



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI
Civil Case 111 of 2005

WATAMU SAILFISH LIMITEDPLAINTIFF

V E R S U S

EMMANUEL CHARO TINGADEFENDANT

R U L I N G

The applicant herein obtained *ex parte* injunctive orders on 11th November, 2005 which temporarily restrained the respondent from trespassing into or remaining upon the applicant's piece of land known as plot No.944 (original No.655/1, Watamu).

The prayer seeking mandatory injunction was not granted. The application was argued *inter partes* on 23rd May, 2006. The application is based on the grounds that the applicant is the registered proprietor of plot No.944 (the suit property) measuring 1.382 hectares, having purchased the same from Elizabeth Ominde Ogaja and Kenya Commercial Bank Ltd and a transfer was duly registered on 23rd August, 2005. At the time of this transaction there was a squatter on the suit property, Kassimu Shariff Mohammed, with whom an agreement was entered into whereby he was to be paid KShs.4,410,000/= in respect of the suit property, being part payment and the other part of KShs.2,940,000 paid to the beneficiaries of the deceased registered proprietor. After concluding the sale the applicant and owners of the adjoining land agreed to develop road of access leading to the sea.

On 11th September, 2005 it was discovered that the respondent was in the process of erecting a wall which had partially subsumed the suit property leaving only 0.5 acres.

It is on this note that the applicant moved to court to restrain the respondent from continuing with the construction of the wall and also a mandatory injunction to demolish the said wall.

The respondent filed both grounds of opposition and a replying affidavit. He has completely denied the averments of the applicant that he has trespassed on the suit property. He has deposed that the wall in question is confined to his parcel of land known as Kilifi/Jimba 1126, which he purchased in 2001 from three previous owners.

That the construction of the wall in question was approved by Malindi Municipal Council. That due to the Government embargo on land transactions in the area it is located, the respondent has not caused it to be registered in his name, although the sellers have executed the transfer.

I have carefully considered the rival submissions as well as the authorities cited. The submissions present two diametrically opposed positions, with the applicant maintaining that the respondent's wall is being or

is built on the suit property (No.944) while the respondent has categorically asserted that his activities are within the confines of Kilifi/Jimba 1126.

In an application seeking orders of injunction the traditional starting point is the celebrated case of **Giella v Cassman Brown & Co. Ltd** (1973) EA 358 which laid down the test to be applied before the grant of injunction. The first thing the applicant is required to show is the existence of a *prima facie* case with a probability of success.

Secondly, the case laid down the principle that interlocutory injunction will not normally be granted unless the applicant stood to suffer loss or damage which cannot be compensated adequately by damages. Then there is the proviso that where the court is in doubt as to *prima facie* case or adequacy of damages, the court will decide the matter on a balance of convenience.

The case to be established by the applicant is that plot No.944 is registered in its name and secondly that the respondent without any lawful justification or authority has trespassed on the said land and is constructing or has constructed a wall.

In determining these questions at this stage, the court is not expected to delve into the merits of the case for each party – or even make conclusions of fact or law which may tend to determine the suit with finality. At this stage the applicant is only expected to show a *prima facie* case as defined in the case of **Mrao Ltd v First American Bank of Kenya Ltd** (2003) KLR 125.

No doubt, the applicant has on a prima facie basis shown that it is the registered proprietor of the suit property purchased from the earlier owners and a certificate of title issued. What the applicant has failed to do is to link Kilifi/Jimba 1126 to plot No.944, Watamu. These parcels of land are clearly different. The latter is registered under the Registration of Titles Act Cap 281 of the Laws of Kenya while the former is registered under the Registered Land Act – Cap 300 of the Laws of Kenya. One parcel is in Kilifi/Jimba while another is in Watamu. From the annexures it is clear that approval of the Municipal Council of Malindi was granted for the construction of the wall on Kilifi/Jimba 1126.

A letter dated 15th August, 2003 addressed to the Director of Surveys by the District Surveyor, Malindi confirmed that the Title issued in respect of Kilifi/ Jimba 1126 is valid and exist on the ground.

