mandatory injunction compelling the Defendants/Respondents by themselves, servants, agents to demolish and remove all the illegal constructions within the Plaintiff's PORTION NUMBER 123 MALINDI and to demolish all the buildings and illegal erections, interfering with the activities of the Plaintiff/Applicant pending the hearing of this application inter partes and thereafter pending the hearing and final determination of this suit.**

- d. THAT, the Defendants be evicted and/or removed from the Plaintiff/Applicant's parcel of land known as PORTION NUMBER 123 MALINDI measuring approximately ninety six decimal point naught one (96.01) Acres within Kilifi County.**

- e. THAT, costs of this application be provided for.**

2. In support of the Application is the Plaintiff's affidavit in which he has deponed that the Plaintiff purchased land known as portion number 123 Malindi measuring approximately 96.01 Acres from Mohamed Saif Hamaid Alkhaled, Ahmed Ali M. Yahya Barhaji and Abdi El Salam Said Moustapha Mohamed El Shirbin having donated their Power of Attorney to Mansur Satahu on 4th August, 2008. The said parcel of land was consequently registered in favor of the Plaintiff.

3. The Plaintiff's director has further deponed that the Defendants have without any colour of right proceeded to occupy the Plaintiff's parcel of land and started building illegal structures thereon, residing thereon illegally and felling indigenous trees without the Plaintiff's permission and that they have refused to vacate the land; that the Defendants are trespassers and or squatters on the Plaintiff's parcel of land and have built shanties all over the parcel of land.

4. According to the Plaintiff's director's deposition, the Plaintiff is in the process of sub-dividing the parcel of land but cannot do so in view of the hostility that has been meted out by the Defendants and that the Plaintiff stands to suffer irreparable loss having already invested heavily on the parcel of land.

5. The 1st Defendant filed his Replying Affidavit on 1st March 2013 and deponed that the Plaintiff's indenture is not conclusive evidence of ownership and the process by which it was registered is dubious, that he has been a resident on the said property for many years and that his father was also born on the suit property.

6. The 1st Defendant deponed that he was charged with an offence arising from his possession of the

suit property but the charge could not be sustained and it was accordingly withdrawn; that by the year 2008, he had continuous uninterrupted, open and peaceful occupation and use of the suit portion of land to the exclusion of the applicant and its predecessor; that they have buried their ancestors on the suit property and it will be a grave historical injustice to deny them their ancestral right.

7. The 1st Defendant finally deponed that there was a similar application in HCCC NO. 8 OF 2008 in which the applicant sought for similar orders of injunction; that the court declined to issue similar injunctive orders and that the Defendants in that suit are residents with him on the suit property.
8. The 2nd Defendant filed his Replying Affidavit on 15th March, 2013 where he deponed that his ancestors were in occupation of the suit property since the 1940's and that he was born on the suit property in 1974 where he has been living with his family.
9. The 2nd Defendant finally deponed that the Plaintiff has not demonstrated how it will suffer irreparable loss due to his continued occupation of the suit property for over 30 years.
10. The parties agreed to dispose of the application by way of written submissions. The Plaintiff/Applicant's advocate filed his submissions on 16th April, 2013 while the 1st and 2nd Defendant's Advocates filed their written submissions on 2nd May, 2013 and 15th May, 2013 respectively. I have considered the said submissions.
11. I should perhaps start by considering the Ruling that was delivered by my sister Honorable Lady Justice Meoli on 24th February, 2012 and which has been annexed on the 1st Defendant's Replying Affidavit.
12. The Ruling in HCCC NO. 8 OF 2009 was in respect to an application for injunction. The said application was filed by the Applicant therein, who is also the Applicant herein, against eight defendants.
13. Malindi HCCC NO.8 OF 2009, and the Application for injunction orders in the said suit is in respect to the land portion number 123 Mtangani. That is the same property that the Plaintiff is seeking for injunctive orders in the current suit.
14. I have not been informed by the Plaintiff why it filed the current suit notwithstanding the fact that Malindi HCCC NO. 8 OF 2008 is still pending.
15. What the Plaintiff should have done, after realizing that there were more people on the suit property who had not been sued in HCCC NO. 8 OF 2008 was to file an application for leave of the court to amend the plaint by adding the current Defendants in the suit. That is the clear

reading of the provisions of Order 1 Rules 10(2) of the Civil Procedure Rules. The filing of the current suit by the Plaintiff over the same suit property, in my view, is an abuse of the court process.

16. Having said so, and considering that Honourable Justice Meoli found and held that the Plaintiff had not established a prima facie case against the Defendants in HCCC NO. 8 OF 2008, and considering that the Judge had found that the Applicant therein had not controverted the fact that the Defendants had lived on the suit property continuously and uninterrupted for a period of more than 12 years, I do not see why I should arrive at a different decision.

17. In the circumstances, and in view of the Ruling by Justice Meoli in Malindi H.C.C.C No. 8 of 2008, I dismiss the Plaintiff's Application dated 12th February, 2013 with costs and direct that this suit should be heard together with Malindi HCCC NO. 8 of 2008.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2013

O. A. Angote

Judge