



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 234 OF 2016

FURAHA SEA CHALETS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HASSAN JUMA.....1ST DEFENDANT/RESPONDENT

KASSIM SWALEH.....2ND DEFENDANT/RESPONDENT

JAFARI ALI SHEKUE.....3RD DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated 7th September 2016. The Plaintiff/Applicant is seeking the following orders:-

a. Spent

b. THAT the Honourable Court does issue a temporary injunction restraining the Defendant/Respondents by themselves, employees and/or agents from further trespassing onto, interfering and/or destroying, obstructing and/or restricting in whatever manner whatsoever with the Plaintiff's parcels of land being Plot No. 1054(Original number 712/21) measuring appropriately 0.2251 Hectares and Plot no. 1052 (Original number 712/19) measuring approximately 0.1356 Hectares and undertaking any constructions thereon and/or using any of the illegal facilities thereon constructed within the Plaintiff's land and from any other manner whatsoever and however(sic) from interfering or blocking the Plaintiff's activities and operations thereon pending the hearing and final determination of this suit.

c. THAT there be a temporary mandatory injunction compelling the Defendants/Respondents by themselves, servants, agents to demolish and remove all the illegal construction within the Plaintiff's parcels of land Plot No. 1054(original No 712/21) and Plot No 1052(original No 712/19) and to demolish all the buildings and illegal erections interfering with the activities of the Plaintiff/Applicant pending the hearing of this application inter-partes and thereafter pending the hearing and final determination of this suit.

d. THAT the defendants be evicted and/or removed from the Plaintiff/Applicant's Parcels of land being Pot No. 1054(Original No 712/21) measuring approximately 0.2251 Hectares and Plot No 1052 (Original No. 712/19) measuring 0.1356 Hectares and that the OCS Watamu to be ordered to effect this order.

2. The Application is supported by an Affidavit sworn by the Plaintiff's Managing Director Anwar Ali Omar on 7th September 2016 and is premised on a number of grounds summarized on the body thereof as follows:-

a. That the Applicant is the registered owner of the two parcels of land.

b. That sometimes in August 2016, the defendants without any colour of right proceeded to occupy the land and started building illegal structures thereon.

c. That the Defendants continue to build permanent and semi-permanent structures all over the Plaintiff's parcels of land thus making it impossible for the Plaintiff to carry out its activities effectively and/or develop the land.

d. That despite numerous interventions by the Local Administration the defendants have become hostile and have refused and/or neglected to vacate the land and thus the Plaintiff stands to suffer irreparable loss and damage.

3. In a Replying Affidavit sworn on 18/10/2016 by Jafari Ali Shekue the 3rd Defendant on behalf of his co-defendants, the defendants are opposed to the grant of the orders sought. They deny encroaching on the Plaintiff's portion of land as alleged. It is their case that they are members of Watamu Youth Future Concern, a registered Community Based Organisation which is in occupation of Plot No. 711 in Watamu and not the one stated by the Plaintiff.

4. The defendants further state that they are in occupation of the land because the said Plot No 711 is under the mandate of Kenya Wildlife Service and that as per a letter originated by the District Fisheries Office, the said area was gazetted for public use and allocated to Watamu Fishermen Association as a landing depot. It is further their case that the Plaintiff has sued the wrong parties as they ought to have sued the Kenya Wildlife Services who are the custodians of the public property.

5. I have considered the application as well as the Replying Affidavit. I have also considered the written submissions filed by counsel for the Plaintiff. The defendants Counsel opted not to make and/or file any written submissions.

6. From the material placed before me, it is not in dispute that the Plaintiff/Applicant is the registered owner of the two parcels of land namely, Plot No. 1054(Original number 712/21) and Plot No 1052(Original Number 712/19). The Applicant has produced title documents as evidence of ownership of the two parcels of land (annexed to the Supporting Affidavit as annexures AAO 3A and AAO 3B).

7. The defendants however contend that they are in occupation of Plot No 711 Watamu and not the Plot numbers indicated by the Plaintiff. They state that the said Plot No 711 is occupied by them by didn't of their being members of a Community Based Organisation known as Watamu Youth Future Concern. They have annexed a copy of the Certificate of Registration of the said Watamu Youth Concern as well as a letter dated 11/5/2010 from the District Fisheries Office, Malindi addressed to 'To whom it May Concern' and purporting to declare the said Plot No. 711 a fish landing site and asking the addressee to preserve and guard it at all costs from prospective land grabbers.

8. The defendants have not denied erecting structures on the parcel of land. They have not annexed any official documentation to show that the area in which they have put up those structures is actually Plot No 711 as they state and/or that it was gazetted as public land as they claim. The Certificate of Registration of the Community Based Organisation, the Survey Plan and the letter from the District Fisheries Office Malindi are in my view incapable of conferring any legal entitlement and/or interest to the Respondents. If indeed the land is public property as they allege, they have not brought out any nexus between their organization and the Kenya Wildlife Service whom they purport to be the owners of the property. Indeed if the land is public property, the Respondents have not demonstrated under what authority they are erecting the permanent and other structures on the land.

9. In Kenya **Breweries Ltd –vs- Washington Okeyo(2002)EA 109**, the Court of Appeal stated that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and a summary one which can be easily remedied, or if the defendant attempts to steal a match on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”

10. Similarly in **Sharif Abdi Hassan –vs- Nadhif Jama Adan CA 121/2005 (2006) eKLR**, the same Court of Appeal observed that:-

“The Courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the Courts in such cases as those of alleged trespass to property.”

11. Again in **Jaj Super Power Cash and Carry Ltd –vs- Nairobi City Council & 20 Others CA No. 111/2002**, the Court of Appeal stated that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

12. In my view, the Plaintiff’s case herein passes the test outlined in the above authorities for the grant of a mandatory injunction at this interlocutory stage. The Plaintiff has demonstrated that the defendants have no colour of right to occupy and/or erect structures on the suitland.

13. Accordingly, I allow the Plaintiff’s application dated 7th September 2016 and order that the three defendants do vacate the Plaintiff/Applicant’s parcels of land being Plot No. 1054(Original No. 712/21) and Plot No. 1052(Original No. 712/19) within 30 days from the date of this Ruling failing which an order of eviction against the defendants is to issue without any further application by the Plaintiff, to be effected with the assistance of a licensed Court Bailiff.

14. The Plaintiff/Applicant shall have the cost of this application.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE