



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 231 OF 2018

LIVINGSTONE MWANGI KAHIGA.....PLAINTIFF

VERSUS

MOHAMED AWADH ISLAM.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 27th December 2018. By the said application Livingstone Mwangi Kahiga (the Plaintiff) prays for a temporary order of injunction restraining Mohamed Awadh Islam (the Defendant) from encroaching upon or trespassing into a parcel of land known as Malindi/Marereni Msumarini Scheme/521 pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:-

i. On 25th February 2016, the Plaintiff entered into a Sale Agreement for the purchase of the said parcel of land with one Mercy Koki Nduhiu pursuant to which it was transferred and a title deed issued in the name of the Plaintiff on 14th July 2017;

ii. In or about December 2018, the Defendant trespassed into the Plaintiff's property, unlawfully grazed his cows thereon and maliciously caused damage to several trees thereon;

iii. The Plaintiff lodged a complaint with the Police but no action was taken and he is now apprehensive that the Defendant will continue trespassing on the land and infringing his rights.

3. The Defendant is opposed to the application. In a Replying Affidavit sworn and filed herein on 4th February 2019, he avers that he has been the registered owner of the suit property. He asserts that sometime in 2014, he gave his title deed for the property to the said Mercy Koki Nduhiu to enable her acquire a loan.

4. The Defendant accuses the said Mercy of having fraudulently transferred the parcel of land to her name. He states that the issue pertaining to the fraudulent dealings with the suit property is the subject of a case he has instituted being **Malindi ELC No. 154 of 2018; Mohamed Awadh Islam –vs- Mercy Koki Nduhiu & 2 Others**.

5. The Defendant further asserts that he is in occupation of the suit land measuring 23 acres in total and that it will be impossible to give access to the Plaintiffs to the two acres he claims as the same falls within the boundaries of the Defendant's larger parcel of land.

6. I have perused and considered the Plaintiff's application and the Defendant's response thereto. I have equally perused the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The principles for the grant of an injunction are clear and well laid out. They include; (a) that the applicant must establish a prima facie case with a probability of success; (b) that the applicant has to show that he will suffer irreparable loss if the orders sought are not granted and (c), that if the Court is in doubt, it will decide the case on a balance of convenience (see **Giella –vs- Cassman Brown Ltd (1973) EA 358**).

8. In regard to what constitutes a prima facie case, the Court of Appeal in **Mrao –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, stated that:-

“.....a prima facie case in a civil application includes but is not limited to a genuine and arguable case. It is a case 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.”

9. In the matter before me, the Plaintiff avers that he is the registered proprietor of the suit property and accuses the Defendant of trespassing thereon. According to the Plaintiff, he purchased the suit property from one Mercy Koki Nduhiu at a consideration of Kshs 2000,000/- on 25th February 2016. Having obtained the requisite Land Control Board Consent, the property was transferred to his name and he was issued with a title deed in his name on 14th July 2017.

10. The Defendant does not deny that he has been grazing his livestock on and utilizing the property. It is however his case that he does so as a right as he is the rightful and legal owner of thereof. It is the Defendant's case that sometime in 2014, he gave his title deed for the suit property to the said Mercy Koki Nduhiu to enable her acquire a loan. He accuses the said Mercy of fraudulently turning around and transferring the parcel of land to her name before alienating the same to the Plaintiff herein.

11. From the material placed before me, it is apparent that the Plaintiff is the registered proprietor of the suit property. While the Defendant asserts that the issues pertaining to the fraudulent transfer of the property are the subject of *ELC 154 of 2018*, the pleadings in that case were neither annexed nor was there any inference made that the Plaintiff herein is a party to the said suit.

12. Section 35 (3) of the Land Registration Act provides that:-

“(3) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.”

13. From the material presently before me, it is apparent that the Plaintiff is the title holder of the suit property. In the circumstances, he is entitled to the protections granted to such a proprietor under Section 25(1) of the Land Registration Act and his title can only be challenged on the ground of fraud or misrepresentation to which he is a party.

14. In the premises, and as the Defendant does not deny that he has been utilizing the suit property, I am persuaded that the Plaintiff has made out a prima facie case and that there is urgent necessity to protect the suit property from further encroachment and/or trespass by the Defendant.

15. Accordingly, the application dated 27th December 2018 is allowed as prayed with costs.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE