



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 23 OF 2018

AHMED ABDILLAHI HASSAN.....PLAINTIFF

VERSUS

1. HUSSEIN DARA

2. MAHMOUD DARA

3. AMINA DARA

4. MAHAD ISMAIL.....DEFENDANTS

RULING

1. By this Notice of Motion application dated 30th January 2018, the Plaintiff Ahmed Abdillahi Hassan prays for an order of injunction to restrain the four Defendants/Respondents from constructing, trespassing into, selling, mortgaging, transferring or in any other way dealing with Plot No. 43 Mokowe Township, Mokowe Village in Lamu County pending the hearing and determination of the suit herein.

2. The said application is supported by the Plaintiff's affidavit and is premised on the grounds that:-

- a) The Plaintiff/Applicant is the rightful owner of the said Plot having bought the same from one Swabaha Awadh Said Hadi;***
- b) The Defendants have persistently encroached, trespassed and/or interfered with the Plot and thus denying the Plaintiff peaceful ownership of the land;***
- c) The Defendants have issued threats and barred the workers, employees and/or agents of the Plaintiff from freely accessing the said plot of land; and***
- d) Unless the orders sought herein are granted the Plaintiff stands to suffer irreparably.***

3. In a Replying Affidavit sworn and filed herein on 9th April 2018, the 1st Defendant Hussein Dara with the authority of the 2nd and 4th Defendants avers that his father the late Daraa Abajila owned an unsurveyed and unregistered parcel of land measuring ten acres at Bula Rahma where he had lived since 1971.

4. It is the Defendants position that they inherited the piece of land from their late father and that Swabaha Awadh Said Hadi who allegedly sold the land to the Plaintiff is not a member of their family and had no right to sell the land. The Defendants further deny that they have trespassed into the Plaintiff's parcel of land as alleged or at all.

5. The Defendants further aver that the 4th Defendant has no claim whatsoever concerning the suit property and has never claimed ownership thereof as purported by the Plaintiff.

6. I have considered the Plaintiff's application and the Defendants' response thereto. I have equally perused and studied the written submissions and the authorities filed herein by the Learned Advocates for the parties.

7. The principles for the grant of an injunction such as the one sought herein were long enunciated in the oft-cited cases of ***Giella –vs- Cassman Brown Company Ltd (1973) EA 358***. First, an applicant must establish a prima facie case with a probability of success. Secondly,

such an 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 a balance of convenience.

8. Accordingly in determining the issues herein, this Court must first and foremost inquire as to whether in the circumstances before me, the applicant has established a prima facie case with a probability of success. As the Court of Appeal stated in ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others(2003) eKLR:-***

“...in civil cases (a prima facie case) 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 or rebuttal from the later.”

9. In the matter before me, it is the Plaintiff’s case that he is the owner of Plot No. 43 Mokowe Township. The Plaintiff avers that he bought the said parcel of land in the year 2009 from one Swabaha Awadh Said Hadi who had inherited the said piece of land from her parents. As evidence of the said purchase, the Plaintiff has attached to his supporting affidavit a copy of a Sale Agreement dated 12th September 2009 between himself and the said Swabaha-Awadh Said Hadi.

10. It is the Plaintiff’s case that following the purchase, he caused the land to be surveyed and fenced off. He then left the Country for further studies leaving the land in the hands of a caretaker. When he came back in May 2017, the caretaker informed him that some people had trespassed onto his land. The Plaintiff then carried out inquiries upon which he came to realise that the 1st, 2nd and 3rd Defendants were the ones who had trespassed into the land and had fenced parts thereof using some poles. It was also the Plaintiff’s case that the 1st, 2nd and 3rd Defendants were trying by all means possible to pass over the land to the 4th Defendant.

11. In a Replying Affidavit filed herein on their behalf, the 1st, 2nd and 3rd Defendants deny that they have trespassed onto the Plaintiff’s land. It is however their case that their father the late Daraa Abajila owned an unsurveyed and unregistered piece of land measuring ten acres situated at Bula Rahama. It is this land which they claim to have inherited.

12. In their long and argumentative Replying Affidavit, the Defendants have not however shown any evidence of the alleged ownership of their deceased father of the ten acres of land which they say was unsurveyed and unregistered. Neither do they make any direct assertion that the land bought by the Plaintiff is part and parcel of their deceased father’s estate.

13. Their argument as I have understood it is that the person who sold the land to the Plaintiff is not a member of their family. While the first three Defendants deny trespass onto the Plaintiff’s portion of land, they are quick to exonerate the 4th Defendant whom they argue has been wrongly enjoined in the suit herein. It is to be noted that according to the Plaintiff, the 1st, 2nd and 3rd Defendants have been doing everything possible to remit the suit property to the 4th Defendant.

14. In the circumstances of this case, I am satisfied that the Plaintiff has demonstrated that he has an interest in the suit property having purchased the same for consideration. That interest is threatened by the actions of the Defendants who have not denied encroaching upon the land. Accordingly and pending an inquiry as to whether the said Swabaha Awadh Said Hadi who sold the land had a right to sell the same, the Plaintiff’s interest deserve protection from the Defendants who appear intent to infringe upon the same.

15. The upshot is that I find merit in the application dated 30th January 2018. The same is allowed with costs.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE