REPUBLIC OF KENYA

High Court at Mombasa

Civil Miscellaneous 185 of 2012

RAMADHAN MASHUA MAVUMBA …..…..……. PLAINTIFF

V E R S U S

GEORGE KAMAU …….…….…… DEFENDANT

RULING

1) The parties herein are litigating over the ownership of Plot No. 140 KWL 10.2002K (**the 'property'**) which is situated in Kwale Town. Having commenced this suit on 6th September 2012 the Plaintiff filed an application dated 4th September 2012 seeking the following prayers-

(a) That pending the hearing of this application inter parties, a temporary injunction do issue against the Defendant restraining the Defendant either by himself, his servants and/or agents from occupying, carrying out illegal construction or trespassing and/or dealing in any way with the Plaintiff's parcel of land situated at Kwale Township of Golini in Kwale County and known as Plot No. K PDP 140 KWL.17.2007 measuring approximately 40 feet by 60 feet.

(b) An order of permanent injunction restraining the Defendant, his agents and/or servants from trespassing alienating onto the Plaintiff's Plot No. K PDP 140 KWL.17.2007 Kwale Township Golini until this case is heard and determined.

(c) A declaration that the Defendant unlawfully entered into occupies and possesses and trespassed onto the Plaintiff's suit premises.

2) According to documents in the Plaintiffs possession Racheal Tabu Kauli (**Racheal**) was allocated the property by Kwale Town Council on 29th November 2000 and paid for it on 6th July 2010. Three days earlier, she had sold this plot to the Plaintiff for the sum of Kshs. 200,000/-. It is said that Kwale Town Council sanctioned this transfer. Subsequently the Plaintiff sought to develop the property and so submitted building plans to the Council for its approval. It is said that the Council approved the plans and so he embarked on clearing the ground in readiness for the construction.

3) In the process someone offloads building materials on the property. This was on 22nd July 2012. He later learnt that the person is the Defendant. The Defendant claims ownership of the property. He has with him a letter of offer dated 22nd February 2005 from the Town Council of Kwale. He accepted the offer and paid the required stand premium on 1st March 2005. In filing his Defence to the Plaintiffs suit, he has also counterclaimed seeking the following prayers-

(a) An order for permanent injunction against the Plaintiff whether by himself, his servants or agents or otherwise whosoever from entering or using the suit premises and a declaration that

the Plaintiff is a trespasser who wrongfully and unlawfully entered into the Defendant's plot.

(b) Damages for wrongful entry into occupation and possession of and trespass onto the suit property of the Defendant.

(c) Costs of this suit.

(d) Interest at Court rates.

4) In my assessment this may be an issue of double allocation. The trial Court will have to resolve who between the Defendant and Rachael obtained lawful allocation of the property. For now I would observe that the letter of offer to Rachael was dated 29th December 2005 and came about 9 months after the Defendant had paid for the property. If that was true then the property would cease to be available for allocation once paid for by the Defendant.

5) There is something else that is curious about Racheal's allocation. The letter offering her the property is dated 29th December 2005. She was to accept the offer by making some payments within 30 days that is by about 29th January 2006. Instead payment therefore was 5 years 4 months later on 6th July 2010 and this was about 6 years after the Defendant had paid for the property.

6) The onus is on the Plaintiff to persuade this Court that he has a prima facie case with a probability of success. No attempt has been made to present evidence from Racheal and the Council to explain and clarify this double allocation. For this reason I cannot see how the Plaintiff has discharged his onus.

7) In declining the application I have also considered that no evidence has been presented before me to displace the Defendant's allegation that he has enjoyed quiet possession of the property from 2005 when he bought it and until recently when the Plaintiff attempted to develop it.

8) The result. The application dated 4th September 2012 is dismissed with costs.

Dated and delivered at Mombasa this 16th day of December, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Muyala for Marandu for Plaintiff

Kinyanjui for Thiaka for Defendant

Court clerk - Moriasi

F. TUIYOTT
JUDGE