



PUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 250 OF 2016

ISAAC KALELI NZAO.....PLAINTIFF/APPLICANT

=VERSUS=

SAMUEL KARANI.....DEFENDANTS/RESPONDENT

R U L I N G

1. The application before me is a Notice of Motion dated and filed on 21st September 2016. The application expressed to be brought under Order 40 Rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeks, inter alia, the following Orders: -

(i)

(ii) THAT the defendant either by himself, agents, servants, employees or any other person whomsoever acting for or on his behalf be restrained by way of temporary injunction from trespassing, entering upon, remaining thereon, constructing, or erecting any structure(s), building(s) or adversely dealing with the Plaintiff/Applicant's Portion of land comprised in Plot No. 20 Weru Group Ranch pending the hearing and determination of this application or further orders of this Honourable court.

(iii) THAT the Defendant either by himself, agents, servants, employees or any other person whosoever acting for or on his behalf be restrained by way of a temporary injunction from trespassing, entering upon, remaining thereon, constructing or erecting any structure(s), building(s) or adversely dealing with the Plaintiff's Portion of land comprised in Plot No. 20 Weru Group Ranch pending the hearing and determination of this suit or further orders of this Honourable Court.

2. The application is premised on several grounds and is anchored on the Supporting Affidavit sworn by the Plaintiff/Applicant Isaac Kaleli Nzao on 21st September 2016. The crux of the Plaintiff's case is that sometimes in the year 1987, he became a member of Weru Group Ranch and was thereupon allocated 2 portions of land which were then registered in the name of his wife one Bessie Mwaka Kaleli(now deceased) upon payment of the sum of Kshs 1,400. On or about 19th August 2016, he discovered that the defendant had encroached on the land earlier allocated to him and had commenced construction of a permanent house thereon. He is accordingly seeking the intervention of this court to restrain the defendant/Respondent from further other interference with the land.

3. On his part, the Respondent Samuel Karani has opposed the Plaintiff's application through a Replying Affidavit sworn on 10th October 2016. The gist of the Respondent's Affidavit is the averment that he is the legal owner of the parcel of land measuring approximately 2 acres which he states he purchased from one Charo Mweni Mramba a.k.a. Ali Tambo for Kshs 50,000/. It is his case that he has learnt from the Area Chief and other community members that the sum of Kshs 500/ mentioned in the Applicant's Affidavit was for membership of the Group Ranch and whoever desired to purchase was compelled to pay a sum of Kshs 700/ for boundary marking expenses (called chororo). Thus the money paid by the Plaintiff was not for purchase of plots but for marking boundaries.

4. I have perused the application and the Supporting Affidavit. I have also considered the Replying Affidavit filed by the respondent in person together with the rival submissions filed by the parties.

5. In the precedent setting case of *Giella-vs- Cassman Brown (1973) EA 358*, the conditions for the grant of an interlocutory injunction were settled as follows: -

“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.”

6. Has the Plaintiff made out a Prima Facie case with a probability of success? In the case of *Mrao -vs- First American Bank of Kenya Ltd & 2 others (2003) eKLR 125*, a Prima facie case was described by the Court of Appeal as follows: -

“A prima facie case in a civil application includes but it is not confined to a genuine and arguable case. 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 or rebuttal from the latter....”

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 success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

7. In *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others (2014) eKLR(Civil Appeal No 77 of 2012)*, the Court of Appeal further proclaimed that:

“The party on whom the burden of proving a Prima Facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

8. In the present case it is the Plaintiff's case that he was allocated 2 portions of land by Weru Group Ranch, upon payment of a membership fee of Kshs 500/ and the sum total of Ksh 1,400/ for the 2 portions which are said in the Plaint to be measuring approximately 24 acres. Other than a receipt of Kshs 500/ issued on 7/3/1996, there is nothing else in the file to show that the Plaintiff purchased the portions of land from Weru Group Ranch and/or the measurements thereof. Indeed, while the Plaint indicates that the suit property measures approximately 24 acres, the Witness Statement of one Isaiah Furaha Kazungu in support of the Plaintiff's case indicates that the land in issue measures 200m x 280m.

9. At paragraph 4 of the Plaint, the Plaintiff states that he lives with his large family on the suit land where his matrimonial home is situated. However, in the affidavit sworn in support of the application, I find no mention of the suitland. Indeed, in the affidavit and his own statement filed herein, the Plaintiff depones that he resides in Lango Baya town and only makes what he terms as “Spasmodic” visits to the said portions of land. It was during one such visit on 19th August 2016 that he states he discovered that the defendant had encroached on his land and commenced construction of a permanent house.

10. On his part, the Defendant states that he bought the land which according to him measures 2 acres from the former owner at a sum of Kshs 50,000/-. In support of his case, he has annexed an agreement of sale dated 25/11/2015 between himself and the vendor-one Charo Mweni Mramba. While the Defendant himself does not say much about the land in aid of his case, it is not in dispute that he is in possession of at least some portion thereof in which he has constructed or is in the process of constructing a permanent house.

11. I am alive to the fact that the receipt for Kshs 500/- issued by Weru Group ranch is in the name of the Plaintiff's wife who is said to be deceased. I am not satisfied that the applicant has presented a prima facie case that either himself or the estate would be deprived of the property. The Applicant has not properly or otherwise demonstrated that he has a legal or equitable right that should be protected by this court.

12. The grant of temporary injunctions used to be a small step during the progress of the suit or proceedings towards the presentation of the subject matter. Today, the society in general and the Judiciary in particular is passing through a very difficult time when the moral values are at their very lowest ebb and there does not appear any prospect of this situation coming to an end in the near future. The dilemma of the court is that initially it has to treat the truth and falsehood at par and has to give the same equal treatment, protection and hearing until it concludes its investigation to find out which is right or wrong, false or true. This process takes a long time during which by some interim measure the subject matter of the dispute between the parties has to be preserved, and it is this anxiety for preservation of the property on the part of the court which is sometimes misused and abused by the side which has come before the court with a wrong or false case or a doubtful case which had been filed only to take a chance. This court must accordingly be very cautious, alert and vigilant while granting temporary injunctions during the progress of the suit or proceedings.

13. In the present circumstances, I think it is only a full hearing that can ventilate all the issues being raised by the parties. The Plaintiffs application dated 21st September 2016 is dismissed. Each party to bear their own costs.

Dated, signed and delivered in Malindi on 7th day of April 2017.

J. O. OLOLA

JUDGE