



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Suit 48 of 2008

HAMOUD RASHID AZZAN(*Administrator of the estate of*

RASHID AZZAN RASHID.....PLAINTIFF

=VERSUS=

KAZUNGU DIWANI.....DEFENDANT

RULING

The Chamber Summons application dated 11/7/08 is made under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act. It seeks that the defendant/Respondent by himself, his agents, servants, representatives and/or assignees be restrained by a temporary injunction from trespassing or encroaching upon, interfering, improving, developing and/or constructing any structure of any kind whatsoever on the Plaintiff/applicant's parcel of land known as Portion No.4260(Original No.4090/144) situated in Malindi until the hearing and final determination of this suit.

It is based on grounds that, on or about the 9th day of July 2008, the Defendant/Respondent trespassed upon, and encroached on the plaintiff/applicant's parcel of land known as portion No.4260(original No.4090/144) and deployed workers who commenced laying a foundation and a boundary wall, being built in preparation for the construction of a structure and have now started constructions which are ongoing.

The estate of Azzan Rashid Azzan is the legal owner of the plot in issue. The Defendant/Respondent has ferried building materials,inter alia sand, blocks, stones and cement to the plaintiff/applicant's parcel of land and is continuing to do so, to the detriment of the plaintiff/applicant and applicant will suffer irreparably if injunction is not issued.

In the supporting affidavit sworn by the applicant(who is also the administrator of the estate of Azzan, having obtained letters of administration and he depones that applicant is the registered owner of the parcel of land known as portion No.4260(original No.4090/144) situated in Malindi – the Deed plan is annexed as HRA 1.

On 9th July 2008, the Respondent without any colour of right whatsoever, trespassed upon, and encroached onto applicant's said land and deposited building materials, ready for the construction of a building thereon. As at the time of making this application, Respondent had constructed a boundary wall – as shown in photographs marked HRA2. Applicant made demands to Respondent to stop the activities in vain and subsequently a report was made to the Town clerk of the Municipal Council of Malindi as per letter dated 10 July 2008 and marked HRA3.

There had been a licensee named Khalifa who had sought permission of the deceased to use the said plot to sell timber as per copy of licence mark HRA 4 and to that extent had even applied for consent to common usage of the plot from the Municipal Council of Malindi as per copy of letter mark HRA5.

It seems Khalifa purported to sell that plot to Respondent. It is further averred that the portion in dispute is part of the original plot to 1755R which was sub-divided, giving rise to the portion 4090/144 from which the current portion arose as a further sub division – a copy of the Title is marked as HRA6.

The said portion of land has been surveyed and if the Respondent is left to carry on with his activities, he will interfere with the whole scheme as shown in the subdivision scheme plan(annexed as HRA 7). Applicant contends that Respondent has no reasonable cause of justification for trespassing and encroaching in the said plot and commencing construction.

The application is opposed and 1st Respondent in his replying affidavit states that he is not the owner or licensee of plot No.4260(Original No.4090/144) situate at Malindi nor has he commenced any construction thereon as he has no interest on that plot. He maintains that applicant has mistaken him for the true owner who is who is Nassir Khalifa Issa. (an acquaintance) of the 1st Respondent). 1st Respondent urges that the application be dismissed as he is a total stranger.

The 2nd Respondent confirms in his replying affidavit, that 1st Respondent is his acquaintance for several years. He insists that he is the legal owner having been officially allotted the plot in 1994 shown by a letter from the Municipal Council of Malindi – the same is dated 26/7/94 and marked A. Prior to that official allocation, 2nd Respondent had been occupying the portion for over ten (10) years and as far as he knows, that land belongs to Municipal Council of Malindi, whom he has been paying relevant rates and rent whose copies one annexed and marked B. He undertakes various commercial ventures under licence from the landlord.

The application proceeded ex parte. Mr Mouko submitted on behalf of the applicant it's the first defendant who was found constructing on the sit. 1st defendant/respondent denies having any dealings with the land – actually apart from the allegation, there is nothing to support that it is 1st Respondent who is doing the construction. Even the annexed photographs are not purported to have captured him in person. It is not for the Respondents to prove what their relationship is, it is up to the applicant to demonstrate that 1st Respondent is the one who deposited the building materials and commenced construction of the wall – this has not been demonstrated.

The son of the administrator who is purported to have found 1st Respondent constructing on the suit plot has not sworn an affidavit to support this or that 1st Respondent told him 2nd Respondent had sold to him the said plot. 2nd Respondent who is alleged to have been paid good will by the 1st Respondent so as to vacate the plot, insists he is the owner of the plot and is the one constructing therein. He says he was allocated the plot by Malindi Municipal Council.

Mr Mouko submits that there is no evidence of such allocation and that the letter from the council which he seeks to rely on, is not an allocation letter, rather the council was simply saying it had no objection to the 2nd Respondent's request to own the land and that the licence, invoice and business permit do not confer ownership – the bottom line being that 2nd Respondent does not have a single document of Title.

The applicant has presented to this court a letter dated 1/2/89, written by the 2nd Respondent in which he refers to the late Rashid Azzan as the owner of the plot who had allowed him to use it. 2nd Respondent has maintained a loud silence regarding this letter. Further letter dated 16/3/89 also by 2nd Respondent and one Khalifa Issa, still referred to the deceased as the owner of the land.

2nd Respondent relies on a letter dated 26/7/94 is an allotment letter – this letter does not make specific reference to plot number which was under reference. The applicant seeks to rely on the Deed Plan – which to my mind is not a document of Title to support his position that he is the registered owner of the

plot. The entries in that Deed Plan do not disclose who is the owner of the plot and the applicant has not established that he has Title to the land – so no prima facie case with probability of success has been made out.

Is the applicant likely to suffer loss that cannot be compensated for by way of damages? The applicant is currently not occupying or using the land. All he says is that it has been surveyed and sub-division done – but if he has no title to the land then the sub-division scheme plan is of no consequence. It is not demonstrated that damages would not be adequate compensation if the orders sought are not granted.

This then means I have to consider the third option – in whose favour does at balance of convenience swing. I would say neither party has Title document, 2nd Respondent is in occupation of the parcel, and I think the pendulum swings away from the applicant. The upshot is that applicant has not met the requirement set out in the case of ***Giella V Cassman Brown 1973 EALR*** to warrant being granted the application sought and the same is dismissed with costs to the Respondents.

Delivered and dated this 24th day of November 2009

H A OMONDI

JUDGE