



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 101 OF 2016**

**MALINDI GINNERIES LIMITED.....PLAINTIFF**

**VERSUS**

**ESTHER MUTHONI MAINA.....1<sup>ST</sup> DEFENDANT**

**BAHATI NASORO HASSAN.....INTERESTED PARTY**

**RULING**

1. I have before me a Notice of Motion application dated 3<sup>rd</sup> May, 2016. The Plaintiff Malindi Ginneries Ltd is seeking for Orders:-

**1. Spent**

**2. Spent**

**3. THAT pending the hearing and determination of the suit herein, an Order restraining the Defendant, her servants, agents, employees, or any person found present on the Plaintiff's property known as Plot 300 Malindi developing the structure the subject matter of the Plaintiff's suit herein by themselves or through others be restrained from further trespass and/or further development of the said structure, does issue (sic).**

**4. THAT the costs be provided for.**

2. The application is supported by an Affidavit sworn by a Director of the Company Omar Ahmed Bashamakh on 3<sup>rd</sup> May 2016 and is premised on a number of grounds which may be summarized as follows:-

*(a) That vide an indenture dated 30<sup>th</sup> September 1948, the Plaintiff purchased Plot No. 300 measuring about 67 acres Malindi from its previous owners for valuable consideration and used the same for cotton farming.*

*(b) That even though the farming activity became unviable, the Plaintiff continues to own the land and conducts regular visits to the property. In one such visit, the Plaintiff learnt of the development of a small residential house thereon and upon enquiry they learnt that someone had purported to sell the land to the 1<sup>st</sup> Defendant.*

*(c) That the construction being carried out on the suitland is inexcusable and deliberate trespass and unless this court grants restraining orders, the Plaintiff is likely to suffer irreparable harm and damage on an investment it has kept dear for more than 60 years.*

3. The Application is opposed by the Interested Party Bahati Nasoro Hassan referred to herein as the 2<sup>nd</sup> Defendant. In a Replying Affidavit filed herein on 21<sup>st</sup> June 2016, the Interested Party calling herself the 2<sup>nd</sup> Defendant avers that she is the owner of the house under construction and not Esther Muthoni Maina who is sued herein as the 1<sup>st</sup> Defendant. It is her case that she purchased the land from one Onesmus Karisa Thethe by virtue of a Sale Agreement dated 25<sup>th</sup> April 2016. It is further her case that the portion of land sold to her to build the house was allocated to the Thethe family in an exercise “coordinated” by the Plaintiff and/or its representative and she could therefore not be a trespasser to the land.

4. I have considered the application and the Replying Affidavit. I have also considered the submissions of the Learned Advocates representing the parties herein.

5. I must point out at the first instance that the Application before me was filed solely in contemplation of Esther Muthoni Maina, now named herein as the 1<sup>st</sup> Defendant. On or about 16<sup>th</sup> May 2016, Bahati Wasoro Hassan filed an application seeking for the following orders:-

*1. That (the) court be pleased to enjoin Bahati Nasoro Hassan as an Interested Party in (this) matter.*

*2. That the Honourable court does discharge its orders issued on 4<sup>th</sup> May 2016 against the Applicant forthwith.*

6. When the Application dated 16<sup>th</sup> May 2016 first came up for hearing inter-partes, the record reflects that the parties agreed that it be allowed. Accordingly the Honourable Justice Angote allowed the application but on the agreement of the parties maintained the Status Quo. Thus while in effect the injunction orders were discharged as against the Interested Party who had just been enjoined, the Status Quo obtaining in regard to the construction of the house was maintained.

7. Although brought in as an Interested Party, Bahati Nasoro Hassan avers that she is the person who was in actual fact carrying out the construction, and was in fact the proper Defendant in this case.

8. The conditions for the grant of an interlocutory injunction are now well settled. In the often-cited case of ***Giella vs Cassman Brown Company Ltd (1973) EA 358***, the court stated 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 a balance of convenience.”*

9. Arising from the dictum of the Court, the first inquiry that this Court must make is to find out whether or not the Applicant has established a “Prima facie” case with a probability of success.

10. In ***Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR (Civil Appeal No. 77 of 2012)***, the Court of Appeal stated that:

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the rights has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..”*

11. In the instant case, the Plaintiff/Applicant has demonstrated that it is the owner of all that parcel of land measuring approximately 67 acres and has had possession thereof since 30<sup>th</sup> September 1948. They

have attached the Certificate of Title. It is their case that in violation of their proprietary rights, the Defendants has by an act of trespass entered into the said property and commenced construction of a small stone house.

12. While the Plaintiff sued a Defendant by the name Eunice Muthoni Maina for the said trespass, the Summons and Plaint were served on the Interested Party herein. The Interested Party has since come out and owned up to being the person who is carrying out the construction. The Interested Party however denies being a trespasser and traces her entitlement to the portion of the land in which she was putting up a house to a Sale Agreement executed between herself and one Onesmus Karisa Thethe on 25/4/2016.

13. According to the Interested Party, the said Onesmus Karisa Thethe was allocated the Plot after a Survey Report on Plot No. 290 and 300 was carried out with the full knowledge and approval of the Plaintiff in May 2012. I have looked at the so-called Survey Report annexed and marked as "BNH2" to the Interested Party's Replying Affidavit and it is evident that the extract of papers annexed is neither a Survey Report nor capable of granting an interest or title to land.

14. Section 24(a) of the Land Registration Act, 2012 provides as follows:-

*"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."*

15. And section 26(1) of the same Act provides that:-

*"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate and the title of that proprietor shall not be subject to challenge, except*

*(a) On the ground of fraud or misrepresentation to which the person is proved to be party;  
or*

*(b) Where the Certificate of title has been acquired illegally, procedurally or through a corrupt scheme.*

16. As was stated in Nguruman Ltd(supra), the Applicant has shown a clear and unmistakable right to the property in dispute which is directly threatened by the Interested Party's act of commencing construction thereof. The continued construction by the Interested Party is likely to occasion irreparable damage to the Plaintiff and it is incumbent upon this court to prevent such damage by bringing an end to the invasion.

17. The upshot is that I find merit in the application dated 3<sup>rd</sup> May 2016. The same is accordingly allowed with costs.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of July, 2017.**

**J. O. OLOLA**

**JUDGE**