



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 13 of 2005

MAYUNGU LIMITED C/O KIARIE KARIUKI.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MALINDI.....DEFENDANT

RULING

In the main suit pending in this Court the applicant has brought an action against the respondent for permanent injunction to restrain the latter from interfering with the former's quiet possession of a parcel of land known as Plot No. Chembe/Kibabamshe/313, among other reliefs. Simultaneously with this suit was filed an application by way of Chamber Summons seeking temporary restraining orders against the respondents from entering, trespassing upon or interfering with the suit premises pending the hearing and determination of the suit.

The application is based on the grounds contained in the application and those set out in the affidavit of Antonio Pezzinol, the Managing Director of the applicant company.

The grounds are that the applicant is the registered owner of the suit premises. That in December, 2004, the respondent threw out some trespassers from the suit premises. Thereafter he was summoned to appear before the mayor of the respondent, who was among the aforesaid trespassers. At the meeting with the mayor he was threatened with police investigations and revocation of his visa. It was alleged that by erecting a gate to the suit premises, he had closed a public road.

After the meeting, the defendant, on 10th January, 2005 invaded the suit premises and demolished the gate.

A back-dated letter was then served upon the applicant's advocates purporting to give the applicant seven day's notice to pull down the gate.

The respondent filed, grounds of opposition and a replying affidavit to the applicant's application.

In the Grounds of Opposition and the replying affidavit of Patrick L Ouya, the respondent maintained the gate in question blocked a public access road. This assertion was based on the fact that the public access road was provided for in the Approved Plans for sub-division of 1996. That the applicant was duly notified to remove the gate or have the same removed at his expense by the respondent.

I have considered the application and the reply as well as the grounds of opposition. The issue at hand for determination revolve around the use of a road on the suit premises and the question to be determined at the trial is whether the road is in public road reserve on a private road. This being an interlocutory hearing, the Court is only concerned with the applicant showing a *prima facie* case that the road is a private one for the Court to confirm the temporary restraining orders. The applicant must also show that an award of damages will not be adequate compensation should the Court grant injunctive order sought. It is only when the Court is in doubt will it decide the application on a balance of convenience. See **Giella V Cassman Brown & Co. Ltd.** (1973) EA 358.

In considering if the applicant has established a *prima facie* case with a probability of success at the trial, the Court must ensure that it does not make definite findings of fact or law, since doing so will be a usurpation of the jurisdiction of the trial Court.

The Court Appeal, in **Mrao Ltd V First American Bank Ltd. & 2 others** (2003) KLR 125 at P 137 defined what amount to a *prima facie* case in a civil suit as follows;

“.....in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

The applicant has asserted his right to a road located on Chembe/Kibabamshe/313 which he has alleged has been infringed by the respondent who invaded the suit premises and demolished the gate belonging to the applicant. To prove his proprietary interest on the suit premises, a title deed in the name of the applicant has been exhibited in the applicant's supplementary affidavit filed on 31st March, 2006.

The respondent on the other hand contended that the suit premises were sub-divided into 17 plots out of the parent plot and that following that sub-division a public access road was created.

This has been denied by the applicant who has again exhibited a recent Certificate of official search dated 8th March 2005 in respect of the suit premises which shows that Chembe/Kibabamshe/313 is approximately 6.0 Hectares and absolutely held by the applicant.

The applicant has, upto this stage shown that the suit premises is registered in his name and has not been sub-divided. The respondent has relied on an approved plan and a copy of a letter on the letter head of Hime and Zimmerlin Surveyors.

The most official position of the suit premises can only be the title deed and the certificate of search.

For these reasons I am satisfied that a *prima facie* case has been established by the applicant.

On the second limb as to whether an award of damages would adequately compensate the applicant, it was argued for the respondent that the loss incurred by the applicant was Kshs. 40,000/=, the amount claimed in the plaint. That the applicant will adequately be compensated in damages. It must be noted that the applicant is seeking both special damages for the damaged gate estimated at Kshs. 40,000/= as well as injunctive relief. The application before the Court is for the grant of injunctive relief. The principles for the grant of injunction as enunciated in the **Giella** case only applies in applications for injunctions.

The subject matter of the suit being land, capable of being valued and the applicant compensated, I am persuaded that such compensation cannot be adequate.

For those reasons, the temporary order of injunction issued on 7th February, 2005 is hereby confirmed. The defendant is restrained by itself, employees or agents from entering, trespassing upon or interfering with the applicant's quiet possession with plot No. Chembe/Kibabamshe/313 pending the hearing and determination of the suit herein. The respondent will meet the costs of this application.

Dated and delivered at Malindi this 23rd day of November 2005.

W.OUKO

JUDGE

23.11.2005

Ruling delivered in the presence of Miss Njoroge for Mr.Kiarie.

Mr.Opija for Dr.Khaminwa.

Matu. CC

W.OUKO

JUDGE.

Mr.Opija

I apply for typed copies.

W.OUKO

JUDGE

Court: Application granted on payment of usual charges.

W.OUKO

JUDGE