



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 185 OF 2015**

**GALERIUS INVESTMENT LIMITED.....PLAINTIFF/APPLICANT**

**-Versus-**

**THE COUNTY GOVERNMENT OF KWALE.....DEFENDANT/RESPONDANT**

**RULING**

1. The Plaintiff/Applicant brought this suit claiming that it is the lawful owner of all that parcel of land known as KWALE/DIANI BEACH BLOCK/1072 (hereinafter “the suit property”). The Plaintiff states that on 1st August 2015, it learnt that the Defendant/Respondent had moved into the suit property through its workmen, servants’ or agents and started clearing all the mature plants, trees and damaging wall on the suit property with an intention of constructing a road through the same without the Plaintiff's consent. The Plaintiff contends that the Defendant's said actions amount to nuisance and trespass on the Plaintiff's suit property and contravene the provisions of Article 40 of the Constitution of Kenya and the Land Act.

2. The Plaintiff has now brought a Notice of Motion Application dated 12th August 2015 seeking the following orders:

- a. Spent
- b. Spent
- c. That the Defendant/Respondent be restrained by way of a temporary injunction from constructing and/or continuing with clearing all the mature plants, trees and damaging the boundary wall on the Plaintiff's/Applicant's suit land with the intention of constructing a road passing through the Plaintiff/Applicant's Plot No. KWALE/DIANI BEACH BLOCK/1072 pending hearing and determination of this suit.
- d. That the Defendant/Respondent be ordered and/or compelled to demolish any illegal structures if any erected by the Defendant interfering with ownership, quiet and peaceful enjoyment of the suit property of the Plaintiff.
- e. Costs of the application be provided for.

3. The Application is supported by the affidavit of MEENA BHAGWANDAS PATEL, one of the Applicant's directors sworn on 12th August 2015. The deponent states that the Applicant Company is the lawful owner of all that parcel of land Title No. KWALE/DIANI BEACH BLOCK 1072 (“the suit property”) by virtue of a Lease from the Government of Kenya dated 10th August 1994.

4. The deponent avers that on or about 1st August 2015, he came to learn that the Defendant had moved into the suit property and started clearing all the mature plants, trees and damaging the boundary wall with an intention of constructing a road passing through the suit property. That the Defendant's said actions contravene Article 40 of the Constitution and the provisions of the Land Act and amount to a nuisance, annoyance and trespass on the Plaintiff's property.

5. The Defendant opposed the Plaintiff's application through the replying affidavit sworn by DR. MOHAMMED PAKIA, the Defendant's Chief Officer in Charge of Lands, Physical Planning and Natural Resources on 21st October 2015 and filed on 29th October 2015. The Defendant's case is that the suit property which is being claimed by the Plaintiff is a public road which is 15 meters wide and 345 meters long and is designed to lead to the beach for beach users and access by fishermen. That when the Defendant resolved to open all beach access roads, it was decided that the Defendant should start with the public access that is the subject of this suit since it is the most central and with the highest usage.

6. The Deponent stated that it has already awarded the contract for the grading and cabro-paving of the subject beach access at a cost of Kshs. 17,190,425/=. That the contractor already moved to the site and commenced the upgrading of the road. The Defendant contends that the Plaintiff entered into an agreement to buy un-surveyed parcel of land situate adjacent to plot number 82623/VII yet the road which the Defendant is in the process of upgrading is situate between plots number KWALE/DIANI BEACH BLOCK/ 627 and 628 on the one side and 819 on the other side. It is the Defendant's contention that the Plaintiff's parcel of land, if any, is not on the road that the Defendant is upgrading and that the Plaintiff must have misidentified the land it bought without sufficient due diligence.

7. In rejoinder, the Plaintiff through its supplementary affidavit sworn by MEENA BHAGWANDAS PATEL and filed on 11th December 2015 denies that the suit property is a road reserve as alleged by the Defendant. The Plaintiff asserts that the suit property was acquired through proper procedure and was approved by the defunct Kwale County Council. The Plaintiff contends that the suit property is recognised by the Defendant as it has been receiving rates of Kshs. 3,600.00 per annum from the Plaintiff on account of the suit property. The Plaintiff also contends that it has been paying annual rent of Kshs. 3,600.00 to the Government of Kenya on account of the suit property.

8. On the issue of misidentification of the suit property, the Plaintiff averred that it tasked an expert to identify the suit property and that the expert advised it that the property was well and properly allocated to its original owner, Boy Juma Boy from whom the Plaintiff had acquired it. The Plaintiff contends that it stands to suffer damage and irreparable loss if the Defendant is allowed to continue with the destruction of the suit property.

9. Both parties filed their respective written submissions to the application. The Plaintiff submitted that the Defendant has no *locus standi* to trespass on the suit property since the Plaintiff is the registered owner with a genuine title document. According to the Plaintiff, the Defendant is estopped from claiming any entitlement of the suit property since it had accepted the Plaintiff's title over the same. It is the Plaintiff's case that it has established a *prima facie* case by showing that it has a genuine title over the suit property. The Plaintiff submitted that it will suffer irreparable loss and damage on account of the investment made on the suit property.

10. The Defendant in its written submissions contend that the Plaintiff did not establish a *prima facie* case with a probability of success since the land that the Plaintiff had bought is not the same one on which the Defendant is upgrading a public access road. The Defendant further submitted that the Plaintiff cannot allege that it will suffer irreparable loss since the Plaintiff has a remedy as against the person who sold to it the un-surveyed land. Further, that the Plaintiff can be compensated by an award of damages which can easily be quantified and the damage the Plaintiff is capable of suffering has already attached because it came to court long after the construction of the road began.

11. On balance of convenience, the Defendant submitted that the same tilts in its favour because the contractor was awarded the tender on 18th May 2015 and soon thereafter moved into the site and commenced work. That the Plaintiff slept on its laurels and came to court too late and failed to give undertaking in damages. It urged the court to dismiss the application with costs.

12. The three principles to be considered whether or not to grant orders such as this are set out in the renowned case of *Giella vs Cassman Brown* i.e; Whether a *prima facie* case is established; Irreparable loss or in whose favour the balance of convenience tilts. Each of the parties has made submissions on all the three headings. The Applicant annexed a copy of a certificate of lease of the suit property to

demonstrate his claim.

13. The Respondent in response, submitted that the whole area was surveyed way back in 1971 and therefore there was no land left as un-surveyed. Further the Respondent submits that the Applicant's land is misidentified as they are constructing a road between plots nos 627 and 628 on one hand and 819 on the other hand while the Applicant's land is described to be near plot number 82623/VII.

14. In my evaluation of the pleadings and the submissions rendered, I draw the conclusion that both the parties to this application have laid a claim to the suit plot in dispute. The Applicant claims that she bought it and has been paying rates. The Respondent's claim that the plot was not available for allocation as it was already reserved as a public access road to the beach. The Applicant annexed receipts of rate payments to the defunct Kwale Municipal Council now the Respondent.

15. The Respondent having taken over the operations of Kwale Municipal Council is assumed to have seen records held by the said council showing the Applicant as the owner of a plot no. Kwale/Diani Beach/1072. Whether or not this plot was irregularly acquired because it is a public road, the Respondent had an obligation to follow the laid legal procedures (due process) in extinguishing the Applicant's right over that plot. However commencing development on it while disregarding the rights of the Applicant, illegal or otherwise is not the best way to resolve such a dispute. To this extent, I find that a prima facie case has been established.

16. On the head of irreparable loss, the Respondent stated that the tender valued at Kenya Shillings Seventeen million One hundred Ninety thousand and four hundred twenty five ( Kshs 17190425/=) has already been awarded and the work is almost finished. According to the defendant, the damage the Applicant is capable of suffering has already attached. Secondly, that the applicant is asserting a private right while the Respondent's is a very public right that would benefit members of the public at large. To support their averment, they have cited the case of **Laly Furnishings House Ltd vs. KeNHA & 3 Others {2015}eKLR** where the high court held that, **"..., However, I do note that the Petitioner may also have an interest thereon. In the event it succeeds in the pending suit, the Petitioner will be at liberty to sue for compensation"**

17. Under the provisions of section 24 and 25 of the Land Registration Act, registration confers on a proprietor absolute ownership together with rights and privileges appurtenant thereto. These rights can only be defeated as provided for under section 26 of the said Act for instance that the title has been acquired illegally or unprocedurally or through corrupt means. The Respondent defence is that the title was acquired illegally/unprocedurally because the suit plot is a public access road to be developed for the greater good of the public. The Applicant submits that it will suffer irreparable loss and damage for the investment it had put in the plot and its entitlement to the suit premises.

18. In evaluating irreparable loss, the Applicant was not convincing. However weighing the importance of promoting due process in exercising of rights by a public body vis a vi the private interest, I am persuaded that such loss to be occasioned is irreparable. The development being undertaken will only be delayed for some months so that the lawful process is observed.

19. The submissions rendered and case law cited by the Respondent in my view will be useful after the parties have presented their case in a full trial. Except for two cases i.e *Niaz Mohamed Jan Mohamed vs Commissioner for Lands & 4 others (1996)eKLR* and *Veronicah Waithira Trustee of Inter- Christian Churches & 3 Others vs KeNHA (2014) eKLR*, the rest were judgments which dealt with the merits of the case. In the *Niaz Mohamed* case, the matter in issue was different from the instant case as it dealt with the question of whether land compulsorily acquired should be used for any purpose other than that it was acquired for.

20. The second case of *Veronicah Waithira* is almost similar to the present application. The learned judge after considering the rights of the Applicants vis a vi the greater public good declined to grant the injunction because in his view, the wider public would suffer more if the Southern Bypass intended to decongest the city center is stalled. Comparing the purpose the Southern Bypass was to serve vis-a-vi this

public access road to the beach, the Respondent's argument is intent on providing ingress and egress to the beach which does not serve a population as big as the Southern bypass. The Respondent also stated that it is one of the access roads to the beach which means there are alternatives routes that were being used before this road was opened for construction.

21. In conclusion, I find merit in the application as I am satisfied that a prima facie case has been shown. I allow the motion in terms of prayer (c). I will not grant prayer (d) at this stage and direct that it awaits the outcome of the main suit. I also direct the Applicant to file a statement of undertaking as to damages within 14 days of this ruling. Costs of the application to abide the outcome of the main suit.

22. Due to the urgency of this case, I direct the plaintiff to comply with the requirements of order 11 within 30 days from today. Thereafter the defendant to also comply with order 11 within 30 days of being served with the Plaintiffs documents. This matter be mentioned on ... May 2016 for pre-trial directions.

**Ruling dated and delivered at Mombasa this 26th day of February 2016**

**A. OMOLLO**

**JUDGE**