



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 5 OF 2019**

**ASHWIN BHAGANI.....PLAINTIFF**

**VERSUS**

**LUCAS OKUMU.....DEFENDANT**

**RULING**

1. By his Notice of Motion application dated 14<sup>th</sup> March 2019, Ashwin Bhagani (the Plaintiff) prays for an order that pending the hearing and final determination of this suit, the Defendant herein be restrained from entering upon, wasting, damaging, alienating, selling, removing any property, interfering with or in any manner dealing with LR No. 12889/133 situated South of Kilifi Town.
2. The application which is supported by an affidavit sworn by the Plaintiff is premised inter alia on the grounds that:
  - i) The Plaintiff allowed the Defendant to enter upon the said property and to act as his caretaker thereof on a temporary basis;*
  - ii) The Defendant has unlawfully and without the express permission of the Plaintiff carried out constructions of a permanent nature on the suit property and has despite the Plaintiff's instructions declined to stop and or to vacate the property; and*
  - iii) By reason of the Defendant's actions, the suit property has been wasted and the Plaintiff has been deprived of the use and enjoyment thereof.*
3. The application is opposed. In a Replying Affidavit sworn and filed herein on 10<sup>th</sup> May 2019, Lucas Okumu (the Defendant) avers that he was given permission to enter the suit property not as a Caretaker but to utilize the same by one Rohit V. Bhagani a brother of the Applicants. He further avers that the agreement between himself and the said Rohit was that he would occupy the property and undertake farming activities thereon as he may please.
4. The Defendant thus denies that he is a trespasser on the suit property and or that he has constructed illegal structures thereon. On the contrary he asserts that he has only renovated the property and the buildings that were thereon to make it habitable. The Defendant further avers that he has spent a sum of Kshs 334,000/- to renovate the property and to apply for installation of water and electricity. He had started farming and was expecting a harvest of chilies at the end of year in the sum of Kshs 1.5 Million to Kshs 2 Million.
5. The Defendant avers that the Plaintiff's actions amount to economic sabotage as the brothers led him to believe that he would be allowed to lease the suit property and encouraged him to undertake farming activities and to renovate the same.
6. I have perused and considered the application and the response thereto. The Plaintiff herein craves an order of injunction to restrain the Defendants from entering upon, wasting, damaging, alienating or in any manner whatsoever dealing with all that parcel of land known as LR No. 12889/133 measuring approximately 2.022 Ha and situated South of Kilifi Town.
7. It is the Plaintiff's case that he allowed the Defendant to enter into the suit property as his Caretaker thereof on a temporary basis but the Defendant has upon entry unlawfully carried out constructions thereon of a permanent nature and has, despite the Plaintiff's instructions, refused to stop the said constructions and to vacate the land.
8. The Defendant on his part denies that he has trespassed onto the land as alleged and carried out illegal constructions thereon. On the contrary he asserts that he was authorized to enter the said premises by one Rohit Bhagani who is a brother to the Plaintiff herein and that the brothers allowed him to occupy and use the land for farming activities on the promise that they would formally lease the land to himself. Contrary to the contention that he has carried out constructions on the land, the Defendant avers that all he did was to renovate the premises and to make them habitable.

9. The power exercised by the Court in an application seeking interlocutory injunctive orders is discretionary. As stated by Spry V.P in the oft-cited Case of Giella –vs- Casman Brown Ltd (1973) EA 358:

”The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

10. What amounts to a prima facie case was explained in Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125, as follows:

“In civil cases, a prima facie case is a case in 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 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.”

11. In the matter before me, it was clear to me that the Defendant does not claim any proprietary interest in the suit property. All he appears to claim at this stage is a return on the investments he claims to have made on the suit property including renovations and the proceeds of a harvest he expected from the chilies he planted on the farm.

12. On the other hand, it was evident from the Certificate of Title produced herein that the Plaintiff and his brother Harishkumar Bhagani are the registered proprietors of the suit property. Their other brother Rohit Bhagani who the Defendant claims to have authorized his entry onto the suit premises does not appear among the names of the registered proprietors.

13. It is the Plaintiff’s case that the Defendant’s so-called renovations on the property and the farming activities on the land have wasted the same and that the Defendant’s continued occupation and use thereof has deprived them of the use and enjoyment thereof.

14. Arising from the circumstances herein, I am not persuaded that the Defendant has any basis to remain on the suit property more so after the registered proprietors and the same Rohit Bhagani gave him written notice to vacate the land on 16<sup>th</sup> July 2018. The Plaintiff has demonstrated that he has unmistakable right to the Defendant’s land which is threatened by the Defendant’s actions. He certainly deserves the protection of this Court having proved that he has a prima facie case against the Defendant.

15. Accordingly I am satisfied that there is merit in the Motion dated 14<sup>th</sup> March 2019. The same is allowed in terms of Prayer No. 4 thereof.

16. The Plaintiff shall also have the costs of this application.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**