



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 214 OF 2017

1. HAMIDA OSMAN

2. ANWAR WALIMOHMAED JIWA (as the Executor of

the Estate of **WALIMOHAMED ISAAK JIWA**.....**PLAINTIFF**

VERSUS

MANGI CHARO YAA.....**DEFENDANT**

RULING

1. Before me for determination is a Notice of Motion application dated and filed herein on 2nd November 2017. The Plaintiffs/Applicants pray for orders that pending the hearing and determination of this suit, the Defendant/Respondent be restrained from entering upon, erecting any structure or carrying out any construction of any nature on the suit premises being all that parcel of land known as Kilifi/Mtondia/57.

2. The said application is supported by an affidavit sworn by Anwar Walimohamed Jiwa, the 2nd Plaintiff herein and is premised on the grounds:-

a) That the Plaintiffs are the executors of the Will of Walimohamed Issak Jiwa, the registered proprietor of a leasehold interest in the suit premises and are entitled to possession thereof;

b) That the Defendant has entered upon the premises unlawfully and has started to erect a structure thereon which act amounts to a trespass which is presently continuing;

c) That unless the Defendant is restrained, the Plaintiffs will not be able to have peaceful enjoyment of the suit premises and the estate of the said Mohamed Issak Jiwa will suffer irreparable loss and damage;

3. Responding to the said application, the Defendant Mangi Charo Yaa has sworn a Replying Affidavit filed herein on 27th November 2017 wherein he states that contrary to the Plaintiffs' allegations, he is the registered proprietor of the parcel of land described as Kilfi/Mtondia/57.

4. The Defendant avers that the grant initially issued by the Government to Mohamed Essak Jiwa on 11th July 1972 was subsequently surrendered to the Settlement Fund Trustees on 25th February 1981 and hence no title exists in the Applicants' name or their father's.

5. In addition the Defendant avers that contrary to the Plaintiffs claim that he entered the suitland recently, he has been living on the said property from time immemorial. It is therefore his case that he stands to be seriously prejudiced if this Court were to grant orders as it would amount to him being evicted from his home.

6. I have considered the application and the response thereto. I have also considered the detailed submissions and authorities placed before me by the Learned Advocates, Mr. Kamolo for the Applicants and Mr. Makaya for the Respondents.

7. The principles on which the Courts will grant an injunction were restated by the Court of Appeal in *Nguruman Limited –vs- Jan Bonde Nieleesen & 2 Others CA No. 77 of 2012(2014) ECLR* where the Court of Appeal stated that:-

“In an interlocutory injunction application, the applicant must 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.....”

8. As to what would constitute a prima facie case, Bosire J.A. in *Mrao Ltd –vs- First American Bank Ltd(2003) KLR 125* had this to say:-

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

....But as I earlier endeavored to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicants case upon trial. That is clearly a standard which is higher than an arguable case.”

9. In the matter before me, it is evident from the material placed before me that there are in existence two titles to the subject parcel of land. While the Plaintiffs hold a Certificate of Lease issued on 28th November 1974, the Defendant on the other hand has in his possession a Title Deed issued under the Registered Land Act (now repealed) on 29th August 2006. While the Plaintiffs aver that they have always had their Certificate of Lease showing the land is registered in their father’s name, the Defendant claims that the Plaintiffs had relinquished the leasehold interest in the land in or about 1981.

10. I think in the circumstances of this case where both parties have produced evidence of title to the same suit property and the court is yet to get an opportunity to consider which of the two titles is valid, it is incumbent upon this Court to consider the balance of convenience in deciding whether or not to grant an injunction.

11. In this regard, the Court notes that while the Plaintiff are seeking an injunction restraining the Defendant from entering the suit land, erecting, or constructing any structures thereon, it is evident from the material placed before me that the Defendant is already in the suit property and has erected thereon structures akin to residential houses. The Defendant himself avers that he has built a residential home on the suit property which he claims to have occupied “from time immemorial.”

12. Whatever period he entered and built the structures on the land, I think it would be unfair in the circumstances to grant orders barring him from entering a place he calls home. The issuance of such an order would amount to evicting the Defendant before this Court can interrogate the circumstances under which both parties acquired title to the land.

13. Accordingly I decline to grant the application dated 2nd November 2017. The same is dismissed.

14. In the peculiar circumstances of this case, each party shall bear their own costs.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

J.O. OLOLA

JUDGE