REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NO. 178 OF 2020 (OS)

MOHAMED MOHAMED MWABUNGARE......................................PLAINTIFF

VERSUS

BINTI OMAR MOHAMED

SULEIMAN KUWEAH GAKURIA...DEFENDANTS

RULING

1. The defendants/applicants have brought the application dated 22nd December 2020 under Order 40 Rule 1, 2, 3, 7 and Order 51 Rule 1 and Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and seeks the following orders:-

i. Spent

ii. Spent

iii. Spent

iv. That pending the hearing and determination of the originating summons herein, this Honourable court be pleased to issue an order of temporary injunction restraining the plaintiff whether by himself, his servants, agents and/or employees from constructing, dealing, selling, wasting, trespassing, developing and/or interfering with the suit property herein.

v. That this Honourable court be pleased to grant any other orders as they deem fit in the circumstances and towards the preservation of the suit property herein.

vi. That the costs of this application be borne by the plaintiff.

2. The application is premised on the grounds on the face of the application and further supported by the supporting affidavit of Hawa Abdul Mwasserah sworn on 22nd December 2020. The applicants state that they are the duly registered owners of Mombasa/Mainland South/Block/1/1808 referred herein as the suit property. The applicants also state that the plaintiff's suit of adverse possession is misplaced and that he has commenced illegal construction of a public toilet on the suit property to the detriment of the applicants.

3. The deponent Hawa Abdul Mwasserah, previously known as Binti Omar Mohamed is the 1st defendant and swore the affidavit in support of the application. She averred that the court issued a temporary injunction against herself and the 2nd defendant on 12th November 2020 pending hearing and determination of the plaintiff's application dated 12th November 2020. She stated that the suit property has been subject to litigation in CMCC 4178 of 2004, Binti Omar Mohamed and Suleiman Kuweah Gakuria V Abdalla Mohamed Mwidau. She urged court to set aside the orders that were issued exparte without the true reflection of what is happening on the suit property. She stated that the plaintiff commenced construction on the suit property in July 2020, and when asked vide a letter dated 13th July 2020 to stop construction, he claimed that he had taken over the suit at the lower court as the heir of the estate of the deceased defendant therein.

4. Ms. Hawa Abdul Mwasserah further stated that her advocate on record demanded that the plaintiff on 3rd November 2020 to demolish the public toilet and desist further trespass, which was followed by a notice to the plaintiff from the County Government of Mombasa on 3rd November 2020 demanding the demolition of the illegal toilet that was constructed without the necessary approvals. The deponent stated that after being served with the notice and demand letter the plaintiff rushed to court and filed this adverse possession suit. The deponent urged court to discharge the orders as they have restrained the applicants from accessing their property which is being wasted by the plaintiff. The deponent pleaded with the court to allow the application and discharge the orders issued on 12th November 2020.

5. The plaintiff swore a replying affidavit on 26th February 2021 in response to the application. He stated that the orders were not made ex parte but after service was duly effected on to the applicants. He refuted the applicants claim that he was constructing the toilet and stated that he only renovated the toilets which were already in existence. He claimed that he brought the application dated 11 th November 2020 to court under certificate of urgency after being served with the notice of demolition from the County Government of Mombasa. He argued that the applicants are also using the toilet but avoiding to mention that there are other buildings on the suit property but have since lost their right to them. He asked court to dismiss the application with costs.

6. The court directed that the application to be dispensed with by way of written submissions.

7. The applicants filed their submissions on 26th May 2021. On the issue of whether the applicants have met the threshold for granting temporary injunction, Counsel for the applicants submitted that the applicants being the registered owners of the suit property have a prima facie case against the plaintiff and as such the orders sought ought to be granted. Counsel also submitted that the applicants attach sentimental value to the suit property which is a lifetime investment and stand to suffer irreparable loss and damage. Counsel relied on the case of **John Kariuki Kinyariro V Reuben Waweru Njuguna and another (2014) eKLR** were it was held that *"the purpose of an injunction is to maintain status quo and the status quo that the applicant herein expects is the status quo which exists before the 1 st respondent started to put up the building on the suit land."* Counsel urged court to tilt the balance of convenience in favour of the applicants and grant the temporary injunction to prevent the plaintiff from transferring the suit property to third parties. Counsel concluded by asking court to allow the application as prayed.

