



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 298 OF 2016

MACDONALD BARAWA MWANGALA.....PLAINTIFF

VERSUS

ELIAS KITI TENA.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 21st March 2018. By the said Motion, Elias Kiti Tena (the Defendant) prays for orders that this Court be pleased to stay and discharge all orders issued in *Kilifi SPMCC No. 304 of 2017* pending the hearing and determination of this suit. In addition, the Defendant urges this Court to transfer the said *Kilifi SPMCC No. 304 of 2017* from the Senior Principal Magistrates Court at Kilifi to this Court for hearing and determination.
2. The application which is supported by an affidavit sworn by the Defendant is premised inter alia on the grounds that:-
 - i) The Defendant's heavy investment has been severely affected by the ex-parte orders issued in the said SPMCC No. 304 of 2017 which was filed after this suit had been filed;*
 - ii) Just like in this suit, the Plaintiff in Kilifi SPMCC 304 of 2017 is claiming vacant possession of the same suit premises. The Defendant in the Kilifi suit is a tenant of the Defendant herein who is not a party in the Kilifi suit;*
 - iii) When the Plaintiff failed to obtain orders in this Court against the Defendant, he filed the Kilifi suit against the Defendant's tenant and did not disclose the existence of this suit; and*
 - iv) The Court in Kilifi is enforcing orders of injunction that it would not have granted if full facts had been disclosed.*
3. The application is opposed. In a Replying Affidavit sworn and filed herein on 6th June 2018 MacDonalld Barawa Mwangala (the Plaintiff) denies *that Kilifi SPMCC 304 of 2017* relates to the same parties and the cause of action herein. In any event, the Plaintiff avers that he was not aware that the Defendant herein had leased out the suit premises to the Defendant in the said Kilifi case when he was served with the Court papers herein.
4. The Plaintiff further asserts that at paragraph 10 of the Supporting Affidavit, the Defendant refers to the parcel of land on which excavation and harvesting of coral blocks is going on as Plot No. Kilifi/Ngerenyi/905. He urges the Court not to grant the orders sought herein as the subject matter of *Kilifi SPMCC No. 304 of 2017* is Plot No. Kilifi/Ngerenyi/906 instead.
5. The Plaintiff accuses the Defendant of having come to this Court with unclean hands having failed to comply with the injunctive orders issued in the Kilifi case on 13th and 15th November 2017 which orders remain in force.
6. I have perused and considered the Motion and the response thereto. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties.
7. This suit was instituted by the Plaintiff herein on 9th November 2016. By his Plaint dated 28th October 2016 the Plaintiff claims the ownership of Plot No. Kilifi/Ngerenyi/906 by virtue of a power of attorney donated to him by one Ferdinard Mwangi Kai and prays for an order of eviction against the Defendant as well as demolition of structures erected by the Defendant on the said property.
8. By a Notice of Motion application dated and filed on 9th October 2017, the Plaintiff sought orders of injunction restraining the Defendant from removing, destroying structures, erecting fences, excavating stones, trespassing upon and or dealing in any manner whatsoever with the

said parcel of land. That application remains on the bed of this file unprosecuted to-date.

9. From the material placed before me however, it is apparent that the Plaintiff instituted **Kilifi SPMCC No. 304 of 2017** against one Casimo Rosafiq seeking similar orders of injunction in regard to the same subject property. Consequent upon a Notice of Motion application filed under certificate of urgency dated 16th November 2017, the Honourable R.N. Ondieki, SPM granted orders ex-parte on 13th November 2017 as follows:-

1. That this matter be and is hereby certified as urgent and the Defendant/Respondent's presence is dispensed with in the first instance;

2. That a temporary injunctive order be and is hereby issued restraining the Defendant/Respondent and/or his agent and/or employees and/or servants or any other person(s) acting on the Defendant's/Respondent's behalf from excavating and/or harvesting building blocks from the Plaintiff/Applicant's parcel of land being Plot No. Kilifi/Ngerenyi/906 situate at Ngerenyi within Kilifi County and/or dealing with the suit premises in any manner whatsoever detrimental to the rights and interests of the Plaintiff/Applicant herein for fourteen (14) days.

10. Those orders were apparently extended at the expiry of the 14 days. As it turned out it would appear that the Defendant in the Kilifi case the said Cosimo Rosafiq is a tenant of the Defendant in the suit herein. In this respect, the Defendant has annexed to his Supporting Affidavit herein a lease agreement dated 28th May 2015 between itself and the said Cosimo Rosafiq wherein they have leased the suit property to the said Cosimo Rosafiq for a period of 20 years.

11. In response to the Defendant's application herein, the Plaintiff retorts that he was unaware of the relationship of landlord-tenant between the Defendant herein and the party he has sued in the Kilifi Case. Given the fact that they had earlier filed this suit against the Defendant/Applicant herein on the purport that he had trespassed upon the self-same property, I think it would not have been difficult for the Plaintiff to establish the relationship between the Defendant herein and the Defendant he has sued in the Kilifi case.

12. From the material placed before me, it was clear to me that the matters in issue, the subject property and the parties are all the same. In the absence of any contestation that the Defendant in the Kilifi Magistrates Court's case is a lessee or tenant of the Defendant in this suit, it was obvious that any order given in favour of the Plaintiff in this suit will be binding upon that tenant against whom he has brought the separate suit.

13. It was further clear to me that if the existence of this suit and the facts surrounding the same were brought to the attention of the Court in Kilifi by the Plaintiff, that Court would not have granted the orders I have cited hereinabove. Those orders of injunction relate to the same property whose ownership is contested in these proceedings before me.

14. In the premises, I am satisfied that there is merit in the Defendant's application dated 21st March 2018. The same is allowed in terms of prayers 'c', 'g' and 'h' thereof with costs.

Dated, signed and delivered at Malindi this 25th day of June, 2020.

J.O. OLOLA

JUDGE