



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 34 OF 2018

PETER KALAMA.....1ST PLAINTIFF

ALBERT NZARO.....2ND PLAINTIFF

VERSUS

MWIDADI SAID CHIPHORO.....1ST DEFENDANT

CHENGO SAID CHIPHORO.....2ND DEFENDANT

AND

KAMLESHI LALIT DURGASHANKER PANDYA.....1ST INTERESTED PARTY

MINESH GOVIND HARJI NATHOO.....2ND INTERESTED PARTY

RULING

1. Before me for determination is a Notice of Motion application dated 8th February 2018 and filed herein on 9th February 2018. The 1st Plaintiff Peter Kalama with authority from the 2nd Plaintiff prays for an order of injunction to issue against the two Defendants restraining them from entering, constructing structures of any nature or in any way whatsoever interfering with the Plaintiffs ownership of the suit property known as Kilifi/Kadzonzo/Madzimbani/146 pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff is based on the grounds that the suit property belongs to the 2nd Plaintiff. Despite full knowledge of that position, the Plaintiffs accuse the Defendants of entering the land and putting up structures thereon. The said acts of the Defendants have deprived the Plaintiffs of their rights over the suit property hence this suit and the application.

3. Responding to the said application, the 2nd Defendant Chengo Saidi Kivoro in a Replying Affidavit filed herein on 27th February 2018 accuses the Plaintiffs of material non-disclosure and seeking to deliberately mislead the Court. The Defendants aver that while indeed the Plaintiffs are the registered owners of Plot No. Kilifi/Kadzonzo/Madzimbani 146, the Defendants are the registered owners of Plot No. Kawala "B"/1373(Original Number Kawala "B" 914).

4. It is the Defendants' case that the original Plot No. Kawala 'B' 914 aforesaid and the Plaintiffs' parcel of land border each other at some point but the two parcels of land are creations of two different adjudication Sections. While the Plaintiff's land is registered under Kawala/Kadzonzo/Madzimbani Adjudication Section, the Defendants contend that their own parcel arises from and is registered under Kawala "B" Adjudication Section.

5. The Defendants further aver that they sub-divided their original parcel of land into two plots, being Plot No. 1372 and 1373. Thereafter they sold Portion No. 1372 which is the land bordering the Plaintiffs parcel of land to one Kamlesh Durgashanker Pandya and Minesh Govind Harji Nathoo. The Defendants therefore accuse the Plaintiffs of being confused about their Plot's boundary and deny trespassing thereon in any manner/whatsoever.

6. I have considered the application herein, the rival affidavits and the oral submissions made before me by the Learned Advocates for the parties. The principles for the grant of a temporary injunction were settled in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*. 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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

7. In the matter before me, the Plaintiffs accuse the Defendants of wrongfully entering upon their parcel of land and putting up structures thereon. It is further their case that the Defendant's entry into their land was without permission and that the act of entry has since deprived the Plaintiffs of their right to the property which they state they acquired lawfully. It is not clear from the Supporting Affidavit of the 1st Plaintiff when the alleged entry of the Defendants occurred and/or what sort of structures the Defendants have erected on the disputed parcel of land.

8. A perusal of the Plaint filed at the same time with the application however sheds some light on when the alleged encroachment occurred. At paragraphs 6 and 7 of the Plaint, the Plaintiffs plead as follows:-

“6. Sometimes early 2015, the 1st Defendant trespassed onto the Plaintiff's land, cut down vegetation and built structures without the Plaintiff's permission. The matter was reported to the area Chief. When called upon, the 1st Defendant admitted he was on the wrong and he was asked to pay a penalty of Kshs 1,000/-. He has not paid to date.

7. Later on the 15th October 2015 or thereabout the 1st and the 2nd Defendant with people unknown to the Plaintiffs entered and made trenches and laid bricks on a portion of the Plaintiffs land without permission, as a result a complaint was made to Mariakani Police Station where the Defendants were asked to produce documents of ownership or they desist from trespassing onto the Plaintiffs land. After such a long time waiting to be called at Mariakani Police Station, the Defendants have now (2018) put up holes in readiness to fence off the portion.”

9. The Defendants on their part deny the Plaintiffs accusations. Of significance is their statement that their own parcel of land originally known as Kawala “B” 914 bordered the Plaintiff's land. According to the Defendants, they sub-divided the parcel of land into two portions and sold the portion bordering the Plaintiffs land to two individuals who are not parties herein.

10. The Defendants have annexed to their affidavits a copy of a Mutation Form showing that indeed LR No. Kawala ‘B’ 914 was on or about 15th February 2016 sub-divided into two with the resultant portions being new Parcel Numbers 1372 and 1373. They have equally annexed a title deed issued on 11th October 2016 jointly to Kamlesh Lalit Durgashakanker Pandya and Minesh Govind Harji Nathoo for the portion Kawala “B”/1372.

11. From the material placed before me, it is evident that the said Kawala “B”/1372 is the land that borders the suit property. I am accordingly persuaded by the Defendants arguments that they have nothing to do with the Plaintiffs parcel of land having relinquished their entitlement to the portion bordering the Plaintiffs land some two years before this suit was filed.

12. As it were, the Plaintiffs have not annexed any survey report or any other evidence to prove any encroachment on their portion of land. The result is that I do not find any merit in the Plaintiffs application.

13. Accordingly the application dated 8th February 2018 is dismissed with costs to the Defendants.

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

J.O. OLOLA

JUDGE