



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 314 OF 2016

ANAS HASSAN KHAMISA.....PLAINTIFF

VERSUS

AMANDA MARY SEEL.....1ST DEFENDANT

SULEIMAN RASHID ABDALA.....2ND DEFENDANT

RULING

1. By an Amended Notice of Motion dated 1st March 2017 the Plaintiff prays for the following:-

3. That this Honourable Court be pleased to issue a temporary injunction against the Respondents whether by themselves, their agents and/or servants, restraining them from blocking or preventing the Applicant, his servants and/or agents from entering or accessing his property being LR NO. 1513/127 situated in Takaungu Trading Centre in Kilifi District or interfering in any way with the peaceful and quiet possession of the Applicant pending the hearing of this suit.

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5. A temporary injunction to restrain the Respondents, their servants and/or agents from entering in and/or trespassing onto all that parcel of land known as LR No. 1513/127 pending the hearing of this suit.

6. A declaration that the access road which lies between LR No. 1513/391/126 on the one side and Group 1/57 on the other part is a public road unhindered entry and exit should be accorded to the Plaintiff, his agents and/or servants, members of the public and all public utility personnel, their workers, employees, servants and/or agents.

7. Order directing the Respondents to remove the metallic gate the 1st Respondent has erected blocking the Applicant from accessing his land or allow the Applicant access to his property by provision of keys to the gate or other means of opening the gate.

8. That the costs of this application be provided for.

2. The said application is supported by the annexed affidavit of Anas Hassan Musa Khamisa, the Plaintiff herein sworn on 1st March 2017 and a Further Affidavit sworn on 2nd June 2017 and is based on the

grounds inter alia that:-

- a) The Applicant is the registered proprietor as owner for an estate in fee simple of the property known as LR No. 1513/127 measuring 0.0335 Ha;**
- b) The land that the 1st Respondent has fenced off and put a metallic gate on includes the public access road and part of the Applicant's property thereby denying the Applicant access to his property;**
- c) On 16th November, the Applicant desirous of developing his property brought building materials to the land but could not access his property as the gate erected by the Respondents on the access road was locked;**
- d) That the Respondents unlawful acts are an infringement of the Applicant's right of use and enjoyment of his property and undermines his fundamental freedom of movement.**

3. In response to the application, the 1st Defendant/Respondent Amanda Mary Seel swore a Replying Affidavit on 13th December 2016 (before the application was amended) and a further one on 12th April 2017. The gist of the two affidavits are that the 1st Respondent is only but a tenant in the disputed parcel of land and that her landlord Suleiman Rashid Abdallar (2nd Respondent) is the one answerable for the issues raised in the application. The 1st Respondent avers that she is however aware that the contacts, discussions and altercations over the property started when one Hubu Seif, a cousin of the 2nd Respondent transferred the property in dispute to the Plaintiff/Applicant. She accuses the Plaintiff of being unnecessarily aggressive and hence contributing to the failure to settle the dispute.

4. In a Replying Affidavit sworn and filed herein on 2nd May 2017, the 2nd Respondent Suleiman Rashid Abdallah swears that the Applicant is not entitled to the orders sought having procured ownership of the disputed parcel of land through unlawful, unprocedural and fraudulent means. He avers that the land in question is part of their family's ancestral land and one Hubuu Seif Mohamed who purports to have sold the same to the Plaintiff cannot explain how she came to acquire the same for her exclusive use and without the knowledge of the family.

5. The 2nd Respondent states that he has lived in the suit property for five decades and that he is the one who issued a long-term lease to the 1st Respondent as an administrator of the property as a whole and further that both the Plaintiff and the said Habuu Seif Mohammed are also related to him and are aware of his status.

6. The 2nd Respondent avers that the said Hubuu Seif Mohammed acquired title to the property in an irregular and fraudulent manner and hence had no better title to pass to any other person and that therefore any transaction in respect to the subject property was illegal *ab initio*.

7. I have considered the application and the response thereto. I have equally considered the written submissions placed before me by the Learned Advocates for the parties herein.

8. As was stated by Spry VP in *Giella –vs Cassman Brown & Company Ltd (1973) 1EA 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 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 the balance of convenience.”

9. A consideration of the three conditions must at the very first instance commence with an inquiry as to whether the Applicant has established a prima facie case with a probability of success. As to what

constitutes a prima facie case, the Court of Appeal in *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others(2003) eKLR*, states as follows:-

“So what is a prima facie case? I would say that in civil case it is a case in 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.”

10. In the matter before me, while the 2nd Respondent contends that the Plaintiff’s title is irregular and fraudulent, it is not in contention that the Plaintiff is presently the registered proprietor of the subject property. As it were, unless and until it is proved that the Plaintiff acquired the said title in a fraudulent, irregular or corrupt manner as alleged, he remains the registered proprietor of the said parcel of land.

11. Section 24(a) of the Land Registration Act confers upon such a registered proprietor absolute ownership of the land which ownership includes all other rights and privileges attendant thereto. In my view, those rights include his right to unhindered access, ownership and quiet possession of the property. From the two Respondent’s affidavits herein, it is clear that they do not deny erecting the metallic gate which is blocking the Plaintiff’s access to his parcel of land. The Applicant has therefore established a prima facie case with a probability of success.

12. Having so found, I do not consider it necessary to consider the other two limbs of the conditions for the grant of an interlocutory injunction. As Maraga J (as he then was) stated in *J-M. Gichanga –vs- Co-operative Bank(2005) eKLR*:-

“My understanding of the Court of Appeal decision in the Giella Case is that the Court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for by an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the Court thinks that the Plaintiff has a fifty/fifty chance of success. However where going by material placed before it at an inter partes hearing of an application for injunction it appears to the Court that the Plaintiff has a strong case, like where it is clear that the Defendant’s act complained of is or may be unlawful, the issue of whether or not damages can be an adequate remedy for the Plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it.”

13. In the matter before me, I did not see anything from the 2nd Respondent to prove that the land in contention is family land and/or giving him authority to administer the so-called family land on behalf of the other family members. Blocking an access road to the Plaintiff’s land on the basis that the 2nd Respondent believes the title thereto was acquired in an irregular and fraudulent manner is arbitrary, unreasonable and likely to lead to a breach of the peace.

14. Accordingly, I find merit in the Plaintiff’s application. The same is allowed in terms of Prayers 3, 5, and 7 thereto. The Respondents have 21 days from the date hereof to comply with prayer No. 7 and to remove the gate blocking access to the Applicants premises. The Plaintiff will also have the cost of this application.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE