



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 50 OF 2019

MAHMOUD ABDALLA MAHMOUD

MOHAMMED SALEH HASSAN..... PLAINTIFFS

VERSUS

CHINA CITY CONSTRUCTIONS CO LTD.

CHINA ROAD & BRIDGE COOPERATION (K) LTD..... DEFENDANTS

RULING

(Application for an interlocutory injunction combined with an application seeking a mandatory injunction to demolish a wall said to have been erected by the respondents on the applicants' land; injunction granted but orders of mandatory injunction to await a full hearing of the case)

1. The application before me is that dated 18 March 2019 which was filed alongside the plaint. It is an application brought pursuant to the provisions of Order 40 Rules 1 and 2, of the Civil Procedure Rules, 2010. The applicants seek orders that the defendants/respondents be restrained by an order of injunction from any subdivision, or construction, or trespass in the land parcels Subdivision No. 2799/V/MN (CR 72903) as delineated on Land Survey Plan No. 428756 and Subdivision No. 2798/V/MN as delineated on Land Survey Plan No. 428755 (the suit properties). They also seek orders of a mandatory injunction to order the defendants/respondents to demolish or pull down illegal structures on the suit lands and vacate the same. Despite being served, the defendants/respondents have not entered appearance and have filed nothing to oppose this motion. The only material that I have is that supplied by the applicants.

2. The applicants' case is that they are the registered proprietors of the suit properties, that the respondents have wrongfully taken possession of the same, and that they are undertaking construction of structures. In the suit, the applicants wish to have orders of eviction and a declaration that they are the rightful owners of the suit land. In the supporting affidavit, sworn by the 1st applicant, there are annexed copies of the certificates of title, and a survey report by M/s Edward Kiguru Land Surveyors. That survey report states that there is a concrete wall erected alongside the boundaries of both suit properties which is unauthorized. I believe that this is the construction that is complained of in this case.

3. I have considered the application. The first orders sought are orders of injunction, which, unless they are mandatory orders, seek to stop an action. It is said that unless restrained, the respondents will continue erecting poles/fences or otherwise develop the suit properties. On this point, I am persuaded that the applicants have made out a prima facie case of ownership and unless restrained, the respondents may proceed with developments and alter the character of the suit land to the detriment of the applicants. I will therefore issue an order of injunction stopping the respondents from erecting any poles or fences, or making any structures, around or within the suit properties. I further order that the current status quo be maintained until the suit is heard and determined.

4. There is the second prayer for a mandatory injunction for the respondents to demolish the wall. To me, this order will be tantamount to giving the applicants final orders before the suit is heard. I am not too sure at this stage of the proceedings, how it happened that the respondents erected a wall or other structures on the suit properties, and I have in fact not been told where the applicants were when all this was happening, and why they did not come to court earlier. I think that it will be unwise to issue this drastic order at this stage of the proceedings before first hearing the suit. I therefore decline to issue the mandatory order seeking the demolition of the wall at this interlocutory stage of the proceedings.

5. On costs, the applicants will have the costs of this application.

6. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

No appearance on the part of M/s Mogaka, Omwenga & Mabeya advocates for the applicant.

No appearance for the respondents.

Court assistant; Koitamet