



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 349 OF 2016

KAHINDI KAHASO KOMBO.....PLAINTIFF

VERSUS

JOSEPH DANIEL KENGA..... DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 19th December 2016. The Plaintiff/Applicant Kahindi Kahaso Kombe is seeking for orders:-

THAT pending the hearing and determination of the suit herein, orders of injunction do issue restraining the defendant whether by himself, his family members, agents, servants, employees and all others claiming through him, from entering into and cultivating, harvesting or in any other manner whatsoever interfering with the Plaintiff's peaceful possession, including the Plaintiff's fencing of the property known as Ngomeni Squatters Settlement Scheme/2161

2. The application is supported by the Plaintiffs affidavit sworn on 19th December 2016. It is the Plaintiff's case that he is the first registered owner of the suit property. On 5th October 2016, he instructed his workers to fence his land but when the workers had gone half-way with the fencing, the Defendants/Respondent who is his neighbour on the northern side of his parcel of land, appeared on the site armed with a machet and threatened to decapitate the workers. He states that attempts to resolve the dispute with his neighbour have come to nought and it is now his prayer that this court intervenes to ensure that the Respondent respects other people's property.

3. The application is opposed. In a Replying Affidavit sworn on 10th February 2017, the Defendant Joseph Daniel Kenga deposes that he was the first person to settle in the area in 1976 and that he is the beneficial owner entitled to possession of a parcel of land situated at Ngomeni Settlement Scheme measuring 5.76 Hectares or thereabouts. The Defendant denies that he has encroached onto the Plaintiff's parcel of land and accuses the Plaintiff of ignoring the boundary that existed before the Plaintiff arrived in the area and proceeding to plant coconut trees thereon. He denies unleashing violence upon the plaintiff's workers as alleged and avers that he only explained to the workers the location of the boundary of the two plots and the plaintiff's workers having been convinced as to the correct boundary abandoned the attempt to fence off a portion of his land. He accuses the Plaintiff of refusing to have the boundary determined by the Land Registrar as provided in the Land Registration Act, 2012 and instead using illegal means to acquire his land.

4. I have considered the application and the Affidavit in Reply. I have also looked at the submissions placed before me by the two Learned Advocates representing the parties herein. The principles on which the courts will grant an injunction are well known. The Court of Appeal restated those principles in ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others, CA No 77 of 2012***, as follows:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

5. In the instant case the Plaintiff avers that he is the registered owner of land Parcel No. Ngomeni Squatter Settlement Scheme/1261. He has annexed a copy of official search showing that title was issued in his name on 3/6/2016 for the parcel of land. He states that his father helped him to acquire the property in the 1990s after they entered the area as the first settlers in the region. It is his case that since 1999 the Defendant has been interfering with his parcel of land by planting coconut trees on the land. Attempts to solve the dispute through the local administration have failed and he therefore decided to fence off his land. On 5th October 2016 while he was in the process of doing so, the Respondent appeared on the scene and threatened violence upon the workers forcing them to abandon the fencing.

6. The Defendant/Respondent admits that the Plaintiff is his neighbour. It is however his case that it is the Plaintiff who has encroached on his land and has been harvesting coconuts therefrom.

7. From the pleadings it is clear that the parties have had a long standing dispute as to where the border of their adjacent parcels of land lies. Indeed, according to the Defendant, the dispute herein is a boundary dispute which ought to be determined by the Land Registrar as per the provisions of Section 19 (2) of the Land Registration Act. In his Supplementary Affidavit sworn on 22nd March 2017, the Plaintiff denies that this is a mere boundary dispute and contends that the two parcels of land are indeed separated by a road of access to the Indian Ocean.

8. While I take note that the Plaintiff is the registered owner of his portion of land, no evidence has been placed before me to show the co-ordinates or boundaries of his parcel of land. In my mind, the question as to whether or not the Defendant has encroached onto the Plaintiff's parcel of land can only be answered and ascertained upon a survey of the two adjacent properties to establish the fixed boundaries thereof.

9. I think in the circumstances, the balance of convenience demands that the status quo prevailing as of today be maintained until this suit is heard and determined. And I so order.

10. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

J.O. OLOLA

JUDGE