REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 5 of 2008

TAHIR SHEIKH SAID ……..……...PLAINTIFF

VERSUS

PROFESSOR ABDALLA BUJRA……DEFENDANT

R U L I N G

By a Chamber Summons dated 20th February 2008 made under Order XXXIX Rules 1, 2 and 3, and section 3A and 63(c), the applicant seeks for temporary orders of injunction to issue, restraining the defendant by himself, his employees, agents and servants from trespassing on and occasioning malicious damage howsoever to the plaintiff's suit property known as portion No. 11215, and all contents thereon, and/or in any other way whatsoever interfering with the plaintiff's peaceful occupation and/or enjoyment of the said property pending hearing and determination of this application.

Further, that the court do issue a mandatory injunction, compelling the defendant to remove the structure extending from his parcel of land known as No. 620 and into the plaintiff's parcel known as portion No. 11215.

It is premised on g rounds that:

(a) The plaintiff/applicant is the lawful and registered owner of the suit parcel and the contents thereon and has been in occupation for several years now.

(b) The Defendant/respondent by himself, employees, agents and/or servants have continuously wrecked havoc, adamantly trespassed on and caused gross malicious damage to the plaintiff's suit property and have threatened to continue doing so and if not restrained, the plaintiff's peaceful occupation and enjoyment of his property as well as massive investments will be in jeopardy

(c) The defendant/respondents acts of constant interference, trespass and malicious damage is in bad faith and plaintiff will suffer irreparable damage.

The affidavit in support of the application is sworn by Tahir Sheikh Said (plaintiff) who has annexed a copy of Grant for the portion 11215 Malindi showing him as the registered proprietor.

The defendant is the owner of parcel no. 620 Malindi – a copy of the Title Deed is annexed and marked TSS 2. Applicant through his surveyors confirmed that Defendant has encroached on his parcel as shown in the surveyor report marked TSS 3 and so defendant has no lawful excuse for his acts or occupation of the said parcel and he should even be directed to remove the structure which is encroaching on respondent's portion.

The application is opposed, and in the replying affidavit by the defendant in which he denies being the owner of portion No. 620 terming the suit as vexatious and calculated to embarrass him. He points out that plaintiff ought to have produced a certificate of official search or such document to buttress his claims and he is simply not entitled to the prayers he seeks.

The respondent has produced a copy of the official search which shows that he owns property No. 786 Malindi, which is situate within Malindi Municipality — the same is marked PASB 1.

He has also annexed a copy of the conveyance by which he acquired ownership and title to the land parcel No. 786 Malindi (original No. 621/2 Malindi) measuring approximately 1.460 acres – the survey was done on 8th March 1957.

He was then confirmed owner of the land and given up to seaward adjacent to his land by the receding Indian Ocean as per correspondence with Lands Department produced as bundle and marked PASB3. He is not aware nor does he believe that plaintiff owns land near his or that they are neighbours so as to allege encroachment of structures. He contests the legality or validity of plaintiff's title saying the Grant is the

kind of document registered at the Inland Registry of alienated Government Land at Nairobi and it does not bear the IR or CR number which is common with such documents and if the ownership is genuine then he ought to have been issued with a title document similar to respondents'

Respondent depones that he is unaware of any encroachments or threats and terms the allegations being made by applicant, as a fignment of his imagination as he has no structure on his land extending to plaintiff's land. Respondent says he has not seen any survey report as none is annexed to the affidavit that was served on his advocate.

He maintains that the area of land infront of his parcel and in front of other parcels adjacent to his are on the Malindi Sea front which is sandy, bushy and undeveloped and one cannot and ought not to erect a permanent development thereon.

At the hearing of the application, Mr. Otieno submitted on behalf of the applicant that, the lease applicant holds is a current tenure and the boundaries are clearly demarcated as shown in the survey plan. He argues that this is a status which vests on the plaintiff/applicant, exclusive and indefeasible rights under section 23 of the Registration of Titles Act, which rights cannot be interfered with other than by the encumbrances imposed by the provision. He repeats what applicant has stated in the supporting affidavit, saying efforts to resolve the matter amicably, only elicited an acrimonious situation resulting in havoc by defendant.

He urges this court to consider the surveyors report – and be guided by it. He explains that to achieve a harmonious co-existence then the offending structure must be removed. He contends that the Title document issued to applicant is conclusive and bears the signature and seal of the registrar, so prima facie case has been made out.

As regards what defendant owns as claimed by defendant, Mr. Otieno argues that it does not necessarily follow that respondent does not own any other piece of land and he is the current occupant of plot 670.

In response, Mr. Mwenesi, on behalf of the respondent submits that the title document being relied on by applicant is questionable as it does not have an IR (Inland Registration) number and he also questions why it would have an IR number yet it is property at the Coast. He opines that page 1 of that document was created elsewhere and that is why it does not contain conditions 1-16 which ordinarily precede the signature. Mr. Mwenesi pokes holes at the document, saying under the Registration of Titles Act (RTA), the legal term used is parcel, not portion and so no prima facie case has been made out. He submits that a certificate of official search points out that whereas plaintiff wants defendant to stop developing plot 620, his counsel in his submissions refers to No. 670 – and it is respondent's contention that he does not occupy or own either – though he is aware of the existence of plot 621.

Further that even if the Grant being relied on by applicant is to be believed, it would still not prove that respondent is occupying plot 620 or encroached on applicant's power. Mr. Mwenesi indicates he has not been supplied with the surveyor's report nor is it in the court file and there are even no photos annexed to confirm the alleged structure exists and so the applicant fails to meet the test set out in **Giella v Cassman Borwn.**

The principles to be considered in granting an injunction have been well laid out in the infamous listed and tried case of **Giella v Cassman Brown 1972 EALR pg 358** – as follows;

a) The applicant must show a prima facie case with probability of success.

b) It must be demonstrated that damages would not be adequate compensation if the orders are not granted.

c) If the above two are not met then the court must consider in whose favour the balance of convenience tilts.

Applicant has annexed a certificate of grant issued in January 2007 to Tahir Sheikh Said for a 99 year lease term whose life began on 1st March 1992. It is issued under the Registration of Titles Act. Other conditions which would naturally follows are missing and the next condition is on the 3rd page appearing as No. 16 – no explanation is offered as to what may have become of conditions 1-15 if at all they existed. This creates doubt as to the veracity of this document.

Quite apart from that, there is no copy of official search annexed to confirm the true status of ownership. Then there is reference to a surveyor's report, which report has not been served on the respondent's counsel, nor is there a copy on the court file. Certainly that report would have assisted the court in determining the position of the parcels in the ground whether there is actual encroachment –

What then emerges is that applicant has made allegations which don't seem to have any support whatsoever, and I find that no prima facie case with probability of success has been shown.

In the absence of (a) the surveyor's report,

(b) photographs to show the nature and extent of the alleged encroachment

(c) non disclosure of the kind of development applicant has on the said portion, then I am unable to even make out whether damages would or would not adequately compensate the applicant.

Can the doubt principle salvage the situation? No – because (a) applicant has failed to show that he is currently in occupation of the property (courtesy of non annexing of a search document) which would show the current owner of plot 11215(b) no demonstration of the purported encroachment (c) failure to establish that respondent actually owns plot 620 or 670 (a referred to by his counsel)

So the balance remains completely unshaken and cannot come to the applicant's aid.

The upshot is that the application lacks merit and is dismissed.

Costs of this application shall be borne by the respondent.

Delivered and dated on this **22nd** day of **June 2010** at Malindi.

H. A. Omondi

JUDGE