



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 3 OF 2018

JAPHETH NOTI CHARO.....PLAINTIFF

VERSUS

ALAMIN AHMED ALAMUDI.....1ST DEFENDANT

MWANGI NJIRI.....2ND DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 8th January 2018. By the said application, the Plaintiff/Applicant Japhet Noti Charo prays for orders that pending the hearing of this suit an injunction be issued restraining the two Defendants/Respondents from trespassing, entering, remaining in, constructing, alienating, working on or dealing with all that property known as Portion No. 5596 or any sub-division curved out of all that parcel of land known as Portion No. M5. The Plaintiff further prays for an order that the OCS Malindi Police Station do ensure compliance with those orders.

2. The application which is supported by an Affidavit sworn by the Plaintiff is anchored on the grounds:-

- i) That the 1st Defendant's interest in Plot No. M5 was long relinquished through compulsory acquisition;***
- ii) That the 1st Defendant has now encroached on a portion reserved for the Plaintiff's family and curving out portions thereof;***
- iii) That some of the portions curved out by the 1st Defendant from the Plaintiff's land have been sold to the 2nd Defendant;***
- iv) That the Defendants have now employed a number of violent men to work on the property and ensure that the Plaintiff does not get there; and***
- v) That the Plaintiff stands to suffer loss and prejudice unless the Orders sought herein are granted.***

3. In a Replying Affidavit filed herein on 22nd February 2018, the 1st Defendant Alamin Ahmed Alamudi avers that Mohamed Ahmed Dahman who died on 16th November 2013 is the lawful and absolute registered proprietor of Land Portion No. 5596 Malindi. He further avers that the only time the Plaintiff's father the late Charo Shutu was in possession of Plot No. M5 was in 1970 when he entered a Lease Agreement with one Abdalla Salim Bakhshwein for a period of one year.

4. The 1st Defendant further avers that vide an Affidavit sworn on 2nd April 1998, the late Charo Shutu aforesaid confirmed that he had no claim whatsoever to any properties owned by the late Abdalla Salim Bakhshwein which properties included Plot Nos M4 and M5.

5. The 1st Defendant asserts that he does not own Portion No. 5596 Malindi or any sub-division thereof as claimed by the Plaintiff and he is not responsible for carrying out any developments thereon as claimed. It is the 1st Defendant's case that the Plaintiff is guilty of material non-disclosure as he has failed to inform the Court that there are a number of Criminal Cases he is facing in Mombasa and Malindi in relation to the portion of land which is the subject matter of this suit.

6. I was unable to find any evidence that at the time the application was argued before me, the 2nd Defendant had been served with the said application and/or that he had responded thereto.

7. I have nevertheless considered the application by the Plaintiff and the response thereto by the 1st Defendant. I have equally perused and considered the written submissions filed by the Learned Advocates for the 1st Defendant. The Plaintiff did not file any submissions herein.

8. As was stated in the celebrated case of *Giella vs- Cassman Brown & Company Ltd(1973)EA 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.”

9. In defining what would amount to a prima facie case in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others(2003)eKLR*, the Court of Appeal delivered itself as follows:-

“So what is a prima facie case?

I would say that in civil cases it is a case in 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.”

10. In the matter before me, the Plaintiff asserts in the Affidavit in support that he is a legal and beneficial owner of the parcel of land described as Plot No. M5 Malindi and measuring about 473 acres. He avers that in the year 1956 while his father was residing within the said property, there developed problems with the family of the 1st Defendant who had started laying a claim over the suit property.

11. The Plaintiff goes ahead to assert that by various Government Gazette Notices, the Government compulsorily acquired the entire 473 acres comprised in Plot M5 and that in doing so, the 1st Defendant’s family was fully compensated and that they therefore relinquished their interest on Plot M5 unlike the Plaintiff’s family which never agreed with the Government and continues to struggle for their rights.

12. The Plaintiff goes ahead to assert that the 1st Defendant being unable to access the suit property has now gone ahead to sell the same to the 2nd Defendant who has in turn now hired a number of men working thereon day and night to defeat the Plaintiff’s claim and stop the Plaintiff from accessing the land.

13. As it were, it is apparent that the Plaintiff’s father the said Charo Shutu is now deceased. It was however not clear to me in what capacity the Plaintiff brings the application. It does not disclose whether he is the administrator of his father’s estate or otherwise. Similarly, the 1st Defendant is described at Paragraph 3 of the Plaintiff’s Supporting Affidavit as Mohamed Ahmed Dahman. The 1st Defendant in these proceedings is named as Alamin Ahamed Alamudi and it was again not very clear to me whether it was one and the same person and/or on what basis if any he had been sued. From the annexure AOB 1 of the Replying Affidavit, it is evident that the said Mohamed Ahmed Dahman died on 16th December 2013 some five years before this suit was lodged.

14. From the material placed before me, it is evident that the said Mohamed Ahmed Dahman was the registered owner of the parcel of land known as Plot No. 5596 Malindi. According to the Plaintiff, this was a sub-division of Portion No. M5 Malindi and he accuses the Defendants of wrongfully encroaching thereon. As per the Certificate of Search dated 26th May 2011 annexed to the 1st Defendant’s Replying Affidavit however, it is clear that as at that date, the registered owner was the said Mohamed Ahmed Dahman.

15. It is also telling that while the Plaintiff alleges that the 1st Defendant’s family was fully compensated and thereafter relinquished their claim on the suit property no evidence of the compensation has been placed before me. Again, while the Plaintiff purports that the 1st Defendant sold the said Plot No. 5596 to the 2nd Defendant, no evidence has been offered of that sale whatsoever. The 1st Defendant herein has categorically denied being the owner of that parcel of land and I think it is incumbent upon the Plaintiff to lay a basis for his contention as to the ownership thereof.

16. Arising from the foregoing, I was not persuaded that the Plaintiff has any registered and/or registrable interest in the suit property and/or any sub-division thereof to warrant the Court’s protection as sought in these proceedings.

17. Even if it were to be found that the Plaintiff had any right of whatever nature to the suit property, I was not persuaded that there is any imminent danger thereto to warrant a grant of injunction at this stage.

18. Accordingly, I find no merit in the application dated 8th January 2018. The same is dismissed with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE