



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 107 of 2005

ALDOFO GUZZINI

ANNA TACCALITI IN GUZZINIPLAINTIFFS

V E R S U S

EMMANUEL CHARO TINGADEFENDANT

R U L I N G

The applicants in this matter have brought an application under certificate of urgency in which they seek two substantive orders of injunction.

In the first instance they are praying that the respondent or his agents be ordered to demolish the wall the latter has erected on the applicants' parcel of land described as plot No.945 (original number 655/2), Watamu. Secondly they want the court to issue prohibitory injunction to restrain the respondent or his agents from trespassing into or remaining upon the applicants' said parcel of land.

The applicants rely on the grounds that they are the registered proprietors of the said suit land. That without any colour of right the respondent has trespassed upon the suit land and built a perimeter wall cutting through the adjacent land – plot No.944 Watamu owned by Sail Fish Ltd and extending some 28 meters into the suit land. That the respondent insists that the area fenced belongs to him.

The respondent has filed both grounds of opposition and a replying affidavit in which he maintains that he has fenced his property known as plot No. Kilifi/Jimba 1126, which he purchased in December 2000 from the original registered owners. That he obtain a permit from the Municipal Council of Malindi to fence the said parcel of land. That he is a complete stranger to the applicants' property in dispute.

These averments formed the basis of both counsel's submissions when the application was heard *interpartes* on 20th June, 2006.

I have considered the arguments as well as the authorities cited in support of each party's case. It has now been established beyond peradventure that an interlocutory prohibitory injunction can only issue where the applicant has established a *prima facie* case with a probability of success. It will, however, not normally issue where damages are shown to be adequate to compensate the applicant. Finally where there is doubt as to *prima facie* case or adequacy of damages, the court will decide the dispute on a balance of convenience. See the case of Giella v Cassman Brown Ltd, (1973) EA 358.

In considering whether a *prima facie* case has been established the court must ensure it does not go into the merits of the parties respective cases as that is reserved for the trial of the dispute. At this stage the court is only concerned with a *prima facie* case as defined in the case of Mrao Ltd v First American Bank of Kenya Ltd (2003) KLR 125.

The applicants have adduced evidence that they are the registered proprietors of Land Reference Number 945 (original No.655/2) situated at Watamu Township. The respondent on his part has maintained that he does not know where that suit land is located and that the wall he is or has erected is on plot No.Kilifi/Jimba/1126.

Clearly the applicant's and the respondent's positions are diametrically opposite. It is the party claiming that his right over land has been or is being violated by another party, to show that, that other party's activities are on the former's land. In other words the applicants must show that the wall is being or about to be erected upon L. R No.945, Watamu and not Kilifi/Jimba 1126. Section 116 of the Evidence Act provides as follows;

"116. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".

The respondent is saying that he is only fencing his land comprised in Kilifi/Jimba 1126. The applicants are, on the other hand, categorical that the fence has extended to L.R. No.945, Watamu by 28 metres. The onus is on the applicants to demonstrate that the fence is not confined to Kilifi/Jimba 1126.

Commenting on the provision of Section 110 of the Indian Evidence Act, the equivalent of our Section 116 of the Evidence Act S.C Sarkar in his book Sarkar's Law of Evidence, 10th Edn. At page 860 states:

" The policy of the law is to allow a person in possession of property to continue his possession until a rival claimant proves his title thereto".

That answers the two grounds of Giella case. The applicants have not shown a *prima facie* case that the wall is on their land by adducing evidence that the respondent has no title to Kilifi/Jimba 1126 or even how the two parcels relate. It may as well be that it is L.R No.945 that has extended to Kilifi/Jimba 1126. L.R 945 is said to be in Watamu Township, while 1126 is in Kilifi/Jimba. What is the relationship?.

L.R No.945 is registered under the Registration of Titles Act and Kilifi/Jimba is under the Registered Land Act.

These divergent positions cannot be decided on affidavit evidence. They can only be clarified during the full hearing. A *prima facie* case with probability of success has not been made out by the applicants. It is safe not to interfere with the activities of the respondent on Kilifi/Jimba 1126 until the matter is heard finally.

Damages will adequately compensate the applicants if it later turns out that the respondent has encroached on their parcel of land by 28 meters.

One last point was taken by the respondent that learned counsel for the applicants having represented him in a criminal trial in which he was charged with offences relating to Kilifi/Jimba 1126 ought not to represent the applicants in this suit. I have looked at the ruling of the court below regarding the charges in question.

I find nowhere in it any reference to Kilifi/Jimba 1126. It is not enough to merely allege conflict of interest without adducing what kind of communication was passed on to the lawyer in the criminal case.

I find no merit on the objection.

For all the reasons stated in this ruling the applicants' application is dismissed with costs.

Dated and delivered this 13th day of July 2006 at Malindi

W. OUKO

J U D G E