



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

ELC 149 OF 2016

GABRIEL KAZUNGU KENGA.....PLAINTIFF

=VERSUS=

ISSA KIM KINYUA.....DEFENDANT

RULING

1. Before me is an application dated 13th June 2016. The same is brought under Order 40 Rules 1 and 2 and Order 51 Rule 1 as well as Sections 1A, 1B and 3A and 63 (e) of the Civil Procedure Act. The application prays for orders: -

1. (SPENT)

2. (SPENT)

3. THAT this Honourable Court be pleased to issue temporary Injunction restraining the Defendant and/or his agent and/or his employee and/or his servant or any other person(s) acting on the Defendant's behalf from entering (sic) structure any structures on the plaintiff's portion of land measuring approximately **50ft by 50ft on unsurveyed parcel of land situated at Mnarani within Kilifi county and/or dealing with the suit premises in any manner, whatsoever detrimental to the rights and interest of the Plaintiff/Applicant herein, pending the hearing and determination of this suit.**

4. THAT costs of this application be provided for.

2. The application is supported by an affidavit sworn by Gabriel Kazungu Kenga on 13th June 2016. It is the Plaintiff's case that he is the owner of an unsurveyed parcel of land measuring **50ft by 50ft** at Mnarani within Kilifi County which land abuts the defendant's piece of land. The plaintiff states that on or about 7th June 2016, the defendant took building materials to the Plaintiff's said portion of land and started erecting a perimeter wall thereon. Despite numerous entreaties by the Plaintiff to the Defendant to stop the construction, the Defendant has refused to stop hence prompting the filing of this suit.

3. The application is opposed. In a replying affidavit sworn on 17th June 2016, the respondent Isaya Kinyua Muturia denies that he has trespassed into the Applicants land and instead accuses the applicant of trying to force his way to get an access route to his plot through the respondent's portion of land. It is the Defendant/Respondent's case that he acquired his portion of land much earlier than the applicant and that he has already erected 2 houses thereon as per photographs which he has annexed to his affidavit and

marked "IKM2". It is the Defendants case that the Plaintiff was not vigilant when buying his parcel of land and that is how he was now been left with little access to his plot after other neighbors sold their pieces of land to 3rd parties.

4. I have considered the application before me and the Replying Affidavit I have also perused the written submissions filed herein by the Learned Advocates appearing for the parties. The conditions for the grant of an interlocutory injunction were settled in **Giella -vs- Cassman Brown Limited (1973) EA 358** as follows:

"First, an applicant must show a Prima Facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

5. Accordingly, this Court must first and foremost consider whether by the facts of this case the plaintiff has 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) KLR 125** a prima facie case was described as follows:

"a prima facie case in a civil application includes but 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."

6. A perusal of the affidavits before me reveal that the suit land is unsurveyed and neither party has a title to their various portions. It is evident that they both bought adjacent portions of land whereupon each one of them has put up dwelling houses. While the plaintiff/applicant contends that the Defendant/Respondent has encroached onto his (the Plaintiff's) portion and started putting up a perimeter wall, nothing was put before this court to show any such construction. As it turned out the real dispute appears to be about an access route to the plaintiff's plot. The evidence before me does not show that the defendant was under any obligation to provide the plaintiff with an access route to his land. According to the defendant he bought his parcel of land before the Plaintiff acquired his portion on 9th July 2007 and proceeded to build his two houses thereon. He has annexed a sale agreement to that effect. It is however not clear on the plaintiff's part when he bought his land. At any rate, he has not demonstrated that he had a right of access through the portion occupied by the defendant.

7. The upshot is that I find no merit in the application. The same is accordingly dismissed with costs to the respondent.

Dated, signed and delivered in Malindi this 12th day of May, 2017.

J.O. OLOLA

JUDGE