



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 312 OF 2016

KARIMA MWANGOMBE.....PLAINTIFF

VERSUS

1. JUHUDI WOMEN GROUP

2. MARY MBEGA

3. MBODZE MBURA

4. CHITSAKA MWADZOVA

5. KINGSFORD ROCHER.....DEFENDANTS

RULING

1. By an application dated 21st November 2016, the plaintiff Karima Mwangombe is seeking injunctive orders against the 5 Defendants sued herein to restrain them jointly and severally from wasting, alienating, selling, disposing, removing/destroying boundary fence, trespassing or in any other way dealing with the Plaintiff's land which he states forms part of Plot No. Kijipwa Settlement Scheme /96 situated within Kilifi County.

2. It is the Plaintiff's case that on or about 22nd December 2009, he bought a parcel of land measuring 100 x 40 metres situated at the said Settlement Scheme from Juhudi Women Group, the 1st Defendant herein for the sum of Kshs 100,000/= It is further the Plaintiff's case that the said sale was witnessed by Mary Mbega (1st Defendant), Mbodze Mbura (3rd Defendant) and Chitsaka Mwadzoza (4th Defendants) all who are the officials of the 1st Defendant.

3. The Plaintiff avers that sometime after he took possession of the portion of land he bought from the 1st Defendant, the 2nd, 3rd and 4th Defendant encroached thereupon and destroyed the developments the plaintiff had carried thereon without any reasonable cause. The Plaintiff concludes that he has since learnt that the reason for the said encroachment and/or destruction of his property is the fact that the portion of land he bought has since been resold to one Kingsford Rocher (the 5th Defendant herein) by the 1st to 4th Defendants.

4. In a Replying Affidavit sworn by Mary Mbega on behalf of the 1st to 4th Defendants and filed herein on 22nd March 2017, the Defendants state that the 1st Defendant first gave the Plaintiff a piece of its property on Kijipwa Settlement Scheme/96 and then sometime in 2009 agreed to sell to him another piece of land after the intervention of "many adversaries". The Defendants however contend that the agreement to sell the land to the plaintiff was later revoked after the plaintiff refused to finish payment and instead started encroaching further into the Defendants' land.

5. The Defendants deny that the plaintiff has ever been threatened with eviction. Instead they state that the Plaintiff has been given numerous "warnings of eviction" when he conducted himself in an aggressive manner by threatening the 1st Defendants' members and officials and encroaching upon its property.

6. The Defendants further aver that they were compelled to put up a structure to demarcate the boundary between their land and that of the plaintiff. The plaintiff however destroyed the structure forcing the Defendants to report the same to the police. They add that the plaintiff is currently facing criminal charges at the Shanzu Law Courts being Criminal Case No. 1065 of 2014.

7. In the circumstances, the 1st to 4th Defendants pray that the plaintiff's application be dismissed.

8. From the record, it would appear the 5th Defendant has neither entered appearance nor responded to the Plaintiff's application.

9. I have considered the Application and the replies thereto. I have equally considered the various submissions and authorities made and/or placed before me by the Learned Counsels appearing for the parties herein.

10. As Spry V.P stated in *Giella –vs Cassman Brown Company Ltd (1973) EA 358:-*

“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 be normally 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.”

11. Arising from the foregoing, it is imperative that this Court first and foremost conducts an inquiry to establish whether or not the Plaintiff has made out a prima facie case with a probability of success. In *Mrao –vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, the Court stated that:-

“a prima facie case in a Civil Application includes but is not confined to a “genuine and arguable case”. It is a case 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.”

12. A perusal of the material before me clearly reveals the fact that by a Sale Agreement dated 22nd December 2009, the Plaintiff purchased from the 1st Defendant a parcel of land measuring 100 x 40 metres situated at Kijipwa Settlement Scheme /96. The Agreement which is annexed to the Applicant's Supporting Affidavit as annexure KM 1 shows that the purchase price was Kshs 100,000/=. Out of this sum a total of Kshs 95,000/= is acknowledged by the 2nd – 4th Defendants as having been received as at the date of the Sale Agreement while the balance of Kshs 5,000/= was to be paid slightly over a month later on 7th February 2010. It would appear that the little balance notwithstanding, the plaintiff took possession of the land and commenced some activities thereon.

13. It is however apparent that some bad blood developed thereafter between the plaintiff and the 2nd to 4th Defendants and according to Mary Mbega in her Replying Affidavit, the agreement was revoked “after the plaintiff refused to finish payment for the consideration and started encroaching on their land. “According to the Defendants, “this necessitated the refund of the plaintiff's monies and the revocation of the Agreement”.

14. From the material placed before me, there was no evidence of when the said agreement was revoked and or the refund of the purchase price was done. Indeed contrary to the claim of refund, and while the Defendants deny in the Replying Affidavit that they intend to evict the plaintiff, I note at paragraph 12 of their Written Statement of Defence that they aver as follows:-

“ 12. The Defendants however aver, that due to the actions of the plaintiff, the Sale Agreement was revoked and the Kshs 100,000/= is currently being held in trust subject to his removal and/or eviction together with any structure thereon from the suit premises.”

15. From the foregoing, it is evident that the plaintiff finally paid in full the purchase price to the Defendants and that for some unclear reason, the Defendants consider the Sale Agreement revoked and intend the removal and/or eviction of the plaintiff from the Suitland.

16. The Plaintiff has through the affidavits filed herein demonstrated that he has since the purchase of the land put up permanent structures and resides upon the suit property. In *Nguruman Ltd –vs- Jan Bonde, Nelsen & 2 Others (2014) eKLR*, the Court of Appeal while expounding on the definition of what a prima facie case in a civil case is, had this to say:-

“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. We reiterate that in considering whether or not a ‘prima facie’ case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.”

17. I think this is one case where the plaintiff has demonstrated that he has a clear and unmistakable right which is threatened by violation by the Defendants/Respondents. This Court has an obligation to protect the Plaintiff's right. An interlocutory injunction will accordingly issue to restrain the Defendants as follows:-

An interlocutory injunction is hereby issued restraining the Defendants by themselves, servants, workmen and/or agents, or otherwise however from wasting, alienating, selling, disposing, removing/destroying the boundary fence, erecting new fences, threatening the plaintiff with harm and eviction, trespassing onto and/or in any other way dealing with the Plaintiff's property/portion forming part of Plot No. Kijipwa Settlement Scheme /96 within Kilifi County and to stop interfering in any other way with the Plaintiff's occupation and peaceful enjoyment of the suit property pending the hearing and determination of this suit.

18. The Plaintiff will also have the costs of this application.

Dated, signed and delivered at Malindi this 22nd day of February, 2018.

J.O. OLOLA

JUDGE