



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 161 OF 2017

JULIUS MWABONJE MURIMA

CHARO KAZUNGU MURIMA

ALLAN KAI MURIMA.....PLAINTIFFS/APPLICANTS

VERSUS

SWALEH ABEID.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 20th July 2017, the three Plaintiffs pray for an order of injunction to issue restraining the Defendant from trespassing, encroaching, harvesting salt, sub-dividing, selling off, building on, constructing upon, wasting, damaging or in any way dealing with an unregistered parcel of land situated at Kadzuhoni within Gongoni.
2. The application is supported by an affidavit sworn by the 1st Plaintiff Julius Mwabonje Murima in which he states, inter alia, that he is the legal owner of the said parcel of land having been in possession of the same since his late brother bought it in 1981. It is his case that the Defendants have recently been trespassing upon the land and harvesting salt therefrom. It is therefore his prayer that the Defendant be restrained accordingly.
3. The application is opposed. In a Replying Affidavit sworn by the Defendant Swaleh Abeid and filed herein on 13th October 2017, he avers that he bought the Plot in question which measures six acres on 8th March 1993 for a sum of Kshs 9,000/-. It is the Defendant's case that he was shown the boundaries of the Plot when he bought the same after which he took possession thereof.
4. It is the Defendant's case that he has all along had uninterrupted possession of the land and that sometime in 2006, he started salt harvesting therefrom for which purpose he dug salt ponds. It is his case that his land does not even border that of the Plaintiffs and he therefore fails to understand why the Plaintiffs have accused him of encroaching upon the land.
5. I have considered the application and the response thereto. I have equally taken into consideration the submissions of the Learned Advocates for the parties.
6. The Plaintiffs application is anchored on their claim that they are the legal owners of the suit property, described as an unregistered parcel of land situated at Kadzuhoni area within Gongoni location. It is their case that they have had possession of the said piece of land since the year 1981 when their late brother bought the same from one Katana Mkonge. The name of the brother described as "the late" at paragraph 2 of the 1st Plaintiff's Supporting Affidavit is not given.
7. However in support of their claim to the land, the Plaintiffs have annexed a copy of a Sale Agreement and a letter from the Assistant Chief Gongoni Sub-location. A perusal of the attachments reveals the name of the purchaser of the land as one Nelson Mwachilumo Mrima. It is not clear from the Plaintiffs documents when their said brother died and how if at all, the ownership of the property in dispute passed to them.
8. Be that as it may be, there was very little support in terms of documentation to the Plaintiffs claim to ownership of the property. Of particular note was the fact that while the plaintiffs claim to have owned the land since 1981 pursuant to a Sale agreement, the Sale Agreement attached as annexure "A1" to their Supporting Affidavit was executed by their late brother on 10th December 2015. Again, while the Plaintiffs contend that the parcel of land in dispute was bought vide the said Sale Agreement from one Katana Mkonge, none of the six sellers listed in the Sale Agreement goes by such a name.

9. Indeed annexure "A1" indicates that the Agreement drafted in Kiswahili was for the sale of "Birika Mbili za Chumvi kwa bei ya Kshs 200,000/-." The agreement does not specify the location, size and measurement of the said "Birika Mbili za Chumvi" and the Plaintiffs have not placed anything before me to show how or even if the reference to the said "Birika Mbili za Chumvi" can be construed to be a reference to the disputed parcel of land.

10. As it were, the threshold for the grant of interlocutory injunctions was long set in the celebrated case of *Giella –vs- Cassman Brown Ltd (1973) EA 358*. Those principles require that in an interlocutory injunction application such as the one before me, the applicant has to satisfy the Court that he has a prima facie case and that he stands to suffer irreparable injury unless the temporary injunction is granted.

11. A prima facie case was described by the Court of Appeal in *Mrao –vs- First American Bank of Kenya Ltd & 2 Others (2003)KLR 125* in the following words:-

“In civil cases a prima facie case is a case in which on the material presented to Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

12. In the instant matter, nothing was placed before me to demonstrate that the Applicants rights have been violated by the Respondent to warrant an explanation or rebuttal. I am therefore not satisfied that the Applicants have made out a prima facie case to warrant the grant of the Orders sought.

13. Accordingly, the application dated 20th July 2017 is dismissed with costs to the Defendant/Respondent.

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

J.O. OLOLA

JUDGE