



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 149 OF 2015

COSIMO ROSAFIO.....PLAINTIFF

VERSUS

MOTION CITY CO. LTD.....1ST DEFENDANT

EVANS JUMA SAID.....2ND DEFENDANT

PETER SAID.....3RD DEFENDANT

MICHAEL SAID.....4TH DEFENDANT

AMANI SAID.....5TH DEFENDANT

NYALE SAID.....6TH DEFENDANT

RULING

1. In the Application dated 9th September, 2015, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to grant orders of injunction restraining the Defendants/Respondents, their agents, servants and or employees and or whomsoever acting under their instruction from interfering, exploiting blocks, trespassing and or in any other way from dealing with the Plaintiff's 12 acres parcel of land known as Kilifi/Tezo Roka/934 pending the hearing and determination of this suit.

b. That costs of this Application be in the cause.

2. According to the Plaintiff's Affidavit, he leased parcel of land number Kilifi/Tezo Roka/934 from the 2nd to the 6th Defendants for the purpose of exploiting and excavating coral blocks for commercial purposes.

3. The Plaintiff deponed that he paid the deposit of Kshs. 50,000 to the 2nd-6th Defendants; that the 2nd-6th Defendants have colluded with the 1st Defendant and leased the same land to the 1st Defendant and that the 1st Defendant has assembled heavy machinery on the land for purposes of excavating coral blocks.

4. In response to the Application, the 1st Defendant's Director deponed that on 15th June, 2015, he entered

into a Lease Agreement with the 2nd-6th Defendants; that he was not aware of the existence of any other agreement between the Plaintiff and the 2nd- 6th Defendants and that he has a valid licence from NEMA and a permit from the County Government to do quarry business.

5. It is the 1st Defendant's case that it moved on the suit property in the year 2015 and cleared the land which was bushy; that the 1st Defendant began work on the land in June, 2015 and that the Plaintiff was not on the plot when he moved it

6. According to the 1st Defendant, the Plaintiff's claim of Kshs. 50,000 has been refunded; that the Plaintiff did nothing on the plot for more than three (3) years and that the Application lacks merit.

7. In his Affidavit, the 3rd Defendant denied ever entering into the agreement of 14th November, 2012 with the Plaintiff; that he never received any money from the Plaintiff and that when he learnt that his brothers had received Kshs. 50,000 from the Plaintiff, he refunded the money to him.

8. In his Further Affidavit, the Plaintiff denied ever receiving a refund of Kshs. 50,000 from the 3rd Defendant.

9. The Plaintiff's and the Defendant's advocates filed their written submissions which I have considered.

10. The Plaintiff's claim is based on the Lease Agreement dated 14th November, 2012 that he entered into with the 2nd-6th Defendants. The five (5) Defendants are the sons of the registered proprietor of the suit land.

11. From the copy of the Lease Agreement that has been annexed on the Plaintiff's Supporting Affidavit, it would appear that the 3rd Defendant never signed the agreement.

12. The payment of Kshs. 50,000 being "*advance payment*" was acknowledged by the 2nd, 4th, 5th and 6th Defendants. Again, it would appear that the 3rd Defendant did not benefit from the Kshs. 50,000 that the Plaintiff paid.

13. The Lease Agreement between the Plaintiff and the 2nd, 4th, 5th and 6th Defendants (*the Defendants*) provided that the same shall be for a term of twenty (20) years from 1st December, 2012.

14. According to the Lease, the Plaintiff was required to pay the Defendants a royalty of Kshs. 2 and Kshs. 1.5 for each first and second grade coral block respectively, payable weekly. This was in addition to the advance payment of Kshs. 50,000 and a monthly royalty advance payment of Kshs. 2,500 with effect from December, 2012 "*to continue on subsequent months until such time that the quarrying operations shall commence on the lessor's portion of land.*"

15. The Plaintiff has not offered any evidence to show that after paying the initial amount of Kshs. 50,000, he has been making the monthly payments of Kshs. 2,500 to the Defendants.

16. The Plaintiff has also not informed the court why it never commenced its operations since the year 2012 to enable the Defendants earn the agreed royalties.

17. In any event, the Lease Agreement that the Plaintiff is relying on did not include the 3rd Defendant who, being a family member of the registered proprietor, had to agree to the terms of the agreement before the same could be valid.

18. Considering that the Plaintiff can be compensated in damages if he succeeds in his claims and having not established a *prime facie* case with chances of success, I dismiss the Application dated 9th September, 2015 with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE