



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 55 OF 2019**

**CHARLES PINTO ARIGI.....PLAINTIFF**

**VERSUS**

**BONFACE KAHINDI JEMBE.....DEFENDANT**

**RULING**

1. By this Notice of Motion dated 15<sup>th</sup> July 2019, Charles Pinto Arigi, (the Plaintiff) prays for a mandatory order of injunction to issue compelling Boniface Kahindi Jembe (the Defendant) to give up vacant possession of all that parcel of land known as Kilifi/Mtwapa/1604 situated in Mtwapa within Kilifi County and containing by measurement 0.050 Ha or thereabouts. In default, the Plaintiff urges this Court to give him the liberty to evict the Defendant from the said property.

2. In addition, the Plaintiff prays for a temporary order of injunction to restrain the Defendant, his agents or servants from entering into, dwelling upon, interfering with the Plaintiff's occupation or in any manner whatsoever dealing with the said property.

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

***1. That the Plaintiff is the registered proprietor of the suit property having purchased the same on 30<sup>th</sup> June 1997 from one Francis Wanjohi Wanganga at a consideration of Kshs 400,000/-;***

***2. That upon purchase of the property, the Plaintiff charged the same to Barclays Bank of Kenya and it thereafter remained vacant until sometime in the year 2017 when the Bank's Surveyors visited the same for inspection and discovered an encroachment thereon by the Defendant who had put up houses thereon;***

***3. That upon confirmation of the encroachment, the Plaintiff reported the matter to Mtwapa Police Station and the Defendant was arrested and charged at Shanzu Law Courts in Criminal Case No. 699 of 2018;***

***4. That thereafter the Defendant reached out to the Plaintiff for an out-of-Court settlement and the Defendant executed an agreement in the presence of witnesses on 11<sup>th</sup> September 2018 in which he committed to vacate the premises;***

***5. That the Defendant has since refused to vacate the said premises thereby necessitating this suit and it is in the interest of justice that the orders sought be granted.***

4. The Defendant is opposed to the orders sought. In his Replying Affidavit sworn on 30<sup>th</sup> September 2019 as filed herein on 2<sup>nd</sup> October 2019 he avers that the suit property is part of a larger parcel of land originally owned by one Mtsando and then by Katsopi Chondo. He states that he is now 61 years old and that he was born on the suit property and knows no other home.

5. The Defendants further avers that the entire parcel was initially registered as Kilifi/Mtwapa/598 before it changed to Kilifi/Mtwapa/447 in the name of the said Katsopi Chondo Karisa. The Defendant states that he put up structures on the land with the consent of the said Katsopi Chondo who intended to sub-divide the same and give the Defendant a title to the portion he occupied. He however states that the said Katsopi Chondo disappeared mysteriously three days before the intended sub-division and that his body was later found elsewhere.

6. The Defendant denies entering into any negotiations with the Plaintiff and avers that following his harassment by the Police and after being charged with the offence of Forcible Detainer, he instituted ***Mombasa ELC Case No. 259 of 2018*** against the Plaintiff herein and that the Plaintiff was aware of that fact before filing these proceedings.

7. The Defendants further avers that the orders of mandatory injunction sought herein are drastic in nature and can only be granted in the clearest of cases and urges this Court to dismiss the same.

8. I have perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions by the Learned Advocates for the parties.

9. As regards the grant of a mandatory order of injunction at an interlocutory stage such as the one before me, the Court of Appeal observed as follows in *Kenya Breweries Ltd & Another –vs- Washington O. Okeyo (2002) eKLR*:

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the Court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”***

10. Similarly, in *Nation Media Group & 2 Others –vs- John Harun Mwau (2014) eKLR*, The Court of Appeal stated thus:

***“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate the existence of special circumstances. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides 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.”***

11. In the matter before me, it has not been denied that the Plaintiff is the registered proprietor of the parcel of land known as Kilifi/Mtwapa/1604 measuring 0.050 Ha. He was so registered as the proprietor thereof on 23<sup>rd</sup> December 1998. The Plaintiff told the Court that he purchased the property using a loan from Barclays Bank of Kenya Ltd to whom the property is presently charged.

12. It was also the Plaintiff’s case that prior to the registration of the charge, they did inspect the suit property and there was no encroachment thereon. Sometime in 2017 however, the Bank’s Surveyors in a routine inspection of the suit property discovered the existence of some structures thereon which turned out to be the Defendant’s.

13. The Defendant however denies that he recently encroached on the suit land. According to him he has always lived on the suit property ever since he was born some 61 years ago. The Defendant has not however provided any evidence of his existence in the property for all those years.

14. And while he claims to have been on the suit property with the consent of the late Katsopi Chondo Karisa, he has not demonstrated that the suit property belonged to the said Katsopi and or that Kilifi/Mtwapa/1604 is the same parcel of land as Kilifi/Mtwapa/447 which he purports to have belonged to the said Katsopi.

15. The Defendant does not deny that he has built structures on the suit property. While it may be true that he ***filed Mombasa ELC Case No. 259 of 2018*** against the Plaintiff and others, it is evident that for reasons known to him, he did not serve the Plaintiff with the said suit until this matter was served upon himself.

16. In the circumstances of this case, it was clear to me that the Defendant is a recent entrant on the suit property. He has no rightful claim thereto and cannot be allowed to remain therein simply because this matter is yet to proceed to trial.

17. In the premises, I am persuaded that this is one of those instances in which an order of mandatory injunction as sought herein ought to be granted. Accordingly, I allow the Plaintiff’s application in terms of prayers Nos. 2 and 3 of the Motion with costs.

18. The Defendant shall have 45 days to hand over vacant possession failure to which the Plaintiff shall be at liberty to evict him from the same.

19. Orders accordingly.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of November, 2020.**

**J.O. OLOLA**

**JUDGE**