



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE. 307 OF 2016

FRANCIS G. MUTUNGI.....PLAINTIFF

=VERSUS=

HASSAN MWAIHA MBARAK.....DEFENDANT

RULING

1. Before me is an application dated 15th November 2016. The Applicant Francis G. Mutungi prays for orders of temporary injunction restraining the defendant, his servants and/or agents or any person or persons acting under them from entering, trespassing, alienating and/or interfering with the suit premises herein pending the hearing and determination of this suit.

2. The Application is supported by an Affidavit sworn by the Applicant on the same 15th day of November 2016. The gist thereof is that the Applicant bought a parcel of land measuring 40ft by 160ft near the Malindi Airport from one Leaky Osuru Kayonzo in 2011. However, on 22nd February 2016, the Applicant received information that there was a building being constructed thereon and when he rushed there, he confirmed that indeed the Defendant/Respondent was in the process of constructing a building on the premises. His attempts to resolve the same through the local administrative structures have come to nought and he now comes to this court seeking for the protection of his property and appropriate orders to restrain the Respondent.

3. In opposition to the application, the respondent Mbarak Hassan Mwaiha has filed a Replying Affidavit sworn on 23rd November 2016 in which he avers that he is the owner of the suit property which according to him measures 50ft by 50ft. It is the Respondent's case that he bought the said parcel of land on 11th July 2009 from one Benard Nyange Zewe after which he proceeded to fence it.

4. The Respondent avers that on or about 16th February 2016, he commenced construction of a building on the plot. It is his case that the plaintiff has no colour of right over his plot and that he is the one who stands to suffer damages since he has bought building materials and incurred labour charges after commencing construction.

5. I have considered the application before me and the Affidavit in Reply. I have also considered the submissions placed before me by the Learned Advocates for the parties herein. The principles for the grant of injunctions are now well -settled. In the renowned case of **Giella -vs- Cassman Brown & Company Ltd (1973) EA 358**, the court held that:

“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”.

6. Accordingly, it is incumbent upon this court to first and foremost consider whether by the facts presented before me, the Applicant has made out a prima facie case with a probability of success. As was stated in ***Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR:***

“a prima facie case 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”.

7. The material presented by the Plaintiff/Applicant describes the property as being a parcel of land situated near Malindi Airport “next to Italian Pasta” and measuring 40ft by 160 ft or thereabouts. From the description, it is apparent the property is an unregistered portion of land.

8. In support of his claim, the Plaintiff has annexed a Sale Agreement dated 11th August 2011(Annexure FGM 1) showing that he bought the said portion of land from one Leakey Osuru Kayonzo for the sum of Kshs 350,000/=. There are also other Sale Agreements annexed showing that the said Leakey Osuru Kayonzo purchased the land from one Dorcas Obambo (also described alternatively as Doreen Adhiambo) who in turn bought it from one Cornelius Mwanyange Kagusi, in January 2005. In all the annexures, the property is described as all that parcel of land situated at or near Malindi Airport next to Italian Pasta measuring 40 x 160ft.

9. On the other hand, the Defendant has averred in his Replying Affidavit that he purchased the suit property on 11th July 2009 from one Benard Nyange Zewe. Annexure 1 of the Replying Affidavit is a Sale Agreement which describes the parcel of land to be measuring 50ft by 50ft and not 40 x 160ft as the one claimed by the Plaintiff. I note that the Plaintiff is not claiming that the Defendant has encroached on a portion of his property.

10. Annexure 3 of the Defendants Replying Affidavit are copies of decisions made by the local administration running from the year 2005 to 2007 which indicate that the family of Benard Nyange Zewe from whom the Defendant states to have bought the land was involved in a dispute with one Henry Karabu. The dispute was resolved with every party being confined to their proper boundaries and it is probable that they owned the suitland until the time when the same was sold to the Defendant.

11. As it were the Plaintiff has not availed any evidence showing that prior to his purchase of the portion of land, the previous owners had been in physical possession of the land. There is no evidence either that the plaintiff himself has been in physical possession of the suitland prior to the commencement of construction by the Defendant.

12. I think in a matter like this where the land is unregistered and/or unsurveyed, and where the portions of land appear to contain contradictory and/or different measurements, it behoves the Plaintiff/Applicant to provide additional evidence upon which the court can rely to arrive at a conclusion that the parcels of land in contention are either one and the same or amount to an encroachment of certain portions of the land in dispute.

13. As it were, the material placed before me does not allow me to arrive at any such conclusion. The result is that I do not find merit in the application dated 15th November 2016. I dismiss the same with costs to the respondent.

Dated, signed and delivered at Malindi this 13th day of July 2017.

J. O. OLOLA

JUDGE