



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 239 OF 2017

JEFA NYALE KITI (suing through his Attorney & Legal Representative

EMMANUEL FADHILI JEFWA.....PLAINTIFF

VERSUS

SIDI DAKTARI.....DEFENDANT

RULING

1. By a Notice of Motion application dated and filed herein on 29th November 2017, the Plaintiff Emmanuel Fadhili Jefwa prays for a temporary order of injunction to issue restraining the Defendant Sidi Daktari from wasting, alienating, disposing, encroaching, erecting structures or trespassing upon the Plaintiff's House without Land situated on Plot No. MN/111/999 in Kilifi pending the hearing and determination of this suit.
2. In addition, the Plaintiff prays for an order of vacant possession directed at the Defendant to vacate the said House without Land and for the Officer Commanding Mtwapa Police Station to give security to the Court Bailiff and to maintain peace during and after the exercise.
3. The application is supported by an Affidavit sworn by the Plaintiff and is premised on the grounds that:
 - a) The Plaintiff is the owner of the House without Land situated on the said property;*
 - b) The Defendant has forcefully invaded and entered the House without a Court order, notice or consent of the Plaintiff;*
 - c) The Defendant is hostile to the Plaintiff and his family and has threatened the Plaintiff with unspecified harm if they set foot on the suit property;*
 - d) The Plaintiff has purchased part of the land where the suit property stands and is yet to process title documents for lack of funds; and*
 - e) The Defendant will not suffer prejudice in any way if the application is allowed.*
4. In her Replying Affidavit sworn and filed herein on 21st February 2018, the Defendant Sidi Daktari avers that there was a house standing on the suit property before Emmanuel Fadhili Jefwa constructed the present house. She further avers that the said Emmanuel and herself had a romantic relationship and it is out of love and affection that Emmanuel agreed to construct for her the present house and she assisted in the construction of the same.
5. The Defendant asserts that the house was built and given to her as a gift and she has lived therein with her children since 24th July 2015. She denies being an employee or caretaker in the house and/or that she has threatened the Plaintiff with any harm as alleged or at all.
6. I have considered both the application and the response thereto. I have also considered the submissions and authorities to which I was referred by the Plaintiff's counsel. The Defendant did not file any submissions.
7. The Plaintiff herein in one limb seeks a temporary order of injunction restraining the Defendant from among other things trespassing into the house in dispute. On the other hand, he is seeking an order of vacant possession to issue as against the Defendant to compel her to vacate the disputed house.

8. From the material placed before me, it is not contested that the Defendant resides in the disputed house. The circumstances under which she entered and took possession of the house however vary from one party to the other.
9. According to the Plaintiff, the Defendant was his employee and caretaker of the house without land situated on Plot No. MN/III/99, Kilifi from the year 2014. However on learning that her employer was unwell, the Defendant illegally and forcefully took charge of the house claiming ownership thereof.
10. The Defendant however denies that she was an employee or caretaker of the Plaintiff. According to her, she was involved in a romantic relationship with the Plaintiff as a result of which the Plaintiff built for her the house which she moved into with her children in July 2015. It is her case that she also contributed towards the construction of the building.
11. As it were, the Applicant seeks both a prohibitory as well as a mandatory injunction. As was stated in the celebrated case of ***Giella –vs- Cassman Brown & Company Ltd (1973) EA 358***, in a prohibitory injunction, one must establish the existence of a prima facie case with high chances of success. He must also show that he will suffer irreparable loss or damage which cannot be adequately compensated by an award of damages if the order is not granted and further, that the balance of convenience tilts in his favour.
12. In the circumstances before me, while the Plaintiff claims that he owns the house without land, he has also annexed an agreement showing that he bought a Portion of the land measuring 50m x 50m from the owner of the land one Hadja Abdala Fadhil. The Sale Agreement evidencing the same is dated 11th September 2015 and Clause 3 thereof reads “that the purchaser has already built a house on the said Plot.”
13. Accordingly, it is possible that the plot of land the Plaintiff bought is the one on which the disputed house stands. It would however appear from the Defendants contention that as at the time the Plaintiff entered into this Agreement, she had already started living in the contested house which she states was completed in July 2015.
14. I take note that this suit has been filed by the Plaintiff’s son on the strength of a Power of Attorney as the Plaintiff is said to be unwell. I think it would be important for this Court to interrogate the circumstances in which the Defendant took over possession of the house whose construction she claims to have contributed to. I would therefore be reluctant to restrain her from using the house in which she has lived since July 2015 and which she considers her house at this interlocutory stage.
15. As it is, an applicant seeking a mandatory injunction at an interlocutory stage must in addition, establish the existence of special circumstances. The standard is certainly higher than the standard in a prohibitory injunction. In the circumstances of this case, I did not find any special circumstances to warrant the grant of a mandatory injunction at this stage.
16. Accordingly I will disallow the application dated 29th November 2017. The costs shall be in the cause.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE