



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL APPEAL NO. 13 OF 2006

SIA BAHATIAPPELLANT

VERSUS

**MARTHA GORRET WAMBUI
NOBBERT TERRY YIDOT.....**

.....RESPONDENTS

RULING

The Chamber Summons dated 16th September 2010 is brought pursuant to provisions of Order XXXIX Rule 1, 2, 3 Civil procedure rules and section 3 and 3A of the Civil Procedure Act seeking for restraining orders to issue against the respondent through themselves and/or their servants and/or their employees and/or their agents or whosoever acting on their behalf, from constructing, utilizing, building, alienating and/or dealing with the disputed boundary of plots No. 60 and 59, between the parties herein in any manner until this appeal is heard and determined. The application is premised on grounds that:

- (a) The appellant filed this appeal sometime on 3rd July 2007 against the decision of Hon. C. O. Obulutsa (SRM) and has prepared all the court papers relating to the appeal.
- (b) The appellant is in the process of listing the appeal for hearing and determination.
- (c) The appellant had travelled to Germany to attend to family issues and while in Germany, she was informed by her caretaker that the defendants were busy with constructing on the disputed boundary which is the subject of this appeal.
- (d) She travelled back to Kenya on 14th September 2010, and found construction going on at the disputed boundary of plots No. 59 and 60 – the subject of this appeal.

Should the defendants continue with their activities, then the present appeal shall be a nullity, which is why it is important that status quo be maintained pending hearing and determination of the appeal.

The supporting affidavit sworn by SIA BAHATI reiterates the issues raised in the grounds for the application – in fact it is replicate. The respondents did not file any reply or grounds of opposition.

I confirm that an appeal has been filed from the decision made by Hon. Obulutsa. From the memorandum of appeal the applicant is aggrieved especially with the finding that she had encroached onto plot NO. 60

which borders her plot No. 59. That is the subject of the appeal. Indeed it is apparent if there are any constructions being carried out on the disputed boundary, by the respondents, they justify such action on account of the findings by the trial court, and it would seem that the appellant never sought for orders of stay pending appeal.

That applicant is aggrieved by the trial court's findings cannot be disputed as indeed an appeal has been filed. Indeed if preservative orders are not issued, then the respondents will proceed to complete construction to the prejudice of the appellant. I think applicant has demonstrated prima facie the need to have the orders issue in the face of the pending appeal.

(2) Would damages be an adequate remedy if the orders are not granted? Applicant did not argue this limb.

(3) What about the balance of convenience – surely it is more convenient to preserve the existing status quo, than allow for the construction to proceed, then in the event that applicant succeeds in the appeal, order for demolition. If the appeal fails, the respondents can always carry on with the construction. The respondents have not indicated any prejudice they will suffer if the construction is halted at this point.

Consequently I find merit in the application and allow for orders of injunction to issue with regard to the respondents' activities whether by themselves, servants and/or agents from constructing, utilizing, building, alienating on in any other manner dealing with the boundary of plot no. 60 and plot no. 59 until the appeal is heard and determined.

The appellant must set down the appeal for hearing within the next ninety (90) days hereof.

Delivered and dated this 23rd day of **March 2011** at Malindi.

H. A. Omondi
JUDGE