



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 91 OF 2017

BENSON MAIMBO NYAMBU.....PLAINTIFF

VERSUS

1. ANDREW MWAKAMU

2. KHAMIS NDEGWA MZUNGU

3. PHILIP WAWERU.....DEFENDANTS

RULING

1. This is the Notice of Motion dated 14.3.2017. It is brought under Section 13 and 19 of the Environment and Land Court Act No. 19 of 2011, the Land Registration Act, No 3 of 2012, Land Act No 6 of 2012 and other enabling provisions of the law.

2. It seeks orders;

a. Spent

b. Spent

c. That pending hearing of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Respondents whether by themselves or their servants and/or agents from evicting, interfering with the Applicants quiet enjoyment, possession, occupation and use of the suit land, the Respondents be restrained from selling, alienating or in any other manner dealing with the suit plot situated in Kishamba “B” Group Ranch, Birikani area, Voi.

d. That costs of this application be in the cause.

3. The grounds are on the face of the application and are;

i. The applicant is the proprietor of the suit plot.

ii. The Respondents have without any colour of right forcibly occupied, possessed and are using portions of the Applicant’s suit plot.

iii. The Respondents have threatened to harm th Applicant if the Applicant goes to or uses the portions of the suit Plot which the Respondents are unlawfully occupying, possessing and

using.

iv. It is in the interest of justice that the orders of injunction be granted to preserve the Applicant's suit plot.

4. The application is supported by the affidavit of Benson Maimbo Nyambu, the Plaintiff/Applicant herein sworn on the 16.3.2017.

5. The application is opposed. There is a replying affidavit sworn by Philip Waweru, the 3rd Defendant/Respondent on the 15.6.2017.

6. On the 20.7.2017 it was agreed by the parties that the application be disposed by way of written submissions.

7. It is the Plaintiff/Applicants case that he the bona fide owner of the suit land. The Defendants are in possession and use of the suit land without the Applicant's/Plaintiffs authority. That his case has met all the requirements for grant of temporary injunction. That it is in the interests of justice that the suit land be preserved.

8. The 2nd and 3rd Defendants/Respondents submit that the Plaintiff/Applicant has not exhibited any document to show that he is the owner of the suit property. The Plaintiff's case does not meet the threshold for grant of temporary injunctions. That the Plaintiff is not in occupation of the suit property. Infact it is the 3rd Defendant who is in occupation.

9. I have considered the pleadings, the Notice of Motion, the supporting and for the affidavits and the annexures. I have also considered the replying affidavit and the annexures. I have considered the submissions on record. The issues for determination are;

a. Whether the Plaintiff/Applicant's case has satisfied the conditions for grant of temporary injunctions.

b. Who should bear costs?

10. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of *Giella –vs- Cassman Brown And Company Limited (1973) EA 358.*

11. In the case of *Mrao Limited –vs- First American Bank Limited And 2 Others (2003) KLR 125,* the court of Appeal gave a definition of what amounts to a prima facie case.

It stated;

“A prima facie in a civil application includes but is not confined to “a genuine and arguable case.” It is a case which in the material presented to the court, a tribunal properly directing itself will concludes that there exists a aright which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? The Plaintiff claims he is the proprietor of the suit land. The portion of land is not described. He said he brought the same from Hassan Hamisi. He did not exhibit any sale agreement nor does he state how much he paid for the portion of land.

13. One of the documents relied on by the Plaintiff shows that he bought a portion of and from one Hassan Hamisi who was not a member of Kishamba “B” Ranch.

In a letter dated 24.9.2015 to the Deputy Governor Taita Taveta County the Plaintiff is seeking that his portion be surveyed.

On the other hand the 3rd Defendant has exhibited sale agreement to show how that he purchased the portion of land.

14. I find that the Plaintiff has failed to demonstrate to the court that he has a prima facie case with a probability of success at the trial. He is not in occupation of the suit land.

He has failed to demonstrate that he is likely to suffer irreparable injury which cannot be compensated by an award of damages if these orders are not granted.

15. The issue of ownership and how each party acquired the suit land will be determined at the trial where each will present their evidence. The Plaintiff is directed to expedite the hearing of the main suit so that the issue of ownership can be determined once and for all.

16. All in all I find no merit in this application and the same is dismissed. The costs of the application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered at Mombasa on the 14th day of February 2018.

L. KOMINGOI

JUDGE

14/2/2018

Mr. Mwinyi: We pray for certified copies of ruling.

L. KOMINGOI

JUDGE

14/2/2018

Court: To issue.

Mention on 5.4.2018 for pretrial before the Deputy Registrar.

L. KOMINGOI

JUDGE

14/2/2018