



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 302 OF 2016

KENGA NGUMBAO MWARANDU & 3 OTHERS.....PLAINTIFFS

VERSUS

LEWIS KARISA KATANA.....DEFENDANT

RULING

1. By a Notice of Motion application dated 9th November 2016 the three Plaintiffs Kenga Ngumbao Mwarandu, Zawadi Kenga Mwarandu and Peter Kenga Ngumbao are seeking to restrain the Defendant Lewis Karisa Katana from entering and working on, alienating or in any manner whatsoever interfering with the Plaintiff's portions of land known as Plot Nos. 98 and 99 situated at Bofa, Kilifi pending the hearing and determination of the suit herein.

2. The Application is premised on a number of grounds stated on the body thereof as follows:-

i) That the suit property belongs to the applicants;

ii) That the Defendant obtained entry into the plots by trickery and retains the same by use of force;

iii) That the Defendant has started making developments of a permanent nature which shall forever alter the character of the property to the Applicants' detriment.

iv) That the Defendant does not stand to suffer any prejudice if the status quo is maintained pending the hearing and conclusion of the case.

3. In a Replying Affidavit sworn and filed herein on 13th March 2017, the Defendant avers that he has been living in and occupying a piece of land measuring 32 metres by 20 metres situated at Shingila B within Kilifi Township since February 2012. It is his further position that all the people living in that area are squatters and have equal rights as squatters.

4. The Defendant denies that he bought the said or any piece of land from the Plaintiffs. It is his case that the Plaintiffs have no title to the subject property and that it appears the subject property is owned by a private individual who has in fact caused the Defendant to be charged in Court for forcible detainer contrary to Section 91 of the Penal Code. He avers that having lived on the land for six years, the balance of convenience would dictate that he continues living thereon until the conclusion of this suit.

5. I have considered the Application and the response thereto. I have also taken into account the written submissions filed herein by the parties being the mode agreed on by the parties to canvass the application before me.

6. The principles for the grant of an interlocutory injunction such as the one sought herein are now well known. In ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012***, the Court of Appeal restated those principles as follows:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

a) Establish his case only at a prima facie level;

b) Demonstrate irreparable injury if a temporary injunction is not granted; and

c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

7. Accordingly, the first inquiry that this Court ought to make in determining whether the Applicants are deserving of the orders sought is to find out if the applicants have made out a prima facie case with a probability of success. Explaining what would constitute a prima facie case in a matter such as this, the Court of Appeal in the same case of Nguruman Limited (supra) proclaimed 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 rights 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...”

8. In the matter before me, the 1st to 3rd Plaintiffs are members of the same family-the 1st Plaintiff being the husband of the 2nd Plaintiff. The 3rd Plaintiff is their son. The 1st Plaintiff avers that he is a member of Shingila Self Help Group by virtue of which he came to own a plot which initially measured 150 by 50 metres. In the year 2012, the 1st Plaintiff sub-divided the same into three equal portions. He gave one portion to the 2nd Plaintiff and another to their son, the 3rd Plaintiff. It is the Plaintiff's case that they sold one of the plots to the Defendant who was their relative at the end of 2013 after one of their children passed his exams and they needed school fees.

9. It was the Plaintiff's case that they sold the portion belonging to the 2nd Plaintiff and the defendant took possession and built a structure thereon even before an agreement could be prepared. According to the Plaintiffs, the Defendant duped them that he was waiting for payment of his money from England where he used to work before he could pay. The Defendant thereafter built his structure on the land but refused to pay claiming he owned the land.

10. On his part, the Defendant merely asserts that he has been occupying the land since February 2012. He does not bother to explain how he came to occupy the land. Indeed he makes no reference to the Plaintiffs' averments on how he came to the land save to deny that he purchased any land from them.

11. Be that as it may, it is evident that there may no longer be any urgent necessity to restrain the invasion of what the Plaintiffs call their land as the Defendant has since entered the same built some structures therein and proceeded to occupy it. Given that the land in dispute is unregistered and that both parties lay some form of claim thereon, it would be unfair to restrain the party currently in occupation in the manner suggested herein, before a full hearing on the merits is done.

12. Given the nature of the dispute and the very possibility that the ownership can change upon the full determination of the dispute herein, it would be treading on very treacherous grounds for any party to continue developing and/or changing the character of the suit property while the dispute remains unresolved.

13. In the circumstances before me however I find no merit in the application dated 9th November 2016. The same is accordingly dismissed.

14. Each party shall bear their own costs of the application.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE