



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 203 OF 2018

ALFRED KENGA KAZUNGU.....PLAINTIFF

VERSUS

NELSON NYALE LUGANJE

MORIS NYANJE.....DEFENDANTS

RULING

1. By this Notice of Motion application dated and filed herein on 6th December 2019, Alfred Kenga Kazungu (the Plaintiff) prays for orders:-

3. That at the inter-party stage, a temporary injunction be issued restraining the 1st Defendant by himself, his servants and/or agents or any person claiming through him from burying body of his daughter called Susan Nyale on any part of the suit property being all that parcel of land situated at Chembe Kibabamshe Village within Kilifi County known as Title No. Chembe/Kibabamshe/1 pending the hearing and determination of this case.

4. That (the) costs of this application be costs in the cause.

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

i. That the matter is coming up for hearing on 5th February 2020;

ii. That despite the on-going dispute on ownership of the suit property herein, the 1st Defendant has now dug a grave on part of the suit property with the intention of burying his child thereon;

iii. That the said Defendant may proceed to bury his child notwithstanding the fact that the dispute is yet to be determined;

iv. That if the Defendant is allowed to inter the body of his child on the property, it will alter its state and render the land uneconomical and incapable of being used for the purpose for which the Plaintiff intends to use it.

3. The application is however opposed. In a Replying Affidavit sworn and filed herein on 10th December 2019, Nelson Nyale Luganje (the 1st Defendant) avers that this Court lacks jurisdiction to deal with the matter as the same has already been settled by the National Land Commission.

4. The 1st Defendant concedes that his daughter Susan Nyale passed away in Qatar on 16th November 2019 and that preparation for her burial are at an advanced stage. He however asserts that he has lived on the suit premises since he bought the same from the Applicant's father in 1989 and the burial of the daughter in suit property would not change anything as in the event case is determined against him, the body can be exhumed.

5. The 1st Defendant further avers that he has no alternative land to inter the remains of his daughter and states that he is likely to be greatly prejudiced in the event the orders sought herein are granted.

6. I have considered the application and the response thereto. The Plaintiff brought this suit on 26th October 2018 in his capacity as the Administrator of the Estate of his father Kazungu Mangale Kombe who was the registered owner of the suit property. The Plaintiff asserts that he was born and brought up in the suit property and that they have since developed the same by building houses, planting crops and

fruits thereon.

7. The Plaintiff accuses the 1st Defendant of coming to the suit property and claiming ownership of 8 acres thereof on the ground that he purchased the same from the Plaintiff's deceased father. The Plaintiff also accuses the 1st Defendant of lodging a caution on his father's title sometime on 11th February 1993. He asserts that his family is unaware of the sale of the land by their deceased father and seeks orders of vacant possession and an injunction to issue against the Defendants.

8. It is however the 1st Defendant's case that he bought the 8 acres of land from the Plaintiff's father pursuant to an agreement dated 22nd March 1989 and that he took possession thereof and developed the same by building his home and planting trees thereon. He asserts that he placed the caution on the land on 11th February 1993 as stated by the Plaintiff by virtue of his interest as a purchaser when he learnt that the Plaintiff's father wanted to dispose off the same to third parties before transferring the portion he purchased.

9. From the material on record herein it is evident that the 1st Defendant entered the land many years back and that he had built his home thereon even before the Plaintiff's father died in 1998.

10. As it were, the circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules require 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.

11. In the circumstances before me it was clear that the 1st Defendant has been in possession of the suit property and that he has been using the same as his home for almost 30 years before this suit was filed. In my mind burial of his deceased daughter will be very much consistent with his use of the disputed parcel of land as his home in the same manner as he has done over the past three decades.

12. In an application for interlocutory injunction such as the one before me, it is a well settled principle that the party seeking the injunction must first establish a prima facie case with a probability of success. In this regard and as the Court of Appeal observed in **Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR:-**

“...The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...”

13. In the matter before me, the 1st Defendant has been in possession of the disputed property for a relatively long period of time and, without delving into the merits of the case, I was not persuaded that there was any clear and unmistakable right of the Plaintiff that required the kind of urgent protection sought herein.

14. Accordingly I did not find any merit in the Plaintiff's application. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 17th day of December, 2019.

J.O. OLOLA

JUDGE