



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 203 OF 2015

STEPHEN MUTURI WANGONDU.....PLAINTIFF

=VERSUS=

JAPHETH NOTI CHARO.....DEFENDANT

R U L I N G

1. This matter was consolidated with Malindi ELC No. 194 of 2015.
2. In this matter, the Plaintiff, Stephen Muturi Wangondu, filed an Application dated 9th November, 2015 in which he is seeking for the following injunctive orders:-
 - (a) **THAT thereafter an injunction order to issue restraining the Respondent, his servants, agents, assigns or his group of hooligans and extortionist cartel or anybody acting under his behest or command from interfering with the Plaintiff and his property referenced as Plot 4162-Malindi or in any way or manner interfering with the activities carried out in the said property or the undertaking of development thereon, in the first instance and thereafter until the hearing and determination of this suit.**
 - (b) **Costs be provided for.**
3. The Plaintiff's Application is premised on the grounds that the Plaintiff is the registered owner of L.R. No. 4162, Malindi (the suit property) and that in November, 2015, the Defendant decided to remove the barbed wire fence around his property and substituted it with a block fence.
4. According to the Plaintiff's Affidavit, he purchased the suit property from Tasneem Aziz Master on 9th May, 2011.
5. Although the Defendant filed an Application dated 17th November, 2015 seeking for an order to strike out this suit for being sub-judice Malindi ELC No. 194 of 2015, the said Application was rendered superfluous when the parties agreed to consolidate the two suits.
6. In his application dated 16th October 2015, in Malindi ELC case No. 194 of 2015, the Defendant herein, Japhet Noti Charo, sought for the following orders:-

(a) THAT a temporary injunction be issued restraining the Defendant/Respondent by himself, his agents, servants, workmen, legal representatives or any other person claiming interest through him from trespassing, entering, remaining, constructing, alienating, working on or dealing with the suit property known as M5 including the portion where the Defendant/Respondent is currently constructing a perimeter wall within plot M5 in any manner whatsoever pending the hearing and determination of this Application inter-partes.

(b) THAT upon inter-partes hearing, an injunction be issued in terms of prayer (2) above pending the hearing and determination of the suit.

(c) THAT the O.C.S Malindi Police Station to ensure compliance of the Orders herein.

(d) THAT costs to this Application be provided for.

7. The Defendants Application is premised on the ground that the Defendant is a beneficial owner of all parcel of land known as M5 including a portion where the Plaintiff is currently putting up a perimeter wall; that the Plaintiff has trespassed into his land and that the Plaintiff is putting up a perimeter wall.

8. This Ruling is therefore in respect to the two Applications.

9. The Plaintiff's advocate submitted that the Defendant never served the Plaintiff with the proceedings in ELC No 194 of 2015; that by the time the Plaintiff filed this suit, he had not been served with proceedings in ELC No. 194 of 2015 and that the Plaintiff's Application in this matter should be amended.

10. Counsel submitted that before the suit property was registered in favour of the Plaintiff, it had been possessed by different persons and not the Defendant; that the Plaintiff is the registered owner of the suit property and that under section 26 of the Registration of Lands Act, the production of a title is prime facie evidence of ownership.

11. The Plaintiff's counsel submitted that the Defendant has admitted in his Complaint in ELC Case No. 194 of 2015 that numerous people occupy the so called M5; that no map has been produced to show the extent of plot M5 and that this case is hopelessly weak.

12. The Defendant's counsel submitted that the Plaintiff failed to disclose that there exists another suit being ELC No 194 of 2015; that the Plaintiff was served with the pleadings in ELC No. 194 of 2015 on 30th October, 2015 and that the suit is sub-judice.

13. Counsel did not submit on the merits of the Plaintiff's Application dated 9th November, 2015 or his Application dated 16th October, 2015.

14. As I have already observed above, the Plaintiff's and the Defendant's counsel entered into a consent on 18th April, 2016 and had the two suits consolidated. Consequently, the issue of this suit being sub-judice does not arise

15. In any event, I have perused the Complaints in ELC No. 194 of 2015 and in this matter.

16. In this matter, the Plaintiff's claim is in respect of land known as L.R. No. 4162 -Malindi while in ELC case No. 194 of 2015, the Defendant's claim in that matter is for land known as M5.

17. It cannot therefore be said on the face of the pleadings; that the two parcels of land are one and the same.

18. Consequently, the Plaintiff herein was entitled to file a separate suit considering that he is referring to land which is different in description from the land that has been pleaded in ELC case No. 194 of 2015 by the Defendant herein.

19. If the Defendant's case is that the two parcels of land are one and the same, then that assertion has not been captured in his Plaintiff.

20. The Plaintiff has annexed on his Affidavit a Grant for L.R.NO.4162 that was issued to Malindi General Engineering Works Limited on 25th June, 1987. The Grant shows that the land was transferred to numerous people, until 9th September, 2011 when it was transferred to the Plaintiff.

21. I have perused the Deed Plan annexed on the Grant. The said Deed Plan does not show that the suit property was a sub-division of land known as M5.

22. The Defendant has not availed any evidence to show that the Grant that has been exhibited by the Plaintiff is a forgery. Indeed, there is no claim by the Defendant seeking to nullify the said Grant.

23. In view of the failure by the Defendant to produce evidence to show that he has a title, or documents to show that land known as M5 exists in the records of the Ministry of Lands, and in the absence of any evidence to show that the title that the Plaintiff is relying on is a forgery, I find and hold that the Plaintiff has established a Prime facie case with chances of success.

24. Unless the injunction order is issued in respect of L.R. No. 4162, the Plaintiff is likely to suffer irreparable damage that cannot be compensated in damages.

25. I say so because the Defendant has threatened to bring down the perimeter wall that the Plaintiff has put up thus making him not only vulnerable in losing the land to third parties, but incur further expenses of putting up another wall in the event his suit succeeds.

26. For those reasons, I allow the Plaintiff's Application dated 9th November, 2015 as prayed and dismiss the Defendant's Application dated 16th October, 2015 with costs.

Dated, signed and delivered in Malindi this 3rd day of February, 2017.

O. A. Angote

Judge