



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 43 OF 2005

DOCTOR SARAH JELANGAT

SIELE.....PLAINTIFF

=VERSUS=

- 1. THE COMMISSIONER OF LANDS.....1ST DEFENDANT**
2. THE CHIEF LAND REGISTRAR.....2ND
DEFENDANT
3. REMO LENZI.....3RD DEFENDANT
4. SEVEN ISLANDS WATAMU LTD.....4TH DEFENDANT

RULING

The Notice of Motion dated 20th April 2011 is made pursuant to section 1A, 1B, 3A of the Civil Procedure Act, and Order II Rule 3 Civil Procedure Rule and Article 159 of the Constitution. It seeks that the Defendants, their agents, servants or any other persons claiming through them as well as their advocates, be directed to allow the Plaintiff's appointed surveyor access to the property in dispute with a view to establishing the boundaries/beacons for **PLOT NO.103 WATAMU** and Title **NO.KILIFI/JIMBA/1125** and to prepare an appropriate report.

Further in the alternative, this Court be pleased to issue an order to the District Surveyor KILIFI or the Provincial Surveyor Coast Province or the Director of Survey, directing them to establish the boundaries and locations of **PLOT NO.103 WATAMU** visa vis Title **No.KILIFI/JIMBA/125**. The court is urged to give appropriate directions in this matter to resolve the issue regarding location of the two parcels.

The application is based on grounds that;-

- (a) The Central issue in controversy is whether the 4th Defendant's parcel **KILIFI/JIMBA/1125** was properly created and whether it encroaches on the Plaintiff's **PLOT NO. 103 WATAMU**.

- (b) The key to a resolution of this dispute is a survey of the plots to verify the competing claims of the Plaintiff and 4th Defendant.
- (c) The Plaintiff and her advocates attempted to have a survey undertaken in order to resolve this issue and make easy the court's work but the 3rd and 4th Defendants have either been difficult or evasive.
- (d) The attitude and conduct of the Respondents have not been helpful or fair and will only stagnate this suit and might result in injustice.
- (e) No prejudice will be occasion to Respondents if this application is allowed, and it is in the interest of justice to do so.

The application is supported by the affidavit sworn by **DAVID OTIENO**, the Plaintiff's advocate who depones that both parties have staked a claim to one piece of land, with the Plaintiff claiming that the 4th Defendant's land if it exists, has irregularly and fraudulently subsumed her portion, while 4th Defendant claims that its title has not subsumed the Plaintiff's title on the ground.

Sometime on the 7th December 2010, **MR OTIENO** visited the offices of **WALTER OKOTH OMBOGO** a surveyor who had previously identified the Plaintiff's plot and was conversant with the problem between the parties hereto, with a view to asking him to testify on behalf of the Plaintiff. However **MR OMBOGO** indicated that he was not comfortable doing that because he was engaged in several other assignments on behalf of 3rd and 4th Defendants. He concluded that Plaintiff looks for a different surveyor to carry out the survey and compile a report. It was on that basis that Plaintiff's Counsel then instructed **NELSON MUTENDO** to visit the land with a view to carry out a survey to establish the physical location of the two parcels of land in dispute and whether there is encroachment. So a letter to that effect was sent to the surveyor and is annexed as DO 1, dated 16th December 2010.

MR MUTENDO informed Plaintiff's Counsel that he visited the land in the company of the area. Assistant Chief with a view to carrying out the exercise, but was barred from entering the land by 3rd and 4th Defendants. Plaintiff's Counsel received a phone call from the 3rd and 4th Defendant's Counsel, **MR WAGARA**, saying that his clients were keen on an amicable settlement of this matter by negotiating with the Plaintiff, with a view to buying her plot. Plaintiff's counsel agreed to seek instructions from his client. During this phone conversation, Plaintiff's Counsel mentioned to **MR WAGARA** the refused entry explained by the surveyor. **MR WAGARA** confirmed being aware of the incident and explained that his client's only problem was that the surveyor just happened on the scene without notifying the Defendants or their advocate, and that there would be no problem if due notification was given. Subsequently Plaintiff's Counsel wrote a letter to 3rd & 4th Defendant's advocate and a copy sent to the surveyor (It is annexed as DO2 dated 31/01/11. In turn **MR WAGARA** sent an e-mail saying the request was not agreeable (as per annexure DO3). Plaintiff's Counsel laments that 3rd and 4th Defendants are blocking evidence and want to win unfairly. The application is opposed by a replying affidavit dated 10th June 2011 by **ROBERT LENZI** which contents I have duly considered.

MR OTIENO in his submissions urged this Court to be guided by the provisions of Order 11 Rule 3 (c) (g) and (j) which require court to explore methods to resolve contested issues and make orders either on its own motion or on application for interlocutory relief. It is his contention that there is an obligation on counsel to assist the court in furthering the overriding objections of the Act as contemplated by section 1B of the Civil Procedure Act. He points out that allowing this application will ensure a fast determination of proceedings and enable expeditious conclusion of this matter. Further, that Defendants have the chance and opportunity to have their own report since they are in possession of the land. It is his argument that the process of identifying beacons is a one day exercise which will not unduly interfere with the Defendant's business. He rejects the suggestion by Defendants that they obtain the required information

from Lands Office saying that is not feasible because the Lands Office have in fact been sued as 1st and 2nd Defendants.

MR WAGARA submits that what is being referred to as an attempt at carrying out survey, was actually an invasion of the premises with demands that all activities that were going on be stopped. He explains that this is a beach property where a hotel is being run and there were guests – so the “invasion” was not only prejudicial to Defendants but also gravely embarrassing and all that happened without notice. This is why 4th Defendant gave instructions to reject survey without notice.

MR WAGARA submits that if survey is to be carried out, then it must be done in a structured manner and the court must supervise anything on the ground. **MR WAGARA** clarifies that it is not his intention to create the impression that defence is shutting due process, but the suit property has on it intensive business investment which must be protected.

Secondly, he argues that the application is belated because the suit was filed in 2002, then 6 years down the line Plaintiff now seeks summing. It is his contention that this application ought to have been made well before the suit was set down for hearing and that is why there is provision for discoveries saying there should be no reason to have discoveries after issues have been settled, so the application should be dismissed.

From the pleadings and even the evidence so far presented before this Court, the issue in controversy is simply whether 3rd and 4th Defendants suit premises encroach and subsume the Plaintiff's property. The only way to determine that would be by a survey being conducted and an appropriate report filed to assist the Court in determining the matter. Of course the request appears belated, but from the affidavit sworn by **MR OTIENO**, this is because Plaintiff had expected the surveyor **MR OMBOGