



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. E002 OF 2020

KHALIF MOHAMED HURE.....PLAINTIFF

VERSUS

MOHAMED ABDI KARIM.....DEFENDANT

RULING

Introduction

This is a ruling in respect of an application brought by way of notice of Motion dated 19th November, 2020 where the plaintiff/applicant is seeking for the following orders:

1. **THAT** the application be certified as urgent and service thereof be dispensed with in the first instance and be heard ex-parte.
2. **THAT** pending the hearing and determination of this application, the defendant either by himself, his servants, agents and otherwise be and are hereby restrained by an injunction from trespassing into the plaintiff property.
3. **THAT** pending the hearing and determination of this suit, the defendant either by himself, his servants, agents and otherwise be and are hereby restrained by an injunction from trespassing into the plaintiff property.
4. **THAT** the Officer Commanding Police Station Wajir Police to ensure enforcement and compliance of the order.
5. **THAT** cost of this application be in the cause.

The application is supported by the affidavit sworn by the applicant and a supplementary Affidavit dated 15th January, 2021 and sworn on 26th January, 2021.

The respondent in response to the application filed a replying affidavit dated 28th December, 2020 and filed on 6th January, 2021 opposing the instant application. The matter came up on 24/2/2021 when parties agreed to canvass the application by way of written submissions.

Background

The applicant's case is that he is the legal owner of **Plot Number R4757 Wajir Township** having purchased the same from one Abdi Mohammed Hura vide a memorandum of sale dated 17th July, 2017. It is his case that the ownership of the subject plot was determined by the County Lands Tribunal Committee Wajir County on 10th February, 2015 that the said plot belonged to the said Abdi Mohammed Hura, who subsequently sold the same to him.

It is his case that the defendant without any iota of right has trespassed upon his plot Number R4757 Wajir Township and has unlawfully and illegally began to dig a well and construct structures on the subject land without his authority, as he is in possession of the subject land.

Through their written submissions, the applicants submitted that there is sufficient legal justification for this court to issue the sought injunctions against the respondent, in that their application meets the parameters for issuance of temporary orders established in the case of **Giella Vs Cassman Brown and Co. [1973] EA358**. They submit that they have established a prima facie case, as they have produced documents such as the sale agreement, County Lands Tribunal Committee Wajir County case Number 033 of 2015 and letters of Wajir County government among others confirming their ownership of the subject property No. R4757.

In addition, they allege that the Respondents response makes reference to Plot No. R4430, which is different from the subject plot and thus his claim is without any basis. Further, it is his submissions that he stands to suffer irreparable loss if the orders sought are not issued as the respondent continued trespass would cause him unquantifiable damages and sentimental loss and that the balance of convenience is in favour of the issuance of the sought orders. He urged the court to allow the application with costs.

The respondent in his response to the application avers that he is the owner of Plot Number R4430 Wajir Municipality currently H1119 under the Wajir County Government by virtue of adverse possession having factually possessed the property, displayed intention to possess and peacefully resided on and used the land since 1982.

In addition, he avers that the tribunal that made a determination on the subject property did not do justice to him as he was denied an opportunity to present his case. And that had the applicant conducted due diligence he would have discovered that the vendor Abdi Mohamed Hura did not have the locus to sell the subject property.

Further, the Respondent averred that he has been in possession of the subject property from the year 1982, dug a well in the plot in year 1998, where the EL NINO swept it and what he did was to repair the well, and therefore the allegation of trespass does not arise as he has been in possession long enough to acquire equitable right in the property vide the doctrine of adverse possession.

In sum, he alleges that the applicant's allegations are half-truths and concocted falsehood and urged the court to dismiss the instant application and suit.

Determination

I have carefully considered the application and the response thereto. I have equally considered the Written Submissions filed herein by the Learned Advocates for the applicant.

Indeed the prerequisites for the grant of interlocutory injunctions have been aptly captured in the case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358* where it was held that:-

“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

In the instant case the applicant claims that he is the owner of Plot No. R4757 Wajir Municipality having acquired the same from the lawful owner one Mr. Abdi Mohamed Hura vide a sale agreement on 17th July, 2017, whose ownership of the subject plot was affirmed by Wajir County lands Tribunal. In support of his case he has attached the proceedings of the said Tribunal dated 10/2/2015, the said sale agreement and correspondences thereof.

The Respondent on the other hand also claims ownership of the subject property, albeit giving another number being Plot No. R4430, which he insists he is in actual possession of the subject property having acquired it by way of adverse possession, as he has occupied the same from the year 1982.

The question therefore before the court is as to whether the applicant has met the threshold for the grant of the sought temporary reliefs. The applicant ownership is hinged on the subject sale agreement produced herein and the proceedings and finding of the Wajir County lands Tribunal, which he claims establishes a prima facie case. The Respondents case on the other hand is solely based on a claim vide adverse possession, claiming he has been in possession since the year 1982.

I have carefully considered the pleadings in general and the annexure thereto and the written submissions, the cited authorities and the relevant provisions of law and in my view the applicant has established a Prima facie case warranting this court to issue the sought temporary orders. The applicant has tendered documents giving genesis to his claim and ownership of the subject parcel land.

On whether he will suffer irreparable loss that cannot be compensated by way of award of damages, it is my finding that from the photographs attached it is clear that the Respondent has embarked on activities which would alter the status of the land by digging a well and therefore the issue of damages would not suffice.

On the balance of convenience, the same would tilt in favour of maintaining the *status quo* and the *status quo* herein is that the Defendant stops any further activity on the subject parcel land pending determination of the instant suit. Consequently, I find the instant application merited and allow the same. Costs shall be in the cause. It is so ordered.

READ AND SIGNED IN THE OPEN COURT AT GARISSA THIS 20TH APRIL, 2021.

HON. E. C. CHERONO

ELC JUDGE

In the presence of:

Mr. Odegi – I am for the Respondent

Applicant/Advocate – absent

Mr. Kimanzi for the Applicant

Fardoswa – Court Assistant