



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 176 OF 2017(OS)

PEPONI HOTEL LIMITED.....PLAINTIFF/APPLICANT

AND

ALI AHMED MOHAMED.....DEFENDANT/RESPONDENT

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 7th August 2017. By the said application Peponi Hotel Limited (the Plaintiff) prays for an order of injunction to restrain the Defendant Ali Ahmed Mohamed from continuing with the construction work of a permanent residential house which has trespassed and/or intruded into the Plaintiff's parcel of land known as Lamu Island/Block III/164 and situated at Shela Village in Lamu, pending the hearing and determination of this suit.

2. The said application is supported by an Affidavit sworn by one Carol Korschen, a Director of the Plaintiff and is premised on the grounds:-

i) That the Plaintiff is the registered owner of the said parcel of land where it has invested in hotel business;

ii) That the Defendant recently commenced construction work on a neighbouring plot which construction has extended beyond the boundary of the Defendant's land and extended into the Plaintiff's Portion;

iii) That despite being requested to stop the Defendant has refused to do so and continues with the said construction with a view to defeat justice; and

iv) That the Plaintiff stands to suffer loss and damage unless the Defendant is stopped from carrying on the construction by an order of this Court.

3. In a Replying Affidavit sworn and filed herein by the said Ali Ahmed Mohamed on 5th September 2017, he avers that the Plot referred to by the Plaintiff is bordering the Plaintiff's plot No. Lamu/Block III/174 which Plot is registered in the name of the Defendant and that of his brother Adussattar Ahmed Mohamed.

4. The Defendant admits that there is construction being undertaken by himself and his said brother on the said parcel of land but denies that the work extends beyond their property into the Plaintiff's Portion.

5. I have perused and considered the Motion and the response thereto. I have equally considered the Plaintiff's submissions filed herein. As Spry VP stated in *Giella –vs- Cassman Brown & Company Ltd(1973)EA 358 at 360*:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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 the balance of convenience.”

6. That being the case, the first inquiry that this Court must make is to assess whether the Plaintiffs have established a prima facie case with a probability of success. As to what constitutes a prima facie case, the Court of Appeal offered guidance in *Mrao Limited –vs- First American Bank & 2 Others(2003)KLR 125* where Bosire J.A. observed as follows:-

“So what is a prima facie case?

I would say that in civil cases, 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 or rebuttal from the latter...But as I earlier endeavoured to show, and I cite ample authority for it, 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 success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

7. In the matter before me, the Plaintiff asserts that he is the registered owner of Plot No. Lamu Island/Block III/164. The Defendant together with his brother own the adjacent Plot No. Lamu Island/Block III/174. The Plaintiff accuses the Defendant herein of engaging in construction of a building beyond the Defendant's boundary. While admitting that they are engaged with his brother in the said construction, the Defendant denies that it exceeds the boundary of their land and/or that it encroached upon the Plaintiff's parcel of land.

8. One would have thought that in light of the defendant's denials herein, the Plaintiff would have gone ahead to provide a survey report or some other evidence to demonstrate that the construction being carried out by the Defendant and his brother encroached upon the Plaintiff's parcel of land. No such evidence is however provided either in the Supporting Affidavit or the Supplementary Affidavit filed after the Defendant filed his Replying Affidavit.

9. As the Court of Appeal stated in *Nguruman Limited –vs- 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.....”

10. In the matter before me, the Plaintiff has failed to demonstrate that there was any encroachment by the Defendant on its land, and if so to what extent. On the other hand, the Defendant has brought some evidence to the effect that together with his brother, they own the adjacent Plot to the Plaintiff and it is their contention that it is on that Plot that they are carrying on the impugned construction.

11. In the circumstances of this case, I do not find any merit in the application before me. The same is dismissed with costs to the Defendants.

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

J.O. OLOLA

JUDGE