

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 205 OF 2014

SAAB ENTERPRISES LTD.....PLAINTIFF

-VERSUS-

PETERSON MAINA.....DEFENDANT

RULING

1. The notice of motion dated 7th August 2014 brought by the plaintiff/applicant seeks the Court to grant, “an order of temporary injunction restraining the respondent whether by himself, his servants or agents from developing, dealing or otherwise disposing of the property known as sub-division number 1865 (original number 1486/69 Section II Main Land North) pending the determination of the suit. He also prayed that the OCS Bamburi Police Station to maintain peace and order during adherence and compliance of the above orders and costs of the application be catered for”.

2. The application is premised on the grounds inter – alia that the applicant purchased the suit property. When it presented their papers for registration, they discovered that the respondent was putting up a perimeter wall which if allowed to continue will cause the applicant immense lose and damage. This is because the defendants' development is going to change the nature and topography of the suit property. The motion is supported further by the affidavit of Swaleh A. Bayaber. The affidavit annexed documents evidencing purchase. In paragraph 5, he deposes that they noticed the defendant deposited building materials on the suit property and started construction of a perimeter wall encroaching on their property. He annexed pictures of the said wall. The deponent stated that he attempted to contact the defendant to discuss the matter for amicable settlement which calls were ignored. Lastly he deposed that this development was going to change the nature of the suit property since the applicant intends to use it in a totally different manner.

3. The respondent vide his replying affidavit filed on 27th August 2014 deposed that he bought his property long before the applicant bought the adjacent plot. He deposed that on his plot, he has constructed the house and the wall. The respondent continued that to the best of his knowledge, there is a road between the two plots therefore he cannot be accused of encroachment. The respondent deposed further that the seller had been restrained from selling the suit property hence the sale to the applicant was by itself done in contempt of Court to defeat justice. He also denied that the construction of the wall will change the nature of the suit property and urged the Court to dismiss the application.

4. The parties thereafter filed written submissions which I have read and considered. To begin with the prayers sought do not agree with the facts laid in support thereof. There is no evidence brought forward of the respondent's intent to “to develop, alienate or other wise dispose of the suit property known as sub-division No 1865”. On this account only, this application should fail. The applicant deposed that the perimeter wall has encroached on its plot. There was no attempt to establish where the boundaries of the two plots are. From the photographs annexed, the wall is already completely built. For this Court to give an order for demolition, there is need to adduce evidence to prove the alleged encroachment. The balance of convenience in this instance, tilts in favour of having the wall remaining in place until the suit is determined.

5. The applicant also feared the defendant's development would change the topography of his suit property thus causing them immense damage to restore it. The respondent on his part deposed that he

bought his land earlier and has put up a house and a perimeter wall. In the photographs annexed by the applicant, it is clear the defendant has a complete house on his plot. The applicant bought this plot knowing the existence of the respondent on the adjacent plot and his house. The building of a wall cannot in ordinary course of business change the topography of the land. The applicant did not specify what the nature of change was and how it would interfere with its user or enjoyment of the suit land. Neither did it say what he would use the land for which the wall blocks him from doing.

6. In conclusion, it is my finding that the present application does not meet any of the principles set out in the case of **Giella vs Cassman Brown**. The same lacks merit and is hereby dismissed with costs to the respondent.

Ruling dated and delivered at Mombasa this **18th** day of **September, 2015**.

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A. OMOLLO

JUDGE