



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 74 OF 2019

ABDILLAH FARAJ HAJI

FAMAU AHMED FAMAU.....PLAINTIFFS

VERSUS

GEORGE MOORHEAD.....DEFENDANT

RULING

1. By their Notice of Motion application dated 15th August 2019 but filed herein on 17th September 2019, Abdillahi Farah Haji and Famau Ahmed Famau (the Plaintiffs) pray for a temporary order of injunction to issue restraining George Moorhead (the Defendant) by himself, servants and or agents from entering, remaining in, constructing, digging trenches, selling, leasing or in any other way interfering with all that property known as LR No. 27898 Lamu pending the hearing and determination of the suit.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff-Abdillahi Farah Haji is based on the grounds that:

- i) The Plaintiffs are two registered proprietors of the said LR No. 27898 Lamu;*
- ii) The Defendant has trespassed upon the said property and is now constructing on the same without the Plaintiffs' authority; and*
- iii) The Plaintiffs stand to suffer irreparable harm unless the orders sought are granted.*

3. The Defendant is however opposed to the grant of the orders sought. In his Replying Affidavit sworn on 22nd October 2019 and filed herein on 23rd October 2019, he denies that the Plaintiffs are the registered proprietors of the suit property. He asserts that he has personally been the one in actual possession and occupation of the suit property but denies undertaking any construction works thereon.

4. I have perused and considered the Plaintiffs' application as well as the response thereto by the Defendant. I have also taken into account the oral submissions made before me by the Learned Advocates for the parties.

5. Order 40 Rules 1 and 2 of the Civil Procedure Rules under which the application before me is brought sets out the law on granting temporary injunctions in the following manner:

“Where in any suit it is proved by affidavit or otherwise-

a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) That the defendant threatens or intends to remove or dispose off his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

6. Thus the circumstances for consideration require proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit. In instances where it is established that such danger exists, the Court is enjoined by law to grant a temporary injunction to restrain such acts.

7. In the matter before me, the Plaintiffs aver that they are the owners of the suit property and accuse the Defendant of trespassing thereon and commencing some construction works. On the other hand, the Defendant denies that the Plaintiffs own the suit property. While he admits being in occupation thereof, he denies taking out construction works thereon.

8. From the material placed before me so far, the Defendant is evidently on the suit property. He admits that fact in his pleadings. While he denies that the Plaintiffs own the suit property, he does not state in what capacity he is in occupation and/or possession of the land.

9. Even though the Plaintiffs have not produced a Certificate of Title for the property, they have annexed a Certificate of Official Search issued by the Registrar of Titles indicating that as at 30th April 2019, the two of them were the registered owners of the 25.00 Ha piece of land. Indeed, while the Defendant denies carrying out any construction on the land, the Plaintiffs have annexed a photograph showing that some construction work was going on and that they even wrote a demand letter to the Defendant on 2nd May 2019 asking him to cease his activities on the land.

10. In the result, I am persuaded that the land in dispute is in danger of being wasted and hence, pending a determination of its proper ownership at the trial, there is need for its preservation.

11. The upshot is that I find merit in the Plaintiffs' application dated 15th August 2019. The same is allowed with costs.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE



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