



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 43 OF 2017

MOHAMED JAMA NOOR.....PLAINTIFF

=VERSUS=

JOSEPH DANIEL MUHAMBI AND OTHERS.....DEFENDANTS

RULING

1. Before me is an application dated 1st March 2017. By this application, the Plaintiff Mohamed Jama Noor is seeking injunctive orders to restrain the 50 named Defendants herein from carrying out any new and/or further sub-division, demarcating and occupying, fencing and erecting concrete poles and/or carrying out further acts of construction on all that parcel of land known as Portion 509-Malindi Title No. LT. 33 Folio 310 File 3778 situated at Malindi containing by measurement 227.3 acres or thereabouts, pending the hearing and determination of this suit.

2. The application is based on a number of grounds stated in the body thereof that may be summarized as follows:-

i. That the Plaintiff is the registered proprietor of the suit property;

ii. That the Defendants have without the Plaintiff's consent 'purported' to construct houses and further develop and alienate the suit property to themselves.

iii. That by constructing several residential houses and developing and alienating the suit property, the Defendants have demonstrated an intention of subdividing and disposing the suit property to themselves; and

iv. That unless the orders sought are granted, the Defendants will continue to erect fences alienating and/or otherwise further developing the suit property and thereby exposing the Plaintiff to irreparable loss and damage.

3. In a Replying Affidavit sworn on their behalf on 16th March 2017 by Kazungu Katite, the 47th Defendants herein, the Defendants state that the suit property is their ancestral land which was transferred to them by their grandfathers. It is the Defendants' case that there exists more than 50 families in occupation and possession of the suit property where they have built permanent premises and cultivated and developed the land for more than 30 years.

4. The Defendants further aver that this application is maliciously filed with the sole intention to evict the

Respondents as they are already in occupation and any orders granted herein would have the effect of removing them from the suitland and thereby render them destitutes.

5. Arising from their contention that they have lived in the suit property for more than 30 years, the Defendants state that they are entitled thereto under the doctrine of adverse possession and that they had only failed to indicate their rights under that doctrine due to the fact that they were not in possession of the title deed in regard to the suit property.

6. I have considered the application before me and the Replying Affidavit. I have equally considered the submissions placed before me by the Learned Advocates for the parties.

7. The principles for the grant of an interlocutory injunction were settled in ***Giella –vs- Cassman Brown Company Ltd(1973)EA 358*** where Spry V.P. observed that:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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 a balance of convenience.”

8. Explaining the elements of a prima facie case in ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR***, the Court of Appeal stated that:-

“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 damages that may result from the invasion...”

9. In the matter before me, the Plaintiff avers at paragraph 3 of the Supporting Affidavit that despite his desire to develop the suit property and construct his matrimonial home thereon, the Defendants have over time encroached upon the suit property and have occupied and continue to be in illegal possession thereof. It is further the Plaintiff’s case that the defendants have sub-divided the land and proceeded to construct residential houses thereon with the sole aim of alienating the property and all efforts to have them vacate the property have so far borne no fruit.

10. On their part, the Defendants while admitting that they are in occupation of the suit property aver at paragraphs 4, 5 and 6 of the Replying Affidavit that the suit property is their ancestral land upon which they have resided for more than 30 years and have put up permanent residential houses. Photos of some of the constructions on the suit property have been attached both to the Plaintiff’s Supporting Affidavit as well as in the Defendants’ Replying Affidavit.

11. Arising from the foregoing it is apparent that the act the Plaintiff seeks to restrain by the orders sought herein had taken place a long time back and the Defendants are the ones presently in occupation of the property even though the Plaintiff holds the title thereto.

12. In view of the circumstances as explained by both parties, I think it would be unfair and unjust for this Court to grant the Orders sought herein as the same would have the effect of restraining the Defendants from entering or remaining in a place they consider their home before the Court can fully hear the circumstances under which they came to occupy the suit property and determine whatever entitlement they may have thereto.

13. Accordingly, I do not find merit in the application dated 1st March 2017. The same is dismissed.

14. The costs of the application shall abide the outcome of the suit.

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

J.O. OLOLA

JUDGE