



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 166 OF 2013

1. MOHAMED ABDALLA A. SHIKELY
2. MARYAM ABDULLA ALI
3. FARID ABDULLA ALI
4. AHMED ABDALLA ALI
5. AOSHA ABDALLA
6. FARIDA ABDALLA ALI
7. ZAINABU ABDALLA ALI
8. FAIZA ABDALLA ALI
9. KHADIJA ABDALLA ALIPLAINITFFS/APPLICANTS

=VERSUS=

MOHAMED ABDALLA SALIM.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. The Plaintiffs have moved this court by way of a Notice of Motion dated 24th September, 2013 claiming for the following reliefs:
 - a) That pending the hearing and determination of this suit the Honourable Court be pleased to issue an order of mandatory injunction requiring the defendant, his servants and or agents to demolish the house and any other developments made by the defendant on the plaintiffs' piece of land known as Land Portion Number 2077(original NO. 422/3) Malindi and remove the debris resulting from the said demolition forthwith and in any event within 7 days of service of the Honourable Court's order and failure of which the plaintiffs be at liberty to engage the services of a contractor who will demolish the said fence and any other developments made by the defendant on the said land and remove the debris resulting therefrom and the cost incurred thereby be paid the defendant in any event within a time to be specified by the Honourable Court, should this become necessary.
 - b) That as a consequential order and pending the hearing and determination of this suit the Honourable Court be pleased to issue an order of injunction restraining the defendant either by himself, employees, servants and or agents or any other person claiming interest through him from trespassing into or remaining on the plaintiff's portion of land known as Land Portion Number 2077 (original No. 422/3) Malindi.

The Plaintiff's case:

2. According to the 1st Plaintiff's deposition, him, together with the other Plaintiffs, are beneficiaries to the Estate of the late Abdalla Ali Abdalla and pursuant to Mesne acts in law, became the registered proprietors of land known as portion number 2077(original number 422/3/) Malindi, the suit property.
3. The 1st Plaintiff has deposed that sometimes in the year 1985, the Defendant sought and obtained his father's permissions to erect on a section of their land a temporary workshop for developing hand craft; that the consent given was conditional upon the Defendant obtaining the approval of the local authority and that any changes to the use of the premises was to be subject to the express approval of their late father.
4. However, after the approval for the development of the property was given, the Defendant converted the development into a residence where he now lives with his family; that the change of user was unlawful because the Plaintiffs' consent or that of their father was never obtained and that the Defendant did not obtain approval for on the Municipal Council of Malindi to the changes he made to the original plans.
5. It is the Plaintiff's case that the Defendant's actions amount to unlawful retainer and trespass.

The Defendant's case:

6. The Defendant has deposed that the Plaintiffs' father not on his free will, invited him on the suit property and allowed him to build the workshop thereon; that on the assurance of the Plaintiffs' father, he obtained building permits of a workshop in October 1982 and that he put up a permanent structure which was supervised at every level.
7. It is the Defendant's case that after sometimes, it became necessary that he annexes an office block to the main building and he once again sought the approval of the Municipal Council which approval was granted in the year 1985.
8. According to the Defendant, he has lived on the suit property with his family for over 31 years in the belief that the rights of ownership over it were granted to him by the Plaintiffs' father as a gift and compensation in kind having worked for him; that the Plaintiffs intentions are driven by greed and ill intentions and that the suit property has always been in his possession and not the Plaintiffs.

Supplementary Affidavit:

9. In his Supplementary Affidavit, the 1st Plaintiff deponed that the Defendant is not in full occupation of the suit property that the Defendant was only allowed to construct a temporary workshop and not to reside therein and that his father never had any intentions of giving the Defendant the suit property.
10. According to the 1st Plaintiff, the Defendant has violated the local authorities by-laws in the same manner he violated their father's good faith in helping him build a temporary workshop and that the local authority only allowed the Defendant to construct a temporary furniture show room.
11. The Plaintiff finally deponed that it is their father who has been paying for the Municipal Council Land Rates to this very day and that the Defendant has since been served with an Enforcement Notice date 4th November, 2010.

Submissions:

12. The Plaintiff's advocate filed his submissions on 19th March, 2014. The Plaintiff's advocate submitted that the Defendant has wrongfully refused to remove his illegal development on the suit property and that his actions amount to unlawful retainer and trespass; that the Defendant has admitted being in occupation of the land and that being the registered proprietors of the suit property, the Applicants are protected in accordance with Article 40 of the Constitution and section 23 of the Registration of Titles Act (repealed).

13. According to the Plaintiff's counsel, the permission granted to the Defendant to put up a temporary structure was for a period of 5 years and that the Defendant was required to renew his Application after the expiry of 5 years which he never did.
14. The Plaintiff's counsel further submitted that the conversion of the use of the premises to residential purposes is illegal and the Defendant cannot avail himself of the defence of the length of time he has used the premises for unapproved and illegal purposes.
15. Counsel submitted that the Defendant has not shown that there was a memorandum in writing witnessed by anyone pursuant to the provisions of section 3 (3) of the Law of Contract Act; that the Defendant has not fulfilled the ingredients of adverse possession and that the Defendant is merely claiming a life interest in the property. Counsel relied on case law which I have considered to buttress his arguments.
16. The Defendant's advocate submitted that it was not in dispute that the Defendant was granted permission by the Plaintiffs' late father to occupy the portion of land which he is currently occupying and that he was allowed to build a workshop to help in the repair of the fleet of canoes owned by the Plaintiffs' father.
17. According to counsel, the Plaintiff was also allowed to put up a permanent structure and that he obtained the requisite building permits from the local authority.
18. The Defendant's counsel further submitted that the Defendant having lived on the suit property for over 31 years has acquired prescriptions rights over the land.
19. According to counsel, the alleged illegality in the change of user in the premises and the construction of a permanent structure contrary to the approval given to the Defendant by both the Plaintiffs' father and the local authority cannot possibly constitute a special circumstance to warrant the grant of a mandatory injunction.
20. Counsel submitted that there are several issues that must be determined by this court at trial which include: the validity and legality of the alleged Assent registered at Mombasa Lands Registry; whether the Plaintiffs can enforce demands on behalf of the Municipal Council of Malindi amongst others.

Analysis and findings:

21. The Application before me is seeking for both a mandatory and prohibitory injunctions. Indeed, the way the prayer for the prohibitory injunction has been framed will also lead to the eviction of the Defendant from the suit premises and will consequently be the same as an order for a mandatory injunction.

22. A mandatory injunction is an injunction which orders a party or requires a party to do an affirmative act or mandates a specified course of conduct. A mandatory injunction is an extraordinary remedial process which is granted not as a matter of right, but in the exercise of sound judicial discretion.

23. The guidelines that should be adhered to by the courts before a mandatory injunction can issue were spelt out in the case of **Locaball International Finance Ltd. -Vs- Agro Expert and Others (1986) 1 ALL E.R. 901** where it was held as follows:

“A Mandatory injunction ought not to be granted at an interlocutory stage in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which can be easily remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance, that at the trial, it would appear that the injunction had rightly been granted”

24. These guidelines have been followed consistently by the courts. In the case of **Mucuha -Vs- Ripples Limited (1990-1994) EA 388**, the Court of Appeal quoted with approval the case of **Canadian Pacific Railway -Vs- Gaud (1949) 2 KB 239** in which it was held as follows:

“The Principles of granting a temporary mandatory injunction are that they will only be granted exceptionally and in the clearest cases.”

25. In the case of **Shepherd Homes -Vs- Sandhan (1970) 3 WLR 348**, Megary J, as he was then, drew the distinction between a prohibitory and a mandatory injunction as follows:

“Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps and may require the dismantling and destruction of something already erected or constructed (as in the present case.) This will result in a consequent waste of time, money and materials if it is ultimately established that the Defendant was entitled to retain the erection.”

