



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 132 OF 2018

CHALI LWAMBI MWALAMBE.....1ST PLAINTIFF

THOMAS LWAMBI MWALAMBE.....2ND PLAINTIFF

VERSUS

FREEDOM LIMITED.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 18th October 2019 and filed herein on 22nd October 2019. By the said Motion, Chai Lwambi Mwalambe and Thomas Lwambi Mwalambe (the Plaintiffs) pray:

3. That this Honourable Court do issue a temporary injunction restraining the Respondent, their servants, workmen and/or agents from excavating and/or constructing, digging, cultivating, surveying and/or dealing with the parcel of land known as Kilifi/Mugumo Pasta/Mazeras 1263 pending the hearing and determination of the suit;

4. That this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case; and

5. That the costs of this application be borne by the Defendant/Respondent.

2. The application which is supported by an Affidavit sworn by the 1st Plaintiff- Chai Lwambi Mwalambe is based on the grounds that:

a) On 30th July 2019, the Plaintiffs noticed that the Defendant had brought an excavator on the ground with the sole aim of harvesting stones for commercial gain;

b) In spite of an order of status quo agreed upon by the consent of the parties, the Defendant has blatantly ignored the same and continues interfering with the suit premises carrying out excavations; and

c) The Plaintiffs are now apprehensive that if the orders sought are not granted, the Defendant may at any time commit waste thereon and or deal with the premises in a manner that may be adverse to the Plaintiffs' vested interests thereby rendering the suit nugatory and occasioning irreparable loss and damage to the Plaintiffs.

3. The application is opposed. By a Notice of Preliminary Objection dated 19th November 2019, Freedom Ltd (the Defendant) objects to the application on the grounds: -

1. That the application is fatally and incurably defective not (being) supported by any affidavit hence ought to be struck out with costs;

2. That the application offends the mandatory provisions of Section 7 of the Civil Procedure Act as there is a similar application seeking similar orders dated 20th June 2018;

3. That by dint of operation of the Oaths and Statutory Declarations, Act Cap 15 laws of Kenya the Supporting Affidavit is fatally and incurably defective thus leaving the application dated 18/10/2019 without legs to stand on hence ought to be struck out; and

4. That the application is incompetent and ought to be struck out.

4. In further response to the application and by a Replying Affidavit sworn by one of its directors Harji Govind Ruda, the Defendant company reiterates the contents of its Notice of Preliminary Objection and asserts that the Plaintiffs are trespassers having admitted to have sold the suit property to the Defendant.

5. The Defendant further avers that the present application is meant to establish a new state of affairs prior to that which existed at the institution of the suit and urges the Court to disallow the same.

6. I have perused and considered the application and the response thereto. I have also perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The application before me seeks the grant of orders of injunction against the Defendant on account that it has brought an excavator on the suit premises wherein it intends to commence harvesting of stones for commercial gain. I note that the Defendant does not deny bringing the excavator on the ground and it instead accuses the Plaintiffs of being trespassers on the land.

8. The Defendant has opposed the application on two fronts; that there is no proper affidavit in support of the application and that there is another similar application that was filed by the Plaintiffs. The contestation on the supporting affidavit arises from the fact that the same is shown to have been sworn on 17th October 2019 while the application before the Court is dated a day later 18th October 2019.

9. My perusal of Order 19 Rule 8 of the Civil Procedure Rules reveals that an affidavit ought not to be rejected by the Court solely on account of its having been sworn before the filing of the suit concerned. The Supporting Affidavit herein though sworn a day earlier was clearly attached to and filed with the Notice of Motion on 22nd October 2019 and I did not find any substance in the submissions that the application was defective for the mere fact that the date of swearing was earlier than that on the face of the application.

10. It was however clear to me as stated by the Defendant that the Plaintiffs had instituted an application similar to the one currently before me that was filed with the suit herein on 20th June 2018. The Defendants herein filed their response to the application on 17th July 2018. When that application came before me for inter partes hearing on 25th September 2018, the parties informed the Court that they had agreed to compromise the same and to maintain the status quo.

11. In the result, this Court endorsed the consent of the parties on record as follows: -

“Accordingly the application dated 20th June 2018 is hereby marked as compromised. The status quo obtaining as of today to be maintained pending the hearing and determination of the suit.”

12. By the present application before me, the Plaintiffs now assert that subsequent to the endorsement of the order, the Defendant have gone ahead to interfere with the status quo hence their new quest for another injunction. That cannot be the way to go. The Plaintiffs appear to have known what they should have done in such circumstances but are rather timid on taking that path. I say so because at Paragraph 8 of the Supporting Affidavit, the 1st Plaintiff avers as follows: -

“8. That I am being advised by my advocates on record that the Respondent’s actions herein are unlawful, illegal and without any colour of right and as such the Respondents should be cited for contempt for disobedience of the previous Court Orders aforementioned.”

13. For some reasons unknown to me, that same Advocate on record has filed the present application seeking another injunction and not the one he advised the client to institute as per paragraph 8 of the Supporting Affidavit.

14. There is no basis upon which this Court can grant another order of injunction when there are orders already on record. This application is therefore incompetent and must fail. It is hereby dismissed.

15. Taking into account the circumstances herein, more so the fact that the Defendant does not deny moving in to excavate stones from the suit premises, I make no order as to costs.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE