



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 315 OF 2016

SAMSON NZARO.....PLAINTIFF

VERSUS

BONFACE NGARI.....DEFENDANT

RULING

1. Before me is an application dated 18th November 2016. The Plaintiff Samson Nzaro prays for an Order:-

THAT pending the hearing of the main suit, this Court be pleased to issue a temporary injunction against the Respondent restraining him from disposing, selling, leasing and or interfering with the Plaintiff's property situated at Kagaa Settlement scheme.

2. The application is supported by the Plaintiffs affidavit sworn on 18th November 2016 and on Grounds contained in the body thereof which are listed as follows:-

a. That the Applicant entered into a lease agreement with the Respondent which made the Applicant to construct some permanent houses for business in the suit property.

b. On or about 26th September 2016, the Respondent developed a habit (sic) of interfering (with) the business of the Applicant. The Applicant reported the matter to Kilifi Police Station but was told by the Police that they are unable to act without a Court Order.

c. The Respondent continues to damage the suit property by stopping the Applicant from dealing with the business in the Applicant's property. The Applicant who is the legal owner of the property has been denied access to the property and as such cannot continue with his business.

d. There is a real threat or danger that the Respondent may further defraud the Plaintiff by selling/leasing the suit premises to third parties unless the Orders sought are granted without delay.

3. In his Replying Affidavit sworn on 27th February 2017, the Defendant Bonface Ngari states that sometime in 2014, the Plaintiff who is his nephew requested for space on his land situated at Mabirikani Sokoke to carry on some business. Thereafter the Plaintiff put up a temporary structure to house a posho mill.

4. The Defendant/Respondent denies that he has entered into any lease agreement with the Plaintiff and/or that he received a sum of Kshs 4,500/= from the Plaintiff as rent for use of the land.

5. I have considered the Application and the Affidavit in Reply. I have also considered the submissions placed before me by the Parties. It is trite law that in an application of this nature, the Applicant must first satisfy the Court that he has a prima facie case with a reasonable chance of success.

6. In ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, the Court of Appeal fashioned a definition for, “prima facie case” in civil cases in the following words:-

“In civil cases, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case...”

7. The Applicant’s case is that he entered into a Lease Agreement with the Respondent in 2014 upon which he constructed some properties for business valued at Kshs 220,000/= on the Respondent’s land. It is his case that he thereafter took possession and carried on his business on the land until September 2016 when the Respondent “developed a habit of interfering with this business”. He states at paragraph 4 of the Affidavit in Support that the Respondent signed the lease and thereafter went against it.

8. The Respondent however denies entering into any lease arrangement with the Plaintiff and avers that he only allowed the Plaintiff who is his nephew to carry out temporary business on his land in 2014.

9. I have looked at the so-called Lease Agreement annexed to the Plaintiff’s Supporting Affidavit and marked “SN1”. The document written in Kiswahili and dated 1/9/2016 reads as follows:-

“MAKUBALIANO YA KUKODISHA

Mimi Samson Nzaro Kirao Id No [...] nilielewana na Bwana Bonface Ngari Mwaka 2014 nijenge nyumba ya Biashara(Mtambo wa Kusiaga Mahindi) kwenye shamba lake lilioko Kagaa Settlement Scheme kwa kukodisha kwa Kshs 200/= kwa mwezi baada ya kumaliza kujenga.

Sikuweza kumaliza kujenga nyumba hiyo mpaka 2016 mwezi wa August ambapo nilimpa Bwana Bonface Kshs 4,500/= kama kodi ya miezi 22 kuanzia 1/9/2016”.

10. The said document is only signed by the Plaintiff who must have prepared it to explain how he understood things to be. It certainly is not a lease agreement between the two parties.

11. As was stated by the Court of Appeal in ***Nguruman Ltd –vs- Jan Bonde & 2 Others(2014) eKRL:-Nielsen***

“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 right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

12. On the facts placed before me, the Applicant is not the owner of the Suitland. The Defendant owns it. He does not have a valid lease agreement either between him and the Defendant. While the Defendant does not deny that the Plaintiff put up a structure on his land, the said structure has already been valued by the Plaintiff himself to be worth Kshs 220,000/= If and when it is found that he is entitled to be compensated by the Plaintiff, for the structure housing the posho mill, it cannot be said that the damages suffered if any are unquantifiable.

13. It would otherwise amount to a great travesty of justice if this court were to impose sanctions upon the Defendant on the use of his land under the circumstances presented herein. The upshot is that I find no merit in the application dated 18th November 2016. The same is dismissed with costs to the Defendant/Respondent

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

J. O. OLOLA

JUDGE