



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CIVIL SUIT NO. 73 OF 2018

MAURICE NABWERA MATANDA

HELLEN NASUTCHA MABWA.....APPLICANTS

VERSUS

JULIUS MIGOT OTIENO.....RESPONDENT

RULING

1. By a Notice of Motion application dated 29th March 2018 and filed herein on 3rd April 2018, Maurice Nabwera Matanda and Hellen Nasutcha Mabwa (the Applicants) pray for an order of injunction to issue restraining Julius Migot Otieno (the Respondent) from interfering with, trespassing onto, selling, disposing off or conducting any transaction on a parcel of land said to be situated at Kwa Chocha (Kaoyeni) and neighbouring Malindi Airport.

2. Applicants aver that they are the owners of the land having purchased the same from one Dickson Kaingu Mangi on 11th July 2008. It is their case that they have been in occupation and possession of the land since they purchased the same and were therefore astonished when the Respondent without any justifiable cause illegally entered the same and started erecting a perimeter fence thereon. The Applicants are apprehensive that the Respondent intends to deprive them of their parcel of land and hence the institution of this suit.

3. However, in his Replying Affidavit sworn and filed herein on 22nd August 2018, the Respondent avers that he is the legal owner of the said parcel of land having bought the same from one Kitsao Baya Kithunga who had inherited the land from his parents. It is the Respondents case that he cross-checked the facts about his property which he states borders that of the said Dickson Kaingu Mangi prior to the purchase thereof.

4. The Respondent further avers that upon purchasing the property, he started to develop the same but the Applicants then started claiming ownership of the same portion of land. The Respondent then reported the matter to the Area Chief and the said Dickson Kaingu Mangu was summoned to attend a meeting for a resolution of the dispute but he ignored the summons. The Respondent thus accuses the Applicant of failing to establish the proper ownership of the land before buying the same.

5. I have perused and considered both the application and the response thereto. I have equally perused and considered the written submissions filed by the parties herein in support of their respective cases.

6. In granting injunctive relief as sought by the Applicants herein, Courts are guided by the principles laid down in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*. Those principles requires 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.

7. As was stated by the Court of Appeal in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others(2014) eKLR:-*

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

8. In the matter before me, the Applicants aver that they are the legal owners of the suit property which they describe as a parcel of land situated at Kwa Chocha (Kaoyeni) neighbouring Malindi Airport. It is the Applicants case that they purchased the said parcel of land from one Dickson Kaingu Mangi. At the time of the purchase, the Applicants assert that the land was measuring 0.5 acres but they later sold an undisclosed part of it to third parties leaving a small portion thereof.

9. It is that remaining small portion that they accuse the Respondent of entering and erecting a perimeter fence thereon. But the Respondent denies this and asserts that he bought his own parcel of land from one Kitsao Baya Kithunga who had inherited the land from his parents. According to the Respondent, the parcel of land he bought is separate and distinct from but neighbours the parcel of land that belongs to the said Dickon Kaingu Mangi from whom the Applicants bought their own parcel of land.

10. From the material placed before me, it is apparent that the land in dispute is unsurveyed and/or unregistered. Both parties have annexed separate agreements with third parties from whom they purport to have bought their respective parcels of land. However other than the Sale Agreements, there is indeed nothing to precisely show what right of ownership the said sellers had over the piece(s) of land.

11. From the description given by the Applicants, it was not even possible to determine the size of the parcel of land they claim and the extent of the Respondent's encroachment. While they claim that the parcel of land they initially bought was 0.5 acres, it is their case that they sold a portion thereof to third parties thereby remaining only with a small portion of what they had initially bought.

12. As the Court of Appeal stated while defining a prima facie case *in Mrao Ltd –vs- First American Bank of Kenya & 2 Others(2003) KLR 125:-*

“...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.”

13. I think from the material placed before me, allowing the prayers sought by the Applicants at this stage will amount to denying the Respondent an opportunity to tender or adduce evidence on how he acquired his portion of the land and the extent thereof. Otherwise the onus lies on the Applicants to demonstrate the alleged or any extent of encroachment and/or trespass to their piece of land.

14. In the result, I did not find any merit in this application. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 11th day of July, 2019

J.O. OLOLA

JUDGE