The burden is on the applicant to disprove the respondent's averments that his activities are confined to Kilifi/Jimba 1126. Without a clear nexus between the two parcels of land, it is difficult to state the extent of the respondent's activities. Land matters must be described very clearly as no two parcels, even when adjacent to each other, are the same.

For these reasons, I come to the conclusion that the applicant has not shown a *prima facie* case with the probability of success. On the adequacy of damages, there has been no suggestion that the respondent is incapable of compensating the applicant adequately if it turns out that he has indeed trespassed on the applicant's land.

The balance of convenience also tilts in favour of the respondent having shown no trespass on the applicant's parcel of land.

Having found that there is no *prima facie* case, it will serve only academic purpose to consider the issue of mandatory injunction.

With the divergent affidavit evidence, it is inconceivable to consider the grant of interlocutory mandatory injunction at interlocutory stage. The law is now settled that such injunction, although available both at interlocutory stage and at the trial, is very rarely and exceptionally granted at interlocutory stage. As Megarry, J, in **Shepherd Homes v Sadham**, (1970) 3 Ch D 402 succinctly put it ;

“.....if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial. What is done is done and the plaintiff has, on

motion, obtained once and for all the demolition or destruction that he seeks”.

This decision has been followed in several local cases, which have in addition to the foregoing held that interlocutory mandatory injunction may only be granted in clear and uncontroverted cases. The instant application is not such a case. The prayer for mandatory injunction at the interlocutory stage must fail.

Finally a matter was raised by the respondent regarding the learned counsel for the applicant, who he insists represented him in a criminal trial which touched on the property in question, i.e Kilifi/Jimba 1126.

It has been argued that it would be unethical for counsel to represent another party against the respondent in respect of Kilifi/Jimba 1126 in view of the fact that counsel is in possession of the details regard the acquisition of the said Kilifi/Jimba 1126. To these allegations learned counsel for the applicant has admitted defending the respondent in Senior Principle Magistrate Criminal Case No.321 of 2001/ in which the respondent was charged with two counts, namely, Disfiguring Portion of Marine National Reserve contrary to Regulation 6(b) as read with Regulation 9 of the Wildlife Conservation and Management Act and second count with Cutting and Setting on Fire of Vegetation within a National Reserve contrary to Section 13 (3) (b) of the Wildlife Conservation and Management Act. Counsel has further deposed in his affidavit dated 17th March, 2006 that he never acted for the respondent in the acquisition, sale or verification of the respondent's title to Kilifi/Jimba 1126.

The objection to counsel acting for the applicant is raised ostensibly under the provisions of Section 134 of the Evidence Act, which prohibits the disclosure of communication between an advocate and his client and Rule 9 of the Advocates (Practice) Rules which provides that;

“9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence whether verbally or by declaration or affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear”.

I need not emphasize the mischief this rule is addressing. It merely protects the advocate and his client alike. The advocate is protected from the likely embarrassment should he be called to testify. To the client, so that the fiduciary relationship with his advocate is preserved. Where evidence is adduced that indeed there were material disclosure by the client to the advocate who is now acting for the adversary, the court will not hesitate to enforce the provisions of Section 134 of the Evidence Act and Rule 9 of the Advocates (Practice) Rules.

See **Stefano Moseti v Nicole Kamene Mariya & Another**, Malindi Hccc No.108 of 2005.

In my view, in the instant case, I fail to see how the respondent could have divulged information regarding Kilifi/Jimba 1126 in a criminal case regarding matters of national parks and wildlife. I have looked at the copy of proceedings in Criminal Case No.531/2001 and I have not seen any reference to Kilifi/Jimba 1126. It is not every representation by counsel that will amount to unethical conduct or result in conflict of interest.

There must be corolation between the subject of the earlier brief and the present one.

Finally, it is improper to raise such matters at this stage. It would have been appropriate to raise the same before the application is argued so that if conflict is shown counsel does not have to argue the entire application.

For all the reasons stated the applicant's application dated 9th November, 2005 is dismissed with costs.

Dated and delivered at Malindi this 10th day of July 2006

W. OUKO

J U D G E