



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.19 OF 2016

KAHIRO KIMANI.....PLAINTIFF

=VERSUS=

1. COMMISSIONER OF PRISONS.....DEFENDANT

2. THE OFFICER COMMANDING G.K.PRISON, HINDI.....DEFENDANT

3. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

RULING

1. The Application before me was filed by the Plaintiff and is dated 1st February 2016. In the Application, the Plaintiff is seeking for the following reliefs:-

(a) THAT pending the hearing and determination of this suit a temporary injunction do issue to restrain the 1st and 2nd Defendants and their successor in office and each of them whether by themselves, their agents, officers, servants or other employees or any person acting on their instructions howsoever from entering or remaining upon the Plaintiff's property known as C.R. Number 5718/19 (Certificate of Title C.R.62978) (the suit premises) demolishing or attempting to demolish the Plaintiff's boundary wall erected thereon, committing any other acts or trespass or waste or interfering in any way with the Plaintiff's lawful and quiet possession of the suit premises.

(b) THAT pending the hearing and determination of this suit an interlocutory mandatory injunction do issue against the 1st and 2nd Defendants and their respective successors in office directing and compelling these defendants to forthwith return all building materials wrongfully and unlawfully seized by prisons officers acting under the directions and control of these Defendants.

(c) THAT the costs of this application be provided for.

2. The Application is premised on the grounds that the Plaintiff is the registered proprietor of a property known as CR number 67181/9, Certificate of Title number 62978; that the 1st and 2nd Defendants have illegally entered into the Plaintiff's parcel of land and demolished or attempted to demolish the boundary wall and that the Defendants should be restrained from interfering with the

- suit property.
3. The Application is supported by the Plaintiff's Affidavit in which he has averred that he purchased the suit property from Fatuma Abdalla Ahmed on 16th December, 2009; that the officer in charge of the Government of Kenya Prison has denied him quiet enjoyment of the land and that although the suit property is adjacent to the Hindi Prison land being L.R. No.24354, the two parcels of land are distinct.
 4. The 1st Respondent's representative swore a Replying Affidavit in which he deponed that the Hindi Prison was established in the year 1964; that at the time of its establishment, the prison was allocated 401 Ha of land as indicated in the Physical Development Plan of 6th August, 1980 and that the Prison has always been in occupation of the land.
 5. It is the deposition of the 1st Respondent's representative that the Prison dug a total of 5 wells which are the only source of fresh water and that the entire land measuring 289.3 Ha is clearly demarcated and is identifiable by way of beacons.
 6. It is the 1st Respondent's case that in the year 2011, the Applicant's employees trespassed on the Prison's land and that the portion of land that the Applicant is claiming is within the beacons of Prison land.
 7. The Applicant's and the Respondents' advocates filed their respective submissions.
 8. The Applicant's counsel submitted that the Applicant at all material times has been the registered proprietor of the suit property; that the original title to the suit property dates back to the year 1923 and that the search at the lands registry revealed that the Applicant is the registered owner of the suit property. On that basis, it was submitted, the Plaintiff has established a prima facie case with chances of success.
 9. The Plaintiff's counsel submitted that the Defendants have trespassed on the suit property and that unless restrained, the Respondents will demolish the boundary wall erected by the Applicant.
 10. The Defendants' advocate submitted that an injunction cannot issue against the Government; that the Applicant has not demonstrated a prima facie case with chances of success and that Fatuma Abdalla Ahmed has not been enjoined in these proceedings.
 11. Counsel submitted that the Respondents have demonstrated that they have been in occupation of the suit land for many years; that the orders being sought are final and ought not to be granted and that by seeking to have the respondents vacate the suit land, the Applicant is seeking for the grant of mandatory orders at an interlocutory stage.
 12. The Plaintiff's Application is based on the ground that he is the registered proprietor of land reference number CR NO.6718 (Plot Number 303) which he purchased from Fatuma Abdalla Ahmed on 16th December, 2009.
 13. Although the Plaintiff has deponed that the title to the suit property has been in existence since the year 1923, the Deed plan annexed on the Plaintiff's Supporting Affidavit shows that L.R. No.29698 measuring 45.33 Ha was curved out of portion number "303 and G.L" on 4th December 2013.
 14. It would appear from the Deed Plan that L.R. No.29698 was issued to Fatuma Abdalla and others who sub-divided the land further to create the suit property.
 15. Considering that the Deed Plan annexed on the Plaintiff's supporting affidavit shows that the suit property could have been curved out of Government land (G.L), it is imperative that this court determines at the hearing whether indeed the said government land had already been reserved for use by the 1st Defendant.
 16. I say so because according to the deposition of the 1st Defendant's representative, the Prisons has been in possession of the suit property since 6th August, 1980 when 401 Hectares were reserved for its use vide a PDP number 1 dated 24th March, 1980.
 17. Indeed, the P.D.P that has been annexed on the 1st Defendants Affidavit shows that 401 Ha was reserved for the Prison. The said P.D.P was duly approved by the Director of Survey and the Commissioner for Lands on 6th August, 1980.
 18. If indeed the Plaintiff's land falls within the "four corners" of the P.D.P. then the Plaintiff will have to adduce evidence to show that another P.D.P was prepared cancelling or amending the P.D.P that was approved by the Commissioner of Lands in 1980.
 19. I say so because for one to be allocated Government land, a P.D.P, has to be prepared first before

- a letter of allotment can be issued.
20. The Plaintiff has not attached a copy of the P.D.P that was prepared and approved by the Commissioner of Lands before the Deed Plan number 361278 dated 4th December, 2013 was issued.
 21. In the circumstances, this court finds that prima facie, it is the 1st Defendant who has been in occupation and possession of the suit property based on the P.D.P that was prepared in 1980.
 22. Consequently, it is the 1st Defendant who should continue occupying all the land that was reserved for its use until the question of how the Plaintiff's title was created is determined.
 23. The mere fact that the Plaintiff is in possession of a title that was registered in his favour in the year 2014 does not in itself show that he has a better right over the suit property than the Defendants.
 24. Consequently, and on the basis that it is the 1st Defendant who has been utilising the suit property, and in view of the P.D.P that was approved in 1980, I find and hold that the Plaintiff has not established a prima facie case with chances of success.
 25. The Plaintiff has also not shown the irreparable injury that he will suffer that cannot be compensated in damages in view of the fact he was only registered as the proprietor of the suit property whereas the 1st Defendant has been in possession of an approved Physical Development Plan since 1980.
 26. In any event, considering that the suit is against the Government, and in view of the fact that the Application has been filed pursuant to the provisions of Order 40 of the Civil Procedure Rules, the Application is a non-starter because Order 29 Rule 2 (1)(d) of the Civil Procedure Rules and Section 16 of the Government Proceedings Act, does not allow the grant of injunction against the Government.
 27. For those reasons, I dismiss the Application dated 1st February, 2016 with costs.

Dated, signed and delivered in Malindi this 22nd day of July, 2016.

O. A. Angote

Judge