



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 244 OF 2017**

**KWENJA BERAU KINU ..... PLAINTIFF**

**VERSUS**

**BEBMAN KALONGO DENA..... 1<sup>ST</sup> DEFENDANT**

**ROBERT RAU KALONGO (Wrongly sued as**

**GEORGE RAU KALONGO ..... 2<sup>ND</sup> DEFENDANT**

**VICTOR DENA KALONGO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application dated 12<sup>th</sup> October 2017, Kweja Berau Kinu(the Plaintiff) prays:-

*c) That an order of injunction be issued restraining the Defendants, either by themselves, agents and/or any other person howsoever claiming through them from further evicting, threatening to erect, developing, leasing, advertising for leasing, trespassing and/or in any way whatsoever interfering with the Plaintiff's ownership of LR No. Buni/Kisimani/561(the suit property) pending the hearing and determination of this suit;*

*d) That an order of demolition be issued to demolish all the offending structures currently erected by the Defendants on the suit property;*

*e) That the OCPD Rabai Police Station do provide security during the said demolition for the sole purpose of maintaining law and order; and*

*f) That (the) costs of this Application be provided for.*

2. The application is supported by the Plaintiff's affidavit and is premised on the grounds that:-

*i) The Plaintiff is the registered and/or beneficial proprietor of the suit property;*

*ii) The Defendants have unlawfully and illegally invaded the suit property and commenced construction thereon without any colour or right;*

*iii) The Plaintiff is apprehensive that he stands to loose the property and his right to own property unless the Defendants are stopped; and*

*iv) In the circumstances, it is in the best interest of justice that the orders sought are granted.*

3. In response to the said application, the Defendants have on 21<sup>st</sup> February 2018 filed Grounds of Opposition thereto stating as follows:

**1. That the application is belated, ill-conceived, misinformed and tainted with mala fides for the reasons that:-**

***i) It seeks orders that are untenable in the circumstances of this case;***

ii) *It is vexatious and does not meet the threshold requirements for the grant of the orders sought;*

iii) *It is bad in law and an abuse of the Court process in light of the Rules of Practice and Procedure;*

iv) *It bears ground not supported by any facts as deponed to in the Supporting Affidavit;*

v) *It is fatally defective.*

**2. That the Application is therefore grossly incompetent, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the Court process.**

**3. That it is therefore only in the interest of justice that the Plaintiff's said Application be dismissed with costs to the Defendants.**

4. The principles on which the Courts will grant an injunction are now well known. The Court of Appeal restated those principles in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others, C.A. No. 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 level;**

**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.**

5. 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.”**

6. Considering the facts of the case in light of the principle in the *Mrao Case (Supra)*, it is evident that the Plaintiff herein is the registered proprietor of all that property comprised in Title No. Buni/Kisimani/561. He accuses the respondents of invading the said parcel of land and commencing construction thereon.

7. The Defendants/Respondents have not controverted the Plaintiff's assertions. Instead, they have come up with generalized and generic Grounds of Opposition claiming the Plaintiff's application is ill-conceived, grossly incompetent, fatally defective et al. Nothing in the said, Grounds of Opposition filed herein on 1<sup>st</sup> February 2018 addresses the specific accusations made against them by the Plaintiff.

8. In particular, the Defendants do not deny that they have commenced construction on a parcel of land that belongs to the Plaintiff. I am satisfied that if that construction and any other infringements by the Defendants are not stopped, the character of the suit property may change drastically to the detriment of the Plaintiff/Applicant.

9. In the circumstances and contrary to the Defendant's denials, I am satisfied that the Application dated 12<sup>th</sup> October 2017 has merit. The same is allowed with costs to the Plaintiff.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of October, 2018.**

**J.O. OLOLA**

**JUDGE**