



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 16 OF 2019**

**DELTA CONNECTIONS LIMITED.....PLAINTIFF**

**VERSUS**

**ALFRED MWARINGA DECHE.....DEFENDANT**

**RULING**

1. By this Notice of Motion application dated 8<sup>th</sup> April 2019, Delta Connections Ltd (the Plaintiff) prays for orders:-

***2. That this Honourable Court be pleased to issue an eviction order against the defendant, his agents and or servants in respect of the parcel of land known as Plot No. 67 Group No. 1 Takaungu.***

***3. That the defendant, his agents and or servants do give the Plaintiff/Applicant vacant possession of the parcel of land known as Plot No. 76 Group No. 1 Takaungu***

***4. That a mandatory injunction be issued compelling the defendant, his agents and or servants to vacate the parcel of land known as Plot No. 67 Group No. 1 Takaungu.***

***5. That this Honourable Court do issue a permanent injunction restraining the defendant, his agents and or servants from trespassing on the suit property.***

***6. That the Officer Commanding Police Station, Kilifi do assist the Court Bailiff in enforcing the orders herein.***

***7. That the cost of this application be provided for.***

2. The application which is supported by an affidavit sworn by the Plaintiff's director Moses Waweru Ndung'u is based on the grounds:-

***i) That the Plaintiff is the duly registered owner of the said parcel of land;***

***ii) That the continued occupation and trespass of the suit property by the Defendant is causing the Plaintiff irreparable loss, damage, hardship and prejudice;***

***iii) That the Defendant has failed and or refused to vacate the suit property and continues to trespass thereon inspite of notice to vacate having been served upon him.***

***iv) That upon the demise of the Plaintiff's caretaker one Anthony Charo Kahindi in January 2019, the defendant has heightened his unlawful occupation and has started 'selling' portions thereof and inviting squatters on the land; and***

***v) That the Plaintiff is unable to work on its land and or enjoy a return on its investment by reason of the Defendant's unlawful occupation thereof.***

3. Alfred Mwaringa Deche (the Defendant) is however opposed to the Plaintiff's application. In a Replying Affidavit sworn and filed herein on 3<sup>rd</sup> May 2019 and a Further Affidavit filed herein on 26<sup>th</sup> June 2019, the Defendant denies that he has trespassed onto the Plaintiff's land sold part thereof or invited squatters thereon.

4. The Defendant avers that he has lived on the land with his family for more than 40 years and asserts that the Plaintiff's registration as the

owner thereof was procured unlawfully and in disregard of due process. He accuses the Plaintiff of being guilty of serious non disclosure of material facts by failing to inform the Court that there have been previous and current cases over the same property between either himself or his late father and the Plaintiffs predecessor in title who was largely represented by the director of the Plaintiff upto the time of the acquisition of the property.

5. The Defendants further avers that unlike the Plaintiff who bought the property in 2012, their family has occupied the land since 1974 and the dispute over the land went before the Land Disputes Tribunal in 1996 and they were awarded sections of the 50 acre piece of land which they continue to occupy to-date. The award of the Tribunal was adopted in **Kilifi SRMCC No. 32 of 1996** and was upheld by the High Court at **Mombasa in HCCC No. 161 of 1997**. The Defendant further asserts that the **Civil Appeal No. 2013 of 2000** that was filed by the Plaintiff's predecessor was similarly dismissed and that this suit is thus res judicata.

6. The Defendants further avers that the Plaintiff's predecessor also filed **HCCC No. 4707 of 2004** wherein he was represented by the Plaintiff's director herein. The Defendant asserts that the suit property was handed over to him by his father Deche Chinyaka who has since passed away and was buried on the same parcel of land.

7. The Defendant further contends that the balance of convenience heavily tilts in their favour flowing from the fact that they are in occupation and have substantially developed the same and urge the Court to dismiss the application.

8. I have carefully perused and considered the Plaintiff's application and the response thereto by the Defendant. The considerations for granting a mandatory injunction at such an interlocutory stage have been established by the Court of Appeal in **Kenya Breweries Ltd & Another –vs- Washington O. Okeyo (2002) eKLR** where it was held that:

***“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury's Laws of England, 4<sup>th</sup> Edition at Paragraph 948 which reads:***

***“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the Plaintiffs...a mandatory injunction will be granted on an interlocutory application.***

9. Similarly in the more recent case of **Nation Media Group & 2 Others –vs- John Harun Mwau (2014) eKLR**, the Court of Appeal stated that:

***“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances....A different standard higher than in a prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides the existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”***

10. The principles of law arising from the above decisions is that a Court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances but also that the act done is a simple and summary one which can easily be remedied.

11. In the matter before me, the Plaintiff accuses the Defendant of continued occupation and trespass into the suit property without disclosing when the alleged occupation and trespass started. From the material placed before me at this stage, it is apparent that the Plaintiff acquired the suit property sometime in the year 2012.

12. As at the time they acquired the property, it was not only clear that the Defendants and his family were already in the land but also that they had engaged the Plaintiff's predecessor in title in a series of litigations over the suitland. Indeed the Defendants even claim to have been awarded a portion of the suit property by the Land Disputes Tribunal.

13. The matter before me is therefore not a clear cut simple dispute in which the Defendant can be said to have tried to steal a match upon the Plaintiff. I did not find any special or exceptional circumstances that would warrant the grant of the drastic eviction orders sought by the Plaintiff before the dispute between these parties can be heard.

14. Accordingly I did not find any merit in the Motion dated 8<sup>th</sup> April 2019. The same is dismissed with costs to the Defendants.

**Dated, signed and delivered at Malindi this 10<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**