26. The reason as to why a mandatory injunction at an interlocutory stage should only be granted rarely and in exceptional circumstances was stated by Megary J. in the *Shepherd Homes* (supra) as follows:

“If a mandatory injunction is granted on motion there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the Plaintiff has no motion or destruction that he seeks.....”

27. Is the suit before me a clear one? Can I order for the demolition of the permanent house that the Defendant has constructed on the suit property at an interlocutory stage, whose end results would be that there will be nothing for determination at trial save for the ascertainment of damages for trespass and unlawful detainer?

21. The circumstances of this case as pleaded by the Plaintiffs in their Complaint and the Affidavits are that in 1985, the Defendant sought and obtained the permission of their late father to erect on a section of portion number 2077 Malindi a temporary workshop for developing hand-crafts.
22. According to the Plaintiffs, the consent by their father was conditional upon the Defendant obtaining the approval of the local authority, and that any change of user of the property was to be with the express approval of their late father.
23. The Plaintiffs have admitted that indeed the Defendant obtained the approval of the local authority to commence the development of the property. However, the Defendant seems to have converted the user of the property from a workshop to residential. The Defendant is said to have proceeded to put up a permanent structure contrary to the initial arrangement.
24. According to annexure P EXb3, the Municipal Council of Malindi approved the Defendant's construction of a temporary furniture show on the suit property in 1985.
25. Prior to that approval, it appears that the Council had given to the Defendant a permit to use the temporary structure that was on the suit property as a workshop on 19th May, 1982. According to the Town Planner's Comments, the permit was only valid for five (5) years. However, it is not clear to me if the permit was overtaken by the subsequent approval for the construction a temporary furniture shop on the plot in 1985.
26. The main complaint by the Plaintiffs is that the Defendant converted the workshop into a residential house without the Council's authorization or that of their father. The Defendant's response is that he put up the permanent structure with the blessings of the Plaintiffs' father and the Council. The Defendant annexed on his Affidavit the plans for the “proposed Temporary Workshop” which was approved on 20th May 1982.
27. Trespass is an authorized or unlawful entry upon land. However, where a land owner gives a person permission, either by consent or by a licence, such an entry cannot amount to trespass.
28. The initial entry on the suit property by the Defendant cannot amount to trespass in view of the admission by the Plaintiffs that the Defendant was allowed on the suit property by their father.
29. As to whether the Defendant abused the terms that the Plaintiffs' father and the Council allowed him on the suit property can only be ascertained at full trial. I say so because the person who allowed the Defendant to enter the property is now dead and the terms on which the Defendant was allowed on the land can only become clearer when witnesses are called to testify.
30. The pleadings before me do not state with certainty when the Defendant converted the workshop

into his dwelling place or when he put up the permanent structure in lieu of a temporary structure. I am not also not clear in mind whether the said permanent structure was put up by the Defendant during the lifetime of the Plaintiffs' father, and if so why he allowed him. Those are issues which can only become clearer after a full trial.

31.The Plaintiffs have annexed on their Further Supporting Affidavit notices from the Municipal Council of Malindi showing that the Defendant has erected a permanent furniture shop on the suit property without the Council's approval and also without the Landlord's consent. That may be true. However, those notices, having been issued under the Physical Planning Act have to be enforced pursuant to the provisions of that Act. It is not clear at this stage if this court can issue a demolition notice based on those notices before the Council is enjoined in the suit.

32.The other issue that this court will have to determine at trial is whether the suit property was donated to the Defendant by the Plaintiffs' father as a gift and if so, the effect of such a gift.

33.In view of what I have stated above, and considering that the Defendant has been occupying part of the suit premises for more than thirty (30) years with the permission of the Plaintiffs' father, I do not have the high degree of assurance at this stage to order for the eviction of the Defendant from the suit premises or to order for the demolition of his structure at an interlocutory stage. Those orders can only be awarded after trial.

34.Consequently, the Plaintiff's Application dated 24th September, 2013 is dismissed with costs.

Dated and delivered in Malindi this 20th day of **June**, 2014.

O. A. Angote

Judge