



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 143 OF 2019

FARID SALIM ALI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....1ST DEFENDANT

AHMED ALI KIBWANA

Alias ABDULMAJID ALI KIBWANA.....2ND DEFENDANT

RULING

1. The application before me for determination is the Notice of Motion dated 1st August, 2019 by the plaintiff/applicant seeking an order of permanent injunction restraining the defendants/respondents either by themselves, officers, agents, employees, assigns or any person acting for them from invading, trespassing, visiting on the plaintiff's property known as CR. NO.23226 and from demolishing any other structure on the said property and from generally interfering with the plaintiff's quiet and peaceable use, occupation, possession, ownership and title of the property known as Land Reference Number CR No.23226 pending the hearing and determination of the suit herein. The application is supported by the affidavit of Farid Salim Ali, the plaintiff sworn on 1st August, 2019. The plaintiff/applicant avers that he is one of the rightful and legal registered owners of that parcel of land known as CR.NO. 23226 (hereinafter referred to as the suit property). That on or about 6th May, 2019, the 1st defendant through the sub-county Commander, Kisauni served or caused to be served a notice dated 6th May 2019 upon the applicant alleging that the suit property was on a road reserve and had to be demolished. That on 8th May, 2019, the 2nd defendant accompanied by several employees, officers and/or agents of the 1st defendant invaded the suit property and demolished the shop erected thereon subjecting the applicant to immense loss and damage. It is the applicant's contention that the suit property is private property and the defendants have no legal basis for carrying out the demolition and that unless an order of injunction is granted, the defendants are likely to evict the applicant from the suit property thus jeopardizing the applicant's title of ownership and right to enjoy a quiet and peaceable possession of the suit property and that the defendants' action amount to abuse of office and resources to threaten and intimidate innocent private property owners. The applicant has annexed copies of the certificate of title and search, the said notice and photographs. The applicant contends that the notice dated 6th May, 2019 sought the removal of abandoned container, structure and vehicle on the road/public pavement and did not state the plot number.

2. In opposing the application, the 2nd defendant/respondent filed grounds of opposition dated 6th January, 2020. The 2nd respondent stated that it is clear and evident from the application and the supporting affidavit that the plaintiff's claim and or issue is against a notice of demolition issued by officers/agents/employees of the 1st respondent and there was no connection to the 2nd respondent; that from the certificate of title and official search annexed to the supporting affidavit the alleged suit property does not belong to the plaintiff solely and the plaintiff has not provided any evidence to show that he has obtained the authority of the other proprietors to file the present suit or to sue on their behalf; that the application is seeking a permanent injunction on an interlocutory application before the suit is heard on its merits, among other grounds.

3. I have considered the application and the submissions made. The plaintiff in his application dated 1st August 2019 has sought the grant of an order of permanent injunction restraining the defendants from invading the property known as CR. No.23226 and from demolishing any structure erected thereon pending the hearing and determination of the suit herein. The plaintiff has deponed that the defendants have already demolished the said structures on 8th May, 2019. In the affidavit in support of the application, the plaintiff has annexed a copy of a letter dated 6th May, 2019 from the 1st defendant to the plaintiff. In that letter, it was stated as follows:

“.....RE: NOTICE TO REMOVE ABANDONED CONTAINER, STRUCTURE AND VEHICLE ON THE ROAD/PUBLIC PAVEMENT AND GOODS.....”

4. That notice made reference to a road and not the suit property. It is pertinent to note that the said letter was written on 6th May 2019 and the plaintiff confirmed that the same was served on him on the same date. The plaintiff also confirmed that demolition of the structures was undertaken on 8th May, 2019. It is pertinent to also note that this application was filed in court on 2nd August, 2019, after a period of about three months since the alleged demolition was done. The importance of mentioning that is that the application was made belatedly but it is also clear to note that the plaintiff is seeking what is clearly a final order. The application before is seeking an order, which if granted, would amount to the grant of a major part of the relief claimed in the claim, in particular prayer (a) of the plaint dated 1st August, 2019.

5. In the case of **Vivo Energy Kenya Limited –v- Maloba Petrol Station & 3 Others (2015)eKLR**, and **Stephen Kipkebut t/a Riverside Lodge and Rooms –v- Naftali Ogola (2009)eKLR**, it was held that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. In my view, the plaintiff's case as pleaded is not a clear case nor has the plaintiff shown that the actions complained of were not undertaken on a road but on the suit property CR. No.23226. On the facts before the court, there is no showing that the defendants have, prima facie, acted illegally. The defendants action may very well be held, after full hearing, to have been on the road/pavement and therefore lawful, and not in the plaintiff's property. The case presented by the plaintiff on a prima facie basis does not merit an order which essentially would be the grant of a major part of the relief claimed in the action. The case, in any view, is not one that is unusually strong and clear to warrant the grant of the orders sought. In the result, the notice of motion dated 2nd August 2019 is devoid of merit and the same is dismissed with costs to the 2nd defendant.

6. It is so ordered.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 6th day of July, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Chebukaka for plaintiff

No appearance for the 1st and 2nd defendants

Yumna Court Assistant

C.K. YANO

JUDGE