



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 48 OF 2020

IVAN TOMLISON.....PLAINTIFF

VERSUS

1. IBRAHIM LUGOGO

2. CHARLES MBIGO

3. DICKSON MAITHA

4. EUNICE SALAMA CHILOMO.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion dated 3rd July 2020 but filed herein on 7th July 2020. By the said Motion Ivan Tomlison (the Plaintiff) prays for Orders as follows: -

3. That an order of injunction be issued against the Defendants herein whether (by) themselves and/or their agents, servants and or persons acting on their instructions restraining them from possessing, occupying, leasing, letting, constructing, wasting and or developing the Plaintiff's property known as Plot No. LR 21105 Kilifi- CR 27631 situated at Roka measuring approximately 4 Ha, or otherwise alienating or dealing with the same in excavating, or disposing, registering, transferring any interest to themselves and/or any other party thereof till the hearing and determination of this suit.

4. That an eviction and/or vacant possession order be issued against the Defendants or any other persons unlawfully occupying and harvesting Coral Blocks in the Plaintiff's property known as Plot No. 21105 – Kilifi CR 27631 situated at Roka measuring approximately 4 Ha.

5. That an order (be issued) directing the Officer Commanding Kilifi Police Station to assist in overseeing Prayer No. 2, 3, and 4 above.

6. That the costs of this application be provided for.

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

a) The Plaintiff is the registered proprietor of the suit property and the Defendants have unlawfully and illegally entered into possession and occupation thereof without the authority or consent of the Plaintiff and have started harvesting or excavating coral blocks therefrom;

b) Despite several notices and warnings sent to the Defendants requiring them to stop their illegal activities, they have persisted in their trespass; and

c) It is in the interest of justice that the orders sought herein are granted as no prejudice will be offered by the Defendants.

3. The application is opposed. By their Replying Affidavit sworn on their behalf by the 2nd Defendant – Charles Mbigo, and filed herein on 8th September 2020, the four Defendants aver that the application as filed is inept, hollow, unmerited and amounts to an abuse of the Court process. The Defendants aver that they have been legally occupying the suit property together with their families as squatters since the year 1993.

4. The Defendants further asserts that their occupation, construction and/or development of the suit property did not commence recently as alleged as they were the first proprietors in the property and have been trying on several occasions to have the land surveyed and registered in their names.

5. The Defendants asserts that the land in question is in excess of 300 acres and that the land reference number given by the Plaintiff is strange to them as the suit property remains unregistered and unsurveyed to-date.

6. I have perused and considered the application and the response thereto. I have similarly perused and considered the rival submissions as filed by the Learned Advocates for the parties.

7. A perusal of the prayers sought by the Plaintiff reveals that the Plaintiff wants this Court to grant both a temporary injunction against the Defendants as well as a mandatory one evicting the Defendants from the suit property.

8. As regards mandatory injunctions, Courts are very reluctant to grant the same at an interlocutory stage save in the most clear cut of cases. As was stated in *Lucy Wangui Gachara –vs- Minudi Okemba Lore (2015) eKLR*: -

“...the Court will not grant a mandatory injunction if the damage feared by the Plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing...”

9. In the matter before me the Plaintiff has neither stated how and when it became the owner of the suit property and/or when the Defendants began the alleged trespass. At paragraph 4 and 5 of his Supporting Affidavit, the Plaintiff simply states as follows: -

“4. That the Defendants have unlawfully, illegally and without the consent and/or authority of the Plaintiff occupied, possessed and purportedly rented out, leased and/or handed over possession of the Plaintiff’s property to other third parties (full particulars are well within the Defendants’ knowledge).

5. That the Defendants and/or other third parties have been illegally and unlawfully excavating and/or harvesting coral blocks, constructing property without the authority, consent, and/or approval of the Plaintiff.”

10. These in my view are generalized statements from which the Court cannot get a clear picture that can merit the grant of mandatory orders of injunction.

11. Indeed, even where the Court was to consider the possible grant of an interim interlocutory injunction, the generalized statements made herein are unhelpful to the Plaintiff’s case. As was stated by the Court of Appeal in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 others (2014) eKLR*: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a) Establish his case only at a prima facie level;

b) Demonstrate irreparable injury if a temporary injunction is not granted; and

c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

12. As to what amounts to a prima facie case, the Court had earlier on in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* explained 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 as 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. Explaining the definition of a prima facie case further in the *Nguruman Ltd Case (Supra)* the Court of Appeal stated as follows: -

“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.”

14. From the material placed before me however, it is apparent that the Defendants have long been in occupation and possession of sections of the suitland and I am unable to see any urgent necessity to restrain people who are already acknowledged to have occupied the land from possessing or occupying the same as sought herein. It is also clear that the Plaintiff may not have sued all the parties in occupation of the land as he appears to suggest that there are other third parties to whom the Defendants have disposed off the land.

15. In the circumstances I decline to grant the orders sought in the Plaintiff's application. Instead and in the interest of justice, I think it is proper and just that pending the hearing and determination of the suit neither party is allowed to dispose of the suit property or any portions thereof.

16. Accordingly, I hereby grant an order of injunction restraining the Defendants from selling, and/or alienating any portions of the suitland pending the hearing and determination of the suit herein.

17. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 16th day of July, 2021.

J.O. OLOLA

JUDGE