



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CIVIL SUIT NO. 388 OF 2016

JOSEPH MUTWIRI MAINGI.....APPLICANT/PLAINTIFF

VERSUS

SALIM MRUCHE.....RESPONDENT/DEFENDANT

RULING

1. By Notice of Motion application dated 8th December 2016 and brought under Articles 22 and 40 of the Constitution of Kenya, Sections 1A, 1B, 3A and 65 (e) of the Civil Procedure Act and Order 40 Rules 1,2, 3, & 10 of the Civil Procedure Rules, the plaintiff is seeking the following orders.

1) Spent

2) Spent

3) That a temporary order of injunction do issue against the defendant/respondent by himself, servants, agents or employees from erecting or causing to be erected structures whether permanent or temporary, undertaking or causing to be undertaken any building or construction works or otherwise from entering, alienating or interfering in any way with the suit land LR. MN/V/1990 pending the hearing and determination of this suit.

4) Any other orders that this honourable court may deem just to grant.

5) Costs of this application be awarded to the plaintiff./applicant.

2. The application is made on the grounds that the defendant has unlawfully encroached on the suit plot and has commenced construction of a semi-permanent structure thereby threatening and alienating the plaintiff's beneficial interest on the said plot, and unless the orders sought are granted, the applicant stands to suffer irreparable loss. The application is further supported by the affidavit of Joseph Mutwiri Maingi, the plaintiff sworn on 8th December 2016. Briefly, the applicant contends that by an agreement made on 10th January 2016 between the plaintiff and one Jason Mungania Maingi, the applicant acquired beneficial interest on the suit property and is awaiting to have it transferred into his name. The applicant has attached copies of the title, agreement for sale, transfer form and spousal consent. It is the applicant's case that the defendant has unlawfully encroached on the suit property, tampered with the boundary beacon and construed a semi permanent structure prompting the applicant to report him to the police but no action was taken against him. The plaintiff depones that the defendant's unlawful enrichment is intended to intimidate him out of his plot and finally dispossess him of the same. The applicant states that he stands to suffer irreparable loss should the defendant be allowed to trample on his constitutional right to own property.

3. There was no opposition to the application. The defendant was served with summons to enter appearance as well as the application herein but did not file any document in response.

4. In his oral submissions, the plaintiff's counsel reiterated the grounds on the face of the application as well as the contents of the supporting affidavit.

5. I have carefully considered the application herein. This being an application for grant of interlocutory injunctions, the plaintiff must satisfy the conditions laid down in the case of **GIELLA –VS- CASSMAN BROWN**. The plaintiff must show that he has a prima facie case with probability of success; that he stands to suffer irreparable damage, and that, in the event of doubt, the balance of convenience lies with him.

6. The plaintiff has exhibited documentary evidence on how he acquired the suit property, including a duly signed transfer form signed by the previous registered proprietor. The facts as presented by the plaintiff have not been controverted as the defendant did not file any response to the application and the court cannot anticipate his claim or interest in the suit property. From the material placed before this

court, I find that the plaintiff has a prima facie case with probability of success. A prima facie case does not mean a case that must succeed at the trial. However, in the case of **MRAO LIMITED –VS-FIRST AMERICAN BANK OF KENYA LTD (2003) eKLR 125** the Court of Appeal held that “...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 the applicant’s case upon trial...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that here exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter...”

7. As regards irreparable damage, the conventional thought on land related matters is that deprivation of an interest in land is not sufficiently remediable by an order of compensation in damages. In addition, the effect of the refusal of the order for injunction in this case is that the plaintiff cannot utilize his land freely for the purpose for which he intended by purchasing it. I find such loss to be an irreparable damage to the plaintiff.

8. The balance of convenience, if I had any doubt in the matter, lies with the plaintiff who has lawfully acquired it from the registered proprietor rather than with an apparent trespasser.

9. Accordingly, I find merit in the application and grant the order for temporary injunction in terms of prayer 3 of the Notice of Motion dated 8th December 2016.

10. The costs of the application are granted to the applicant.

11. Dated, signed and delivered at Mombasa this 15th day of JUNE 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE