



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO.113 OF 2015

ABUBAKAR HUSSEIN SADIK.....PLAINTIFF

VERSUS

CHRISTIAN MUCHIRI MBURU.....DEFENDANT

RULING

1. By this Notice of Motion dated and filed herein on 11th July 2019, Abubakar Hussein Sadik (the Plaintiff) prays for an order of temporary injunction to issue restraining Christian Muchiri Mburu (the Defendant) from excavating, harvesting soil, constructing permanent structures or in any other manner trespassing upon all that parcel of land known as Plot No. Lamu/Lake Kenyatta/11/363 pending the hearing and determination of this suit.

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

a) That the Plaintiff is the registered owner of the said property;

b) That although the Plaintiff had intended to sell the suit property to the Defendant, the sale was rescinded. The Defendant has however refused to vacate the land and to hand over vacant possession even after receiving a refund of the purchase price;

c) That the Defendant has instead commenced construction of a permanent structure and has also contracted H. Young Construction Company to excavate the land by harvesting soil therefrom; and

d) That the Plaintiff stands to suffer irreparable loss and damage if the Defendant proceeds with his illegal actions and it is in the interest of justice that the orders sought herein be granted.

3. The Defendant is opposed to the application. In a Replying Affidavit sworn on 15th August 2019 and filed herein on 26th August 2019, he avers that the application does not disclose any ground upon which an order of injunction may be granted. The Defendant avers that he has a right of ownership of the land having purchased the same from the Plaintiff before the issuance of titles and having assumed possession thereof to-date.

4. The Defendant further contends that the title in the Plaintiff's name was obtained unprocedurally through misrepresentation of facts and as such cannot be used to claim ownership. He denies ever receiving any refund of the purchase price to-date and avers that he has a right to use the land in whatever manner he pleases.

5. I have perused and considered the application and the response thereto. I have also considered the submissions and authorities placed before me by Ms Abuodha, Learned Counsel for the Plaintiff. The Defendant did not file any submissions.

6. It is the Plaintiff's case that he is the registered proprietor of all that parcel of land known as Lamu/Lake Kenyatta/II/363 measuring 6.6 Ha (the suit property). On or about 9th December 2003, the Plaintiff entered into a sale agreement to sell the suit property to the Defendant at a consideration of Kshs 40,000/-. The Defendant took possession of the land upon payment of the consideration but before the transfer was effected.

7. The Plaintiff avers that he was however unable to obtain consent to transfer the property from the Land Control Board after his family objected to the transaction. He avers that as a result, the parties rescinded the agreement and he proceeded to refund the purchase price to the Defendant who has since declined to vacate the suit land.

8. The Defendant however insists that he is on the land courtesy of his having purchased the same and denies that the Plaintiff rescinded the agreement and or refunded to him the purchase price as stated.

9. In an interlocutory injunction application such as the one before me, the applicant has to satisfy the triple requirements to:

a) Establish his case only at a prima facie level;

b) Demonstrate irreparable injury if a temporary injunction is not granted; and

c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

10. As to what would amount to a prima facie case, the Court of Appeal had this to say in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125:-*

“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 as 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. That is clearly a standard which is higher than an arguable case.”

11. In the matter before me, there is no doubt that the Defendant entered into the suit property almost some 12 years before this suit was filed pursuant to an agreement of sale executed with the Plaintiff on 9th December 2003. While the Plaintiff asserts that the agreement was rescinded, nothing much has been placed before me to demonstrate the rescission. All that the Plaintiff has exhibited at this stage is a copy of cheque dated 9th August 2008 from Kenya Post Office Savings Bank Ltd addressed to Omwancha & Company Advocates.

12. There is nothing to show that the said cheque emanated from the Plaintiff and or that it was the refund aforesaid. There is also no evidence that the said Advocates were acting for the Defendant and or that they did forward the proceeds of the said cheque to the Defendant.

13. As the Court of Appeal explained in *Nguruman Limited –v-s 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.”

14. In the instant matter, the Defendant has been in possession and has occupied the suit property since 2003. During that period he has undeniably been using the land and I am unable to see any material right over the property that is in need of urgent protection.

15. The parties shall have an opportunity at the trial to demonstrate whether or not the sale agreement was rescinded and who between them has a right to the suit property. In the meantime, I find no reason to interfere with the manner in which they have dealt with the land since the year 2003 when the parties entered into the sale agreement.

16. The upshot is that I find no merit in the Plaintiff’s application. The same is dismissed with costs.

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

J.O. OLOLA

JUDGE