



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 190 OF 2019**

**BONIFACE KALAMA BINGUMA.....APPLICANT/PLAINTIFF**

**AND**

**CHARLES CHISHENGA.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of motion application dated 24<sup>th</sup> October 2019 by the plaintiff/applicant seeking orders of temporary injunction restraining the defendant/respondent and/or his agents and/or employees and/or servants or any other person acting on his behalf from entering, invading, trespassing or erecting any structures on the plaintiffs parcel of land, being PLOT NO. 3841/ORIGINATING NUMBER 3839/2)/III/MN, CR 33336 MEASURING APPROXIMATELY 0.4887 HECTARES situate at North of Mtwapa Creek within Kilifi County pending the hearing and determination of the suit. The applicant is also seeking an order of mandatory injunction directing the defendant to demolish the perimeter wall being constructed on the suit premises.
2. The plaintiff's case as elaborated in the plaint and the affidavit in support of the application together with the annexures thereto, is that the plaintiff is the registered owner of the suit property. It is averred that on 23<sup>rd</sup> October, 2019, the defendant, without the authority and/or permission and/or consent entered, invaded and/or trespassed onto the suit premises and started erecting a wall thereon, yet he has no proprietary rights or interest over the suit premises. The plaintiff has attached a copy of the certificate of title in his name and has also annexed photographs allegedly evidencing the construction works on the suit premises. It is the plaintiff's contention that the defendant's actions are unlawful, illegal and unprocedural and without any colour of right and urged the court to grant the orders sought.
3. The defendant has opposed the application for injunction through the replying affidavit sworn on 15<sup>th</sup> November, 2019. The defendant has deposed that the plaintiff is not the registered owner of PLOT NO.3841/III/MN. He averred that he has been in occupation of the premises since 1980 to date and that he constructed business and residential premises on the suit property in 1980 when the premises were leased to him and that the tenancy is still subsisting. He stated that he resides on the property together with his family. He has annexed copies of lease agreement and photographs. The defendant averred that he was lawfully and legally constructing a wall and structure which got burned on 26<sup>th</sup> March 2019 by fire that started from the plaintiff's premises. He denied that the construction carried out is on the portion that belongs to the plaintiff. The defendant stated that there is an existing case being Mombasa ELC Case No. 299 of 2013 involving the same parties and others in respect of the same property. The defendant has exhibited an order in Mombasa ELC Case No. 299 of 2013.
4. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties and which I have taken into account.
5. The case of the plaintiff is that he owns the suit property and the defendant therefore ought to be kept off the same. The defendant claims the actions complained of are on a portion that he leased way back in 1980 and not on the plaintiff's property.
6. I have looked at the material before. I have seen the copy of tile held by the applicant which bears his name. Section 26 of the Lang Registration Act directs courts to take title as *prima facie* evidence of ownership. The said Section 26 provides as follows:

**“(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

7. It will be seen from the above that the title can be impeached where it has been procured by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. However, until such vitiating factors are proved, the court is to assume that the title is a good title and that is why there is the direction that the court needs to take title as prima facie evidence of ownership. I further note that the defendant has not displayed any title to the suit land whether described as PLOT NO. 3841(ORIGINAL NUMBER 3839/2)/III/MN that is contrary to the title that the plaintiff has displayed. What the defendant has displayed are alleged lease documents of PLOT NO. 742/III/MN and other unnamed plots. Given that position, and given that the applicant has title to the suit property and the defendant has displayed none, it follows that the plaintiff has established a prima facie case with a probability of success. The plaintiff certainly stands to suffer irreparable loss if the defendant proceeds with the impugned construction. The defendant will have a chance at the hearing of the suit to show that the developments undertaken by him are not on PLOT NO. 3841/III/MN but on a different plot, and until that is determined, the order of temporary injunction ought to be granted. Even if I was to consider the balance of convenience, the same tilts towards maintaining the status quo ante until this suit is heard and determined.

8. The plaintiff in his application has also sought mandatory injunction directing the defendant to demolish the perimeter wall and other structures being put up by the defendant on the suit land. Mandatory injunction requires its grant to be made in case which are clear or where the guilty party has undertaken a blatantly illegal course of action which the court needs to remedy. On the facts before court there is still a dispute as to the portion the developments undertaken by the defendant stand. In this case, the defendant alleges the developments are not on the plaintiff's land. It is therefore clear that both parties have laid a claim of ownership on the area the developments are being undertaken by the defendant. This is a dispute that has to be determined at the main trial. In my considered view, there is nothing to justify the mandatory order sought as that would amount to issuance of final orders at interlocutory stage. Having carefully considered the material before me, in my view a case of mandatory injunction has not been made out.

9. Given the above discourse, I do allow the application for injunction dated 24<sup>th</sup> October, 2019 in the following terms:

**1. That pending the hearing and determination of this suit, there is hereby issued and order of injunction restraining the defendant, his agents, servants or any other persons acting on his behalf from continuing with the erection of any structures of Plot No.3841 (original number 3839/2)/III/MN, CR, 3336 or dealing with the said property in any manner whatsoever detrimental to the rights and interests of the plaintiff.**

**2. The plaintiff shall have the costs of this application.**

10. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29<sup>th</sup> day of July 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**