



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Suit 90 of 2011

FRANCIS MUNYAO MULINGEPLAINTIFF

-VERSUS-

LAWRENCE M. THOYADEFENDANT

R U L I N G

1. By the Notice of Motion filed on 6th July, 2011, the Plaintiff is seeking orders to restrain the Defendant from encroaching onto his property being LR CHEMBE/KIBAMBAMSHE/389, initiating any developments on it or interfering with his use and enjoyment thereof, pending the determination of the suit.
2. The plaintiff swore two affidavits in support of the application. His complaint is situated that the defendant has mobilized residents of the area where the suit land is with the declared intention of laying claim to and encroaching upon his land parcel, principally because the plaintiff is “not a local resident.”
3. The respondent swore a replying affidavit, where he has denied the plaintiff’s claim and asserting that he owns his own land viz CHEMBE/KIBAMBAMSHE/434 and has no interest in the plaintiff’s land whatsoever.
4. The parties agreed to argue the application through submissions, which I have considered alongside the four affidavits in record. The legal principles guiding the grant of interim injunction was laid down in the case of **GIELLA VS CASSMAN BROWN LTD. [1973] EA358** and an applicant is required to demonstrate:-
 - a. A prima facie case with a probability of success.
 - b. That he will suffer irreparable damage if the order sought is not granted.
 - c. When in doubt the court will consider where the balance of convenience lies.

5. In the present case, the applicant has not tendered any evidence of the alleged threats of encroachment by the defendant. Indeed, he concedes that the defendant has not physically set foot on the land or undertaken any activities adverse to his title. Looking through the applicant's affidavits, it is my considered view that the allegations against the defendant are vague, unsupported and perhaps based on fear and speculations perhaps due to the notorious history of land invasion by alleged squatters in the Coast generally in the CHEMBE/KIBAMBAMSHE area in particular.

6. But a court of law cannot act on speculations. Order 40 Rule 1 (a) upon which the Applicant's main prayer is premised provides as follows:

1. Where in any suit it is proved by affidavit or otherwise-

(a) That any property is in dispute in a suit is in danger of being wasted; damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation...as the court thinks fit..."

7. Viewed against this provision, the plaintiff's affidavit provides little if any proof that his property is in danger of wastage, damage or alienation. He has failed to prove a prima facie case with a probability of success and no useful purpose will be served by a consideration of the second principle in **Giella Case**. Accordingly, there is no merit in the plaintiff's application and the same is dismissed with costs.

Read and delivered at Malindi this **11th** day of **May, 2012** in the presence of:

C. W. MEOLI
JUDGE