



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

PET. NO. 30 OF 2019

SAID SALIM (Suing as an Administrator of the

Estate of SALIM DAUD OGINA).....PLAINIFF

VERSUS

THE CDF COMMITTEE NYALI CONSTITUENCY & 3 OTHERS.....DEFENDANTS

RULING

(Application for injunction; petitioner claiming that respondents are constructing on his land; no evidence of any construction tendered; no evidence of the sort of construction being undertaken; construction alleged to have commenced nine months prior to the application for injunction; no explanation why the application was not filed earlier; no evidence upon which an injunction may issue; in any event petitioner suing for full value of the property so does not stand to suffer irreparable loss if the injunction is not granted; application dismissed)

1. This suit was commenced through a petition filed on 23 August 2019. The petitioner has averred that he is the legal representative of the estate of Salma Daud Ogina (also known as Salima Said Amur) (deceased) who was his wife. He has contended that the land parcel MN/Section I/ 9823 (the suit property) is registered in the name of the deceased. He has mentioned that while he was on a routine check of the suit property in December of the last year (2018), he found an on-going construction on the property under the supervision of the Constituency Development Fund of Nyali, who also claimed to be the owners of the property. He has pleaded that no compulsory acquisition of the property has been conducted and the deceased's title had never been challenged. In the petition, the petitioner wants a declaration of ownership of the suit property, and a declaration of a violation of Article 40 on the right of property. He also wants full compensation at market value.

2. Together with the petition, the petitioner filed an application seeking orders to stop the respondents from further interference with the land pending hearing of the petition. It is that application which is the subject of this ruling. The supporting affidavit has been sworn by the petitioner.

3. Despite being duly served, the respondents are yet to enter appearance and have not filed anything to oppose this motion.

4. I have gone through the petition and the application. The application before me is one seeking orders of interlocutory injunction and thus the principles in ***Giella vs Cassman Brown (1973) EA 358*** apply. In the said case, it was held that one needs to demonstrate a prima facie case with a probability of success; show that he stands to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience.

5. The petitioner of course claims that the respondents are illegally constructing on the suit land. However, save for annexing a copy of the title to the suit land in the name of the deceased, nothing has been annexed to show what sort of construction is being undertaken and nothing to demonstrate that the construction (whatever it may be) is actually on the suit land. In fact, I have nothing before me that will make me believe that there is any construction on the suit land. I do not see how the petitioner can succeed if he cannot demonstrate that there is construction on the suit land and I am not therefore persuaded that the petitioner has disclosed a prima facie case with a probability of success.

6. The above notwithstanding, the petitioner himself in the petition has averred that he saw the construction in December 2018, and I note that this petition was filed in August 2019 which is 9 months later. I wonder why the petitioner did not come to court early after seeing the construction. An injunction is an equitable remedy and one of the principles of equity is that equity aids the vigilant and not the indolent. The delay of 9 months before seeking the injunction militates against this court issuing a stop order at least nine months after construction has begun. In essence I am not persuaded from the facts presented before me to issue an injunction.

7. In any event, I can see that in the petition, the petitioner has sued for the full value of the property, which means that if he succeeds, he will have received full compensation, and he does not stand to suffer any irreparable loss if the injunction is not granted.

8. It is for the above reasons that I see no merit in the application for injunction and the same is hereby dismissed.

9. I make no orders as to costs as the same was not opposed.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Ahmed present for the applicant.

Mr Mwandeje present for the AG.

Court assistant; David Koitamet.