



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 77 OF 2018**

**JOHA MKUZI KAKONO.....PLAINTIFF**

**VERSUS**

**MKUZI SAHA MKAUMA.....DEFENDANT**

**RULING**

1. By this Notice of Motion application dated and filed herein on 6<sup>th</sup> April 2018, Joha Mkuzi Kakono (the Plaintiff) prays for an order of injunction to issue restraining the Defendant from cultivating, alienating, sub-dividing, interfering with, leasing or dealing with the suit premises being all that parcel of land known as Kaliangombe/Jimba/580 until the hearing and determination of this suit.

2. The application which is supported by a short affidavit sworn on 6<sup>th</sup> April 2018 by the Plaintiff is premised on the ground that the Plaintiff is the registered owner of the suit premises. It is the Plaintiff's case that despite being the registered owner of the land, the Defendant has without authority or consent encroached upon and commenced cultivation on the suit premises thereby interfering with the Plaintiff's enjoyment thereof.

3. But in a Replying Affidavit sworn on 3<sup>rd</sup> May 2018 and filed herein on 4<sup>th</sup> May 2018, Mkuzi Saha Mkauma (the Defendant) strongly denies that the Plaintiff is the registered owner of the said premises. The Defendant accuses the Plaintiff of being economical with the truth and failing to state all the relevant facts concerning the dispute.

4. According to the Defendant, there has been a long drawn dispute over the suit property going back to the year 2000 when the Defendant instituted proceedings before Kaya Elders against the father of the Plaintiff. The Defendant avers that the suit property belonged to his father Tsaha Mkauma (now deceased) who bequeathed the land to the Defendant in 1962,

5. The Defendant avers that he thereafter went to work in Tanzania and upon his return he found the Plaintiff and his father occupying a portion of the land. The Defendant asserts that the Plaintiff's father had requested for a temporary place of shelter and was allowed to use the portion even as the Defendant's wife continued to cultivate the land.

6. During land adjudication the portion on which the Plaintiff had built his house was carved out and made Plot No. 581 which Plot is separate from the Defendant's Parcel No. Kaliangombe/Jimba/580. The Defendant therefore denies encroaching on the Plaintiff's land as alleged or at all.

7. I have considered the Plaintiff's application and the response by the Defendant. In granting injunctive relief, Courts are guided by the principles laid down in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*. Those principles provide that:-

***i) The applicant must demonstrate a prima facie case with a probability of success;***

***ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage which cannot be adequately compensated in any way or by an award of damages; and***

***iii) If the Court is in doubt, it will decide an application on a balance of convenience.***

8. Accordingly, the first inquiry that this Court must make is whether on the material placed before me, the Plaintiff/Applicant has demonstrated that he has a prima facie case with a probability of success. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, the Court stated thus:-

***“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”***

9. In the matter before me, the Plaintiff contends that he is the registered owner of Plot No. Kilifi/Jimba/580 situated at Rabai. He accuses the Defendant of encroaching upon the said parcel of land and proceeding to cultivate the same without his consent. In support of his claim, the Plaintiff has annexed his statement made before the Rabai District Land Adjudication Arbitration Board Members on 11<sup>th</sup> January 2013.

10. The Defendant however denies that the Plaintiff is the owner of the said parcel of land. On the contrary, the Defendant asserts that he is the registered owner of the land and accuses the Plaintiff of running to Court after the Rabai District Adjudication Arbitration Board dismissed his case.

11. I have perused and considered the material before me. It is evident that the suit property has been the subject of Land Adjudication proceedings as stated by the Defendant since the year 2000. While the Plaintiff has only partially annexed to his application the Statement he made before the Rabai District Adjudication Board on 11<sup>th</sup> January 2003, the Defendant has annexed an extract of the complete proceedings.

12. A perusal of the said proceedings demonstrates that on 17<sup>th</sup> January 2003, the Board ruled against the Plaintiff and ordered that the suit property remains registered in the name of the Defendant. It is further clear from annexure “MBM 1” to the the Defendant’s Replying Affidavit that the Plaintiff appealed the Arbitration Board’s decision to the Minister.

13. While it was not clear to me what so far is the outcome of the Appeal proceedings this Court takes Judicial notice of the fact that under Section 29(1) of the Land Adjudication Act (Cap 284) the decision of the Minister in regard to the appeal is final and this Court may not interfere therewith unless the Applicant was for instance alleging a violation of the procedures on the part of the Minister and/or failure to be accorded natural justice.

14. As it were, there was nothing before me to demonstrate that the Plaintiff is the owner of the suit property. The material before me point to a declaration that the Defendant was awarded the parcel of land in proceedings in which the Plaintiff participated.

15. In the result I am not persuaded that the Plaintiff has a prima facie case with a probability of success. The application dated 6<sup>th</sup> April 2018 is accordingly dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of July, 2019**

**J.O. OLOLA**

**JUDGE**