REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 103 OF 2017

ABDALLA MOHAMED BAJOH.....PLAINTIFF

VERSUS

SAID M. HABAN.....1ST DEFENDANT

COUNTY GOVERNMENT OF TANA RIVER.....2ND DEFENDANT

RULING

1. Before me for determination is an application dated 5th May 2017. The Plaintiff Abdalla Mohamed Bajoh prays for an order of temporary injunction to restrain the Defendant from dealing, leasing, constructing, selling, cultivating, wasting, damaging, intruding, trespassing, developing and/or interfering with what is described as "Plot size 0.36 Ha as shown on Part Development Plan No. TRD/312/2009/27" pending the hearing and determination of this suit. In addition, the Plaintiff prays that an order be issued for the removal of the fence, any other structures and beacons illegally placed by the Defendants on the said land.

2. The application is supported by the Plaintiff's affidavit and is premised on a number of grounds which may be summarized as follows:-

a) ***That the applicant bought 0.200 ha of the suit property from the Respondent on 27th October 2008 for Kshs 500,000/-***

b) ***Thereafter the defunct Tan River County Council allocated the Plaintiff more land making it 0.36 ha.***

c) ***The Applicant then started running a Petrol Station business on the property and has been peacefully using the same until 1st April 2017 when the 1st Respondent invaded the same with surveyors from the 2nd Respondent and started placing beacons and fencing the land;***

d) ***The 1st Respondent has since occupied part of the land and is threatening to evict the plaintiff who stands to suffer irreparably unless the Orders sought herein are granted.***

3. In a sworn Affidavit filed herein on 31st October 2017, the 1st Defendant Said Mohamed (Haban) avers that he applied for a Plot from the defunct Council in the 1990s and was allocated a commercial one measuring 0.294 hectares in 1999. In 2008, he sold 0.2 ha to the Plaintiff while he remained with about 0.094 ha.

4. The 1st Defendant however avers that he is aware the Plaintiff forged a copy of a plot-showing agreement purporting to show that he acquired 0.266 ha which is not the correct position as he only purchased 0.200 ha from the 1st Defendant.

5. The 2nd Defendant entered appearance but failed to file any response to the Plaintiff's application.

6. I have considered the Application and the response thereto by the 1st Respondent. I have equally considered the written submissions and the authorities I was referred to by the Learned Advocates for the Plaintiff and the 1st Defendant.

7. In ***Giella –vs- Cassman Brown Company Ltd(1973)EA 358***, the conditions for the grant of an interlocutory injunction were settled as follows:-

"…First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the application 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 the balance of convenience."

8. Has the Plaintiff made out a prima facie case with a probability of success" In ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125***, the Court of Appeal stated as follows in regard to what constitutes a prima facie case:-

"…….a prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

9. In the matter before me, the Plaintiff avers that he purchased 0.200 hectares of land from the 1st Defendant. That fact is confirmed by the 1st Defendant who avers that after the sale, he remained with 0.0094 hectares. The Plaintiff avers that after the said purchase, the defunct County Council of Tana River allocated him more land making his portion a total of 0.366 hectares and thereafter issued him with an allotment thereof. He has annexed a copy of the said letter of allotment and the PDP marked as AMB-3 to the Supporting Affidavit.

10. I have studied the documents annexed by the Plaintiff in support of his claim. I did not however find any document showing either a request from the Plaintiff and/or an approval of the request to allocate the Plaintiff more land. As it were, the so-called allotment letter and the Part Development Plan (PDP) collectively mention the size of the Plot as 0.3666 Hectares but are silent on when the allocation was done. It was in any case not clear to me how the defunct Council could purport to allocate the Plaintiff 0.366 hectares which allocation appears to include the 0.200 hectares which the Plaintiff had initially bought from the 1st Defendant.

11. From the material placed before me, it would appear that the plaintiff is now claiming land in excess of what he had purchased. The Plaintiff himself concedes that when he purchased the portion measuring 0.200 hectares from the 1st Defendant, a portion measuring 0.094 hectares was left with the 1st Defendant. I did not see any claim by the plaintiff that the 1st Defendant is now claiming more than the portion that he was left with. As it is the Plaintiff cannot purport to acquire land in excess of what he purchased without a concomitant increment of the acreage on the ground.

12. It is accordingly not apparent to me that the Plaintiff has a right which has been infringed by the Respondents as to require the intervention of this court. In the result, I find no merit in the application dated 5th May 2017. The same is dismissed with costs to the1st Defendant.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE