



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 222 OF 2017

ARBI ALI MOHAMED MUSSANI.....PLAINTIFF/APPLICANT

VERSUS

ALFRED MABEYA MOKAMBA.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is an application dated 13th November 2017 but filed herein on 14th November 2017. By the said application, Arbi Ali Mohamed Mussani, the Plaintiff herein prays for a temporary order of injunction restraining the Defendant from further constructing, entering and remaining on Plot No. 219 Malindi, carrying on any business on the said property or interfering in any way with the Plaintiff's proprietary rights thereon pending the hearing and determination of this suit.

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

a) The Plaintiff is the registered owner and proprietor of Plot No. 219 Malindi;

b) The Defendant has entered into the property and commenced construction without any authority; and

c) Unless restrained the Defendant will continue with his unlawful activities thereby wasting the property to the detriment of the Plaintiff.

3. In a Replying Affidavit filed herein on 10th January 2018, Alfred Mabeya Mokamba, the Defendant herein asserts that it is doubtful that the Applicant is the registered owner of the said Plot as he has failed to exhibit the grant of letters of administration that issued from Succession Cause No. 70 of 1997.

4. It is the Defendant's case that contrary to the Plaintiff's claims that he has invaded a portion of Plot No. 219 Malindi, he in fact bought one acre of land that was hived from the said Plot from one Ali Ngoba Rua for Kshs 300,000/- on 3rd October 2017. The said Ali Ngoba Rua had occupied his Portion of the said Plot 219 since time immemorial.

5. The Defendant avers that he has since commenced construction of a permanent building on the land and the Criminal Case pending against him in the Lower Court is a scheme hatched at the instigation of the complainant for the purpose of intimidating him and harassing him to abandon the project. The Defendant concludes that there are more than 300 inhabitants on the said parcel of land and he does not understand why the Plaintiff who according to him relies on forged documents has not sued the others.

6. I have considered the application and the responses thereto. I have equally considered the submissions filed herein by the Learned Advocates for the parties.

7. As was stated by Spry V.P in the celebrated case of *Giella –vs- Cassman Brown & Company Ltd(1973) EA 358:-*

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

8. Arising from the foregoing, this Court must first satisfy itself whether or not the Plaintiff has made out a prima facie case to warrant the grant of the orders sought. As was stated by the Court of Appeal in *Mrao Ltd –vs- First American Bank of Kenya Ltd (2003) eKLR:-*

“...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 the Applicant’s case upon trial....It is a case 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 from the latter...”

9. In the matter before me, the Plaintiff avers that he is the proprietor of the suit property. In support of his case, he has provided copies of an Assent showing that the suit premises were transferred and vested upon him by the Executors and Trustees of the Estate of the late Haji Adam Haji Ibrahim who was previously registered as the owner of the said Plot No. 219, Malindi. The Defendant however casts aspersions on the Plaintiff’s title and avers that given time, he will be able to prove that the documents the Plaintiff relies on are nothing but forgeries. It is further his case that he bought his one acre Portion from a 72 year old man who had lived on that Portion of the Plot since time immemorial.

10. As it were, Section 24(a) of the Land Registration Act provides that:-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

11 At the same time, Section 26(1) of the same Act binds this Court as follows:-

“A Certificate of Title issued by the Registrar upon registration...shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.....and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

12. In the matter before me, nothing has been placed before me to warrant a conclusion that the title exhibited by the Plaintiff herein was acquired by fraud or that it was acquired in a manner that was illegal, unprocedural or tainted with corruption.

13. The Plaintiff has also exhibited approvals for development of the said Plot No. 219 and as the Defendant admits that he had embarked on the process of putting up a permanent structure on the Portion that he purports to have bought, I am satisfied that the same will lead to wastage of the suit property and thereby cause irreparable loss and damage to the Plaintiff whose development plans shall be rendered useless.

14. In the circumstances, I am satisfied that the Plaintiff has made out a prima facie case with a probability of success at the trial herein. The application dated 13th November 2017 is accordingly allowed in terms of Prayer No. 3 thereof with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE