



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.261 OF 2016

EDWARD FURHA NZARO.....PLAINTIFF/APPLICANT

-VS-

JAMAL SALAD ABDILLE.....DEFENDANT/RESPONDENT

RULING

This is the Notice of Motion dated 15th September 2016. It is brought under Order 40 Rules of the Civil Procedure Rules Section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act.

It seeks orders;

1. Spent

2. Spent

3. THAT temporary injunction order do issue against the defendant either by himself or his agents and/or employees and/or the dependants or otherwise from constructing, transferring, offering for sale, leasing, rent, subletting for rent, changing the property and/or interfering and/or otherwise dealing in any other manners however with the portion of land measuring 30 feet by 70 feet on plot NUMBER 228/V/MN JOMVU (MAJENGO MAPYA) pending the hearing and determination of this suit.

4. THAT costs of this application be provided for.

The grounds are on the face of the application. The plaintiff leased a portion of land measuring 30ft by 70ft a plot **NUMBER 228/V/MN JOMVU (MAJENGO MAPYA)** and took possession.

That the defendant invaded the suit property and started construction of permanent building without any consultation with the plaintiff or the lessor.

The application is supported by the Affidavit of Edward Furaha Nzaro the plaintiff herein sworn on the 15/9/2016.

The application is opposed. There is a Replying Affidavit sworn by Jamal Salad Abdille the defendant herein on 19.10/16.

When the application came up for hearing on 2/11/16 it was agreed by both parties that the application be disposed of by way of written submission.

Both counsels then filed submissions. In their written submissions counsel substantiated their client's respective positions stated in their respective affidavits.

I have considered the pleadings, the application supporting affidavit and the annexures, submissions of counsel and the authorities cited.

The issues for determination are;

1. Whether the plaintiff/applicant made out a good case to warrant the orders sought.

2. Who should bear the costs of this application.

I have considered the facts that have emerged and the legal principles applicable.

The principles were laid down in the precedent setting case of **GIELLA –VS- CASSAMAN BROWN (1973) EA 358**

First the applicant must show a prima facie case with a likelihood of success.

Secondly it should be shown that the applicant is likely to suffer an injury which cannot be adequately compensated by way of damages if the injunction is not granted.

Finally, that if the court is in doubt it should decide on a balance of convenience.

It is the plaintiff's case that he leased the suit property he has annexed the lease agreement between Hamza Abdalla and himself and one Maurine Awuor Okuon. The same is dated 9/9/2014 and is marked as annexure A-1. He has also annexed a RTGS Money Transfer of Kshs.400,000.00 dated 11/8/2014 and a receipt of for Kshs.100,000.00. also annexed and marked A-2 are photocopies of newly constructed houses.

It is the plaintiff's contention that he leased the suit property and that he has made out a good case.

He also states that he will suffer irreparably if the orders on injunction are not granted. He risks losing the portion he paid for.

The defendant on the other hand contends that the said portion was let to his wife Hawa Dere Mohammed on 2/7/2009 who was to pay ground rent of Kshs.500.00 per month.

I have seen a copy of the handwritten tenancy note marked as annexure JAS-1. The same does not state the description of the portion being let. There is also no evidence of payment.

All in all, I find that the parties will have an opportunity to prove their claims during the hearing.

Meanwhile I find that there is need to preserve the suit property pending the hearing of the suit. Failure to preserve may result in the plaintiff being prejudiced as he has paid for the said portion.

I find that the plaintiff has made out a good case. I find the application herein to have merit and I grant the orders sought namely;

1. THAT an order of temporary injunction do hereby issue against the defendant either by himself or his agents and/or employees and/or third parties or otherwise from constructing, transferring for sale, leasing, subleasing, letting rent, subletting for rent, charging the property and/or interfering and/or otherwise dealing in any other manner however with the

portion of land measuring 30 feet by 70 feet on plot NUMBER 228/V/MN JOMVU (MAJENGO MAPYA) pending the hearing determination of this suit.

2. THAT costs of this application do abide the determination of the main suit.

L. KOMINGOI

JUDGE

26/4/2017