



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 220 OF 2017

FREDRICK NDUNE JAPHET AND MBEYU KALONGO

(Suing as Administrators of the estate of ELIAS FARAH JAPHET)...PLAINTIFFS/RESPONDENTS

VERSUS

CATHERINE MNYAZI SOFALI.....1ST DEFENDANT/APPLICANT

JAPHET HENRY MWAMBAJI.....2ND DEFENDANT/APPLICANT

RULING

1. By this Notice of Motion application dated 3rd July, 2019, Catherin Mnyazi Sofali and Japhet Henry Mwambaji (the Defendants/Applicants) pray for an order that this court be pleased to issue a temporary injunction restraining the Plaintiff/Respondents from interfering, harassing or in any manner whatsoever dealing with Plot No. Mikahani/Mawemabomu/Chonyi/354 pending the hearing and determination of this suit.

2. The Application which is supported by an Affidavit sworn by Catherine Mnyazi Sofali (the 1st Defendant) is premised on the grounds:

i. That the 1st Defendant purchased a piece of land measuring a quarter of an acre from one Mwambaji Kailo Mtuto on 23rd September, 2001;

ii. That the Plaintiffs are engaged in an ownership dispute with he said vendor Mwambaji Kailo Mtuto and there is a matter pending in court;

iii. That the Plaintiffs have now entered the parcel of land and physically restrained the 1st Defendant/|Applicant from carrying out any farming activities on the land;

iv. That it is fair that given these proceedings are pending in court that the status quo ante ought to be maintained lest the substratum of the suit is damaged.

3. The Plaintiffs/Respondents did not file any response to the application and the Applicants have urged this court to grant the orders of injunctions sought.

4. I have perused and considered the pleadings filed herein. In the Plaint filed herein on 14th November, 2017, the Plaintiffs accuse the Defendants of proceeding to the suit property and erecting a building thereon despite knowledge of the dispute surrounding the same. They urge the court to grant an order of mandatory injunction as well as eviction orders against the Defendant.

5. In their Statement of Defence and Counterclaim filed herein on 24th January, 2018, the Defendants aver that they entered upon the suit premises with the leave and licence of the said Mwambaji Wa Kailo and assert that they have since 1989 constructed permanent structures therein.

6. It is now the Defendants' case in the application before me that the Plaintiffs have despite the pendency of these proceedings entered the suit property and physically restrained them from the use thereof.

7. The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires

proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. The court in such a situation is enjoined to grant an injunction to restrain such acts.

8. In the instant suit, it is not in dispute that the Defendants are presently in occupation and use of the suit property. By the application before me, they assert that the plaintiffs have now moved into the suit property and physically restrained them from the use thereof. The Plaintiffs despite being served did not file any response to the application. That leaves the assertions of the Defendants uncontroverted and I did not find any reason to doubt their contention.

9. In the circumstances herein I am satisfied that there is merit in the application dated 3rd July, 2019. The same is allowed as prayed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF NOVEMBER, 2019.

J. O. OLOLA

JUDGE