8. The respondent filed his submissions on 10th June 2021. Counsel for the respondent submitted that the respondent was served with a Notice to demolish by the County Government of Mombasa on 3rd November 2020. Counsel submitted that the application dated 11th November 2020 that bore the temporary injunction orders were meant to halt the demolition. Counsel submitted inter alia that the respondent is likely to suffer prejudice if the injunctive orders issued on 3rd December 2020 are set aside. Counsel also submitted that the applicants have occupied the suit property for the past four decades and question why the applicants chose to tackle the toilet yet there are storey buildings on the suit property. Counsel concluded by asking court to dismiss the application with costs for lacking merit.

9. I have considered the application, its response as well as the submissions filed herein.

10. I now delve, straight into whether the applicants have met the threshold required for an order of temporary injunction. The court has discretional powers in Order 40, Rule 1 of the Civil Procedure Rules to grant temporary injunction where the suit property is in danger of being wasted, damaged, sold, disposed of, or alienated by any party to the suit. The court may grant a temporary injunction to restrain such acts until the suit is heard and determined. The principles for granting temporary injunctions are well settled in Kenyan Law by **Giella V Cassman Brown & Co Ltd & Co. Ltd (1973) EA 358** where these principles were stated that:-

> **"The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an application 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."**

11. A prima facie case is an arguable case with a probability of success upon trial. In the case of **Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) KLR 125** it was held that:-

> **"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."**

12. The applicants herein have the burden to prove a prima facie case. From the material on record, the applicants have pleaded that they are the registered owners of the suit property situated in Likoni area and issued with a certificate of lease for Mombasa Mainland/South/Block/1/1808. However the applicants have not annexed the certificate of title to the supporting affidavit for the court to consider it as evidence. The applicants have instead annexed two letters to the plaintiff, one dated 13 th July 2020 and the other one dated 3rd November 2020 demanding that he demolishes the illegally built toilet and all the structures on the suit property. The material on record is not sufficient to tell whether the applicants have established a prima facie case with a probability of success. The applicants have not shown that they have a fair and bonafide question before the court for determination.

13. The second determinant is for the applicants to demonstrate to court that, unless the temporary injunction is granted, they stand to suffer irreparable injury, which would not adequately be compensated by an award of damages. The **Court of Appeal in Nguruman Limited V Jan Bonde Nielsein & 2 others (2014)eKLR** had this to say about the second factor that the applicant must established:-

> **"the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfolded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrate injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount will never be adequate remedy."**

14. I adopt the above findings of the Court of Appeal in considering whether the applicants have established that they stand to suffer irreparable damage that cannot be compensated by an award of damages. In the supporting affidavit, the deponent has pleaded that she was

served with the application and communicated with the 2nd applicant who is based in Nairobi. From the evidence on record, the neither the 1st nor the 2nd applicant are in physical possession of the suit property at least from July 2020 when the plaintiff has been constructing on it. The applicants have stated that the suit property is for commercial purposes. The applicants have also not established the irreparable damage, and in my view the applicants claim is capable of being quantified hence damages would be sufficient compensation.

15. The suit property being used for commercial purposes means that there may be more people, who are not party to this suit, and who will be affected by an order of temporary injunction. A court will not grant a remedy where the result would adversely affect the sources of livelihood of third parties and their families who are not party to the suit unless they are heard. More to that, the respondent has pleaded that the toilets have been there all along and he was only renovating it since they were dilapidated and unhealthy to the public. In addition the letter from the County Government of Mombasa dated 3rd November 2020 was a notice to the plaintiff to demolish the structures as well as the latrines. The letter is proof that the plaintiff is in occupation of the suit property and in my considered view, the balance of convenience tilts in favour of the respondent.

16. In my view, the applicants have not proved a prima facie case, and they have fallen short of proving they will suffer irreparable injury that cannot be compensated by an award of damages and the balance of convenience tilt in favour of the respondent. In the case of **Nguruman Limited V Jan Bonde Nielsen (supra)** court held that:-

> **"if the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit leap-frogging by the applicant to injunction directly without crossing the other hurdles in between."**

17. The upshot of my above findings, is that I find the defendants/applicants' Notice of Motion dated 22nd December 2020 lacks merit and is therefore dismissed with costs to the respondent.

18. The plaintiff shall move the court by fixing a hearing date for the application dated 12th November 2020 and the applicants are at liberty to respond to the said application.

Ordered accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 27th Day of July 2021

____

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE