



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.175 OF 2016

MWAGONA ANTHONY SADIPLAINTIFF/APPLICANT

VERSUS

SAADI ALI RAO

SHIDA CHARO KASHURU

ASHIRAF M. SADIK.....DEFENDANTS/RESPONDENTS

RULING

1. By this Notice of Motion application dated and filed herein on 9th April 2018, Mwagona Anthony Sadi (the Plaintiff) prays for orders of injunction to issue restraining the three Defendants from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging or in any other manner interfering with all that parcel of land known as Kilifi/Mtondia/242 measuring approximately 50 x 100 ft.

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

a) The Applicant is the lawful owner of the said parcel of land;

b) The Defendants have started putting up a permanent structure on the suit property;

c) The Defendants actions are illegal, unlawful and aimed at materially distorting the suit property; and

d) The Plaintiff stands to suffer irreparable loss and damage unless the orders sought herein are granted.

3. The application is opposed by the three Defendants. In a Replying Affidavit sworn on their behalf by the 2nd Defendant Shida Charo Kashuru and filed herein on 9th May 2018, the Defendants deny that the Plaintiff is the owner of the suit property. They aver that the suit property was sold way back in the year 2001 to the 3rd Defendant and accuse the Plaintiff of failing to take heed of that fact even after he was so advised by the Area Chief.

4. The Defendants further assert that there are no plausible reasons cited for seeking the orders of injunction as the Plaintiff has failed to demonstrate a prima facie case. They further deny that the Plaintiff stands to suffer any irreparable loss and urge the Court to dismiss the application.

5. I have perused and considered the Plaintiff's application and the response thereto by the Defendants. I have also perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. The Plaintiff herein prays for an order of injunction to issue restraining the three Defendants from dealing with the suit property described as Kilifi/Mtondia/242. It is the Plaintiff's case that he is the owner of the said parcel of land measuring 50 x 100 ft. He accuses the Defendants of recently trespassing onto the suit property and commencing construction thereon.

7. The Defendants on their part do not deny the accusation that they have commenced construction on the suit property. It is however their case that the suit property was purchased from the lawful owner by the 3rd Defendant in the year 2001 and accuse the Plaintiff of failing to take heed of that fact even after he was properly advised about the same by the Area Chief.

8. From a perusal of the record, this suit was filed on 12th July 2016. On that very day, the Plaintiff filed a Notice of Motion application dated the same day under Certificate of Urgency which Motion is word for word with the present application before me. For some inexplicable reason, that Motion has neither been prosecuted nor withdrawn.

9. In the meantime, this matter proceeded before the Deputy Registrar of this Court on 11th February 2017 for pre-trial directions when the parties were ordered to comply with the requirements of Order 11 of the Civil Procedure Rules and to proceed to take a date for the hearing of the case in the Court Registry.

10. Rather than fix the matter for hearing, the Plaintiff waited out for some one year before filing this present application. As I have said, the application and the Supporting Affidavit raise the same issues in the Plaintiff's abandoned application dated and filed on 12th July 2016.

11. In the premises, I am not satisfied that the issues raised are recent and/or that they pose any new danger to the Plaintiff. He has been given time to fix his matter for hearing so that he can ventilate the issues raised in the application but he has chosen not to do so.

12. In an application for an interlocutory injunction, the Applicant must first and foremost establish that he has a prima facie case with reasonable chances of success at the trial. As the Court of Appeal stated 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.....”

13. In the matter before me, while there probably was an urgent necessity to prevent damage to the property when the Plaintiff first filed the abandoned application some four(4) years ago, I am unable to arrive at that conclusion in the present circumstances given the Plaintiff chose not to prosecute the earlier application.

14. In the result, I am not persuaded that there is any basis to grant any injunction orders at this stage. The application dated 9th April 2018 is accordingly dismissed.

15. The Costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE