



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO. 365 OF 2017**

**FRANCIS MBINDU SYENDU.....PLAINTIFF**

**VERSUS**

**JOHN MWENDA.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 10<sup>th</sup> November 2017. It is brought under order 40 Rule 1, 2, 3 and 4 of the Civil Procedure rules Section 1A and 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. It seeks orders:
  1. Spent
  2. Spent
  3. **That pending the hearing of this suit, this Honourable court be pleased to issue a temporary injunction restraining the defendant either by himself, his servants, agents, and/or employees from entering, trespassing into, digging, building structures, depositing construction materials or in any other manner dealing with the property known as Plot No 2912/VI/MN registered as CR NO.62933 to the adverse interests of the plaintiff.**
  4. **That an order of mandatory injunction directed to the defendant, his servants, agents, employees and/or assigns to forthwith remove all the construction materials deposited on to the said property or remove any construction erected on Plot No.62933.**
  5. **That costs of this application be provided for.**
3. The grounds are on the face of the application. I do not need to reproduce them here.
4. The application is supported by the affidavit of Francis Mbindu Syengo, the plaintiff/applicant herein sworn on the 10<sup>th</sup> November 2017 and a further affidavit sworn on the 19<sup>th</sup> November 2017.
5. The application is opposed. There is a replying affidavit sworn by John Mwenda Abraham, the defendant/respondent in the 10<sup>th</sup> November 2017.
6. On the 13<sup>th</sup> November 2017, it was agreed by consent that the application be canvassed by way of written submissions.
7. It is the plaintiff/applicant's submissions that he is the bonafide owner of the suit property. That the provisional title issued to him be deemed as prima facie evidence that he holds interest in the property devoid of any illegality since the Registrar adhered to the law and did due diligence before issuing a Provisional Certificate of Title.
8. Further that the plaintiff/applicant has established a prima facie case with a probability of success and that he will suffer irreparable injury which cannot be compensated by an award of damages if these orders are not granted.
9. The defendant/respondent has annexed to the replying affidavit, the sub leases. He told the court that he is constructing on Plot No

MN/VI/2911. That he commenced construction after seeking the necessary approvals. Further that the plaintiff is not in possession of the suit property. He prays that the application be dismissed with costs.

10. I have considered the notice of motion dated 10<sup>th</sup> November 2017, the affidavits in support and the annexures. I have considered the replying affidavit and the annexures. I have considered the submissions of counsel and the authorities cited. The issues for determination are:-

**(i) Whether or not the plaintiff's/applicant's case has met the threshold for grant of temporary injunctions.**

**(ii) Who should bear costs?**

11. In their submissions, counsel have substantiated their clients respective positions stated in their respective affidavits. It is now appropriate to consider the facts that have emerged and the legal principles applicable.

12. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Company Limited [1973] EA 358**. In the case of **Mrao Limited vs First African Bank Limited and 2 others [2003] KLR 125**, the Court of Appeal in determining what amounts to a prima facie case stated;

**“so what is a prima facie case? I would say that in a civil application, it is a case which on the material presented to the court, a tribunal properly directed 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”**

13. It is the plaintiff's/applicant's case that he owns property known as Plot No 2912/MN/VI registered as CR NO 62933. That the provisional Title Was issued after loss of the original one.

14. The defendant on the other hand states that he is the owner of CR NO. 13728/1, Plot NO MN/VI/2911 and CR NO. 12723/1, Plot No MN/VI/3756. He stated that he is not constructing on the plaintiff's/applicant's Plot No MN/VI/2911.

15. I find that he plaintiff/applicant has failed to demonstrate that he has a prima facie case with a probability of success at the trial. In the case of **Njenga vs Njenga [1991] KLR 401** Bosire J (as he then was) held that:

**“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles”.**

I am not persuaded by the facts presented by the plaintiff/applicant that he deserves the orders sought.

16. The plaintiff/applicant has also failed to demonstrate that he will suffer irreparable injury which cannot be by an award of damages.

In **Kenleb Cons Limited vs New Gathitu Service Station Limited & Another [1990] KOLR 557** Bosire J (as he then was) held that:

**“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction”**

I am not satisfied that the applicant herein deserves this kind of protection.

17. I am also guided by the case of **Ooko vs Barclays Bank of Kenya Limited [2002] KLR 394 page 398**, where Ringera J (as he then was) held that;

**“The second condition is that an interlocutory injunction will not normally be granted unless the applicant can show that he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the applicant to do that. In the instant matter, the plaintiff did not even attempt to do so. She was content to submit that once a prima facie case had been made, it was not necessary to consider any other matters and that the defendant had not shown it could compensate her adequately in damages. To my mind, the plaintiff's submission was misconceived”.**

I would say the same for the plaintiff/applicant herein. That he has failed to demonstrate that he will. Suffer irreparably if these orders are not granted.

18. The defendant/respondent has maintained that he is constructing on Plot No MN/VI/2911 and not the suit property. I find that the balance of convenience title in favour of not granting the orders sought.

19. The plaintiff/applicant also seeks a mandatory interlocutory injunction to compel the defendant/respondent to remove any construction material deposited on the suit property or to remove the construction erected thereon. In the case of Kenya **Breweries Limited & Another vs Washington O. Okeyo [2002] eKLR** the Court of Appeal considered the position of mandatory injunction. The court looked to the general practice on common law systems, invoking a passage in Halsbury's Laws of England.

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of**

**special circumstances, it will not normally be granted: However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match from the plaintiffs.....a mandatory injunction will be granted on interlocutory application.”**

20. There is also the question as to whether the municipal council of Mombasa was in place on 13<sup>th</sup> December 2013 at the time when the plaintiff alleges to have purchased the suit property. I find that the same had been rendered defunct owing to the promulgation of the Constitution of Kenya, 2010. However I leave this issue to be dealt with at the hearing stage.

21. All in all I find that this application has failed to meet the threshold for grant of temporary injunctions. The same lacks merit and it is dismissed. The costs of the application do abide the outcome of the main suit.

**Dated and signed in Nairobi on this.....day of .....2018**

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**L. KOMINGOI**

**JUDGE**

**Dated and delivered at Mombasa on this 5<sup>th</sup> day of October 2018.**

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**JUDGE**