



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 322 OF 2016

MOHAMED ARFUN MOHAMED

BARKE SAID SALIM.....PLAINTIFFS

VERSUS

LALI ATHMAN LALI ALIAS BABU MOHAMED.....DEFENDANT

RULING

1. By a Notice of Motion application dated 24th November 2016 and filed herein on 25th November 2016, the two Plaintiffs pray for a temporary order of injunction to restrain the Defendant from constructing on, entering into, encroaching on, or trespassing upon a parcel of land measuring 40 feet by 90 feet which is part of land Parcel No. 347 situated at Muyeye area of Malindi. They further seek to have those orders effected with the assistance of the Officer -in -Charge Malindi Police Station and the Defendant to be condemned to pay the cost of the application.

2. The Motion is supported by an Affidavit sworn by Mohamed Arfun Mohamed, the 1st Plaintiff herein and is based on the grounds listed on the body thereof as follows:-

- i. The Defendant started entering, trespassing and/or encroaching on the subject parcel of land on 15th November 2016 or thereabout;**
- ii. The subject parcel of land is wholly owned by the Plaintiffs and the Defendant has absolutely no colour of right(thereto);**
- iii. The Defendant is forcefully attempting to take over part of the Plaintiff's land and has wrongfully removed his fencing posts and began constructing a wall;**
- iv. The Defendant has by violent conduct threatened anybody who has tried to intervene;**
- v. There is a grave danger the Defendant will continue the said encroachment and may even alienate more of the Plaintiff's parcels of land or dispose of the same; and**
- vi. The Plaintiffs are bound to suffer gravely and irreparably.**

3. In response to the said Motion and by a Replying Affidavit sworn and filed herein on 10th April 2017, Lali Athman, the Defendant herein, avers that the Plaintiff's Motion is full of falsehoods and that the same should not be believed by anyone. According to the Defendant, the portion on which he is currently building once belonged to one Christopher Karisa Iha who in turn sold it to one Abdirehman Omar Ahmed alias Cheka. The Defendant's mother Asmaa Mohamed Sharif subsequently bought the suit property.

4. The Defendant further avers that the Plaintiffs only bought a portion of land next to his property from a person who did not even have any right of ownership thereof and at the time of fencing the same, the Plaintiffs encroached onto the Defendant's said property by two metres. It is therefore the Defendant's position that the application has no merit and that the same should be dismissed.

5. I have considered the Motion and the response thereto. I have equally considered the written submissions filed herein by the Learned advocates for the parties.

6. The principles on which the Courts will grant an injunction are well known. The Court of Appeal restated the same in *Nguruman Limited*

–vs- *Jan Bonde Nelsen & 2 Others, CA 77 of 2012* 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 case,**
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and**
- c. Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.**

7. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, a prima facie case was defined 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.”

8. In the matter before me, the Plaintiffs aver that they bought the parcel of land in dispute that measures 40ft by 90ft from one Bakari Nassir About by dint of a Written Agreement dated 19th August 2011 for Kshs 240,000/-. A copy of the said Agreement is annexed to the 1st Plaintiff’s Affidavit in support and it is their case that thereafter they built a residential house and stayed peacefully on the land until on or about 15th November 2016 when the Defendant trespassed thereon and started putting up a wall.

9. The Defendant does not deny moving into the land in November 2016 as stated by the Plaintiffs. It is however his case that the Plaintiffs bought land from a person who had no right to sell the land. That portion that the Plaintiffs bought was according to the Defendants, adjacent to a parcel of land measuring 42ft by 34ft which the Defendant’s mother one Asmaa Mohamed Shariff had on 7th June 2011 bought from one Abdrehman Omar Ahmed.

10. According to the Defendant, when the Plaintiffs were fencing the parcel of land they had bought, they encroached upon the portion that the Defendant’s mother had bought as aforesaid by two metres. The Defendant does not explain where his mother presently is and why it now falls upon him to protect the said land from the Plaintiffs encroachment. He however tactfully admits that he is putting up a fence on the section that the Plaintiffs had allegedly encroached upon.

11. It was not clear to me how the Defendant arrived at the conclusion that the Plaintiffs had encroached upon his mother’s parcel of land by two metres. Whatever the case, the Plaintiffs deny any such encroachment and have put in a supplementary affidavit from Bakari Nassir About, the man who they say sold the land to them way back in 2011 in which the Vendor explains how the Defendant’s new wall has encroached upon the portion that he sold to the Plaintiffs.

12. It is indeed apparent from the said Supplementary Affidavit that when the Vendor had on the said 15th November 2016 tried to dissuade the Defendant from putting up the wall, the Defendant became violent and assaulted the Vendor. The Defendant was subsequently on 25th November 2016 arraigned before the Chief Magistrate’s Court at Malindi on the Charge of Assault causing actual bodily harm contrary to Section 251 of the Penal Code. On 10th March 2017, the Defendant pleaded guilty to the Charge and was sentenced to a fine of Kshs 2,000/- in default of which he was to serve one month imprisonment.

13. In addition, the Plaintiffs have also filed a Supplementary Affidavit sworn by one Abdirehman Omar Ahmed. This is the man who the Defendant credits with selling the disputed portion of land to his mother. In the Affidavit filed on 10th May 2017, Abdirehman Omar Ahmed categorically states that the Defendant has wrongly enlarged the land that he sold to his (the defendant’s) mother and that the land claimed by Defendant now encroaches into the neighbouring plot by approximately 12ft by 45ft.

14. In light of the foregoing, I am satisfied that the Plaintiff has made out a prima facie case with a probability of success. I am equally satisfied that the Plaintiffs who are in occupation of the suit property stand to suffer great loss and damage unless the Defendant is stopped in his unsupported quest for territorial aggrandisement.

15. In the result, I am satisfied that the Plaintiffs application dated 24th November 2016 has merit. Given the Defendant’s past violent conduct, I think it is only reasonable that those orders be enforced by the Police as sought herein.

16. Accordingly the application is allowed in terms of Prayers Nos. 3 and 4 thereof. The Plaintiffs will also have the costs of this Application.

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

J.O. OLOLA

JUDGE