



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 62 OF 2018

SMITH ARON KADEMU.....PLAINTIFF

VERSUS

MWAKOYO CHITUKU.....DEFENDANT

RULING

1. By a Notice of Motion application dated 21st March 2018, Smith Aron Kadem, the Plaintiff herein, prays for an order that pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendant from trespassing, encroaching upon, selling off, building upon, or in any manner whatsoever carrying out any activities on Plot N. 535, Mazeras.

2. The Plaintiff's application is premised on the grounds:-

a) That the Plaintiff is the lawful owner of all that parcel of land known as Plot No. 535 Mazeras;

b) That the Defendant has deliberately, illegally and unlawfully embarked on a serious construction spree all over the Plaintiff's said parcel of land to the Plaintiff's detriment;

c) The Plaintiff is apprehensive that the Defendant will continue his illegal actions unless restrained by this Court;

d) That the Defendant has no legal claim or any colour of right whatsoever over the suit property and is hell bent and keen on altering the face of the suit property to tilt the balance of convenience in his favour; and

e) That the Applicant stands to suffer irreparable loss as the Defendant is making a physical attempt to stake and legitimize a non-existent claim over the suit property.

3. In a Replying Affidavit filed herein on 18th May 2018, Mwakoyo Chituku Ganero (the Defendant) avers that it is true the Plaintiff is the registered proprietor of Plot Number Kilifi/Kaliang'ombe/Jimba/535. The said plot neighbours Plot No. Kilifi/Kaliang'ombe/Jimba/900 which is registered jointly in the name of the Defendant and his nephew Sande Jumaa Ali.

4. The Defendant avers that he is a stranger to Kaloleni RMCC No. 2 of 1979 as the case did not affect his parcel of land. The Defendant further denies that he has ever encroached on the Plaintiff's parcel of land.

5. I have considered the Plaintiff's application and the Defendant's response thereto. The question for my consideration is whether on the material presented before this Court the Plaintiff has made out a prima facie case to warrant the grant of an order of injunction.

6. In *Mrao Ltd –vs- First American Bank of Kenya Ltd(2003)eKLR*, the Court of Appeal stated that:-

“.....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant's case upon trial....”

It is a case 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 from the latter...”

7. In the matter before me, the Plaintiff avers that he is the owner of Plot No. 535 Mazeras after the same was adjudicated to him in 1979 in Kaloleni District Magistrates Land Case No. 2 of 1979. In support of this contention, he has annexed a copy of the Judgment delivered on

29th April 1981. It is his case that the Defendant has been encroaching upon the said land and has now commenced construction thereon.

8. On his part the Defendant does not dispute that Plot No. 535 Mazeras belongs to the Plaintiff. It is however his case that the Plaintiff's Plot neighbours land parcel Number Kilifi/Kaliang'ombe/Jimba/900 which parcel of land is registered jointly his name and that of his nephew one Sande Juma Ali. He vehemently denies encroaching on the Plaintiff's land and has exhibited a title of their portion of land issued to him and his nephew aforesaid on 9th August 2016.

9. From the material placed before me, it is evident that the area Kaliang'ombe/Jimba where the disputed parcel of land is situated was recently undergoing adjudication. From annexure 'MCG3' to the Defendant's Replying Affidavit it is evident that Parcel No. 900 was carved out of the original Parcel No. 535. The Plaintiff herein was not satisfied with the creation of the new Plot which was then registered in the name of the Defendant's family. Subsequently, the Plaintiff filed Objection proceedings before the Land Adjudication Committee. On 17th January 2013, the Committee decided the case as follows:-

FINDINGS

Ground visit was made on 11th January 2013. It was established that the Plaintiff has a Portion to cultivate and not that he was only left with his homestead. The Plaintiff has got his Plot Numbers. The defendant and the Plaintiff both are neighbours. The Court allowed the Plaintiff to cultivate but not ownership. This Plot belongs to the defendant as from his father Gavero. The defendant has got several trees on the Plot in question. The land committee ruled that the Plot be sub-divided and the defendant was issued with this number (900).

DECISION

Case dismissed. The Plot to remain as recorded."

10. It is apparent to me that the Plaintiff is still unhappy with the decision of the Arbitration Committee and hence this suit. As it were, the Land Adjudication Act, Cap 284 of the Laws of Kenya has an elaborate in-built mechanism of settling disputes arising from an adjudication process. From the material placed before me, it was not clear to me whether the Plaintiff had exhausted the procedures provided there under which culminate with an Appeal to the Minister in-charge of the Lands Portfolio.

11. In the circumstances of this case, I was not satisfied that the Plaintiff had made out a prima facie case to warrant the grant of the orders sought.

12. The application dated 21st March 2018 is accordingly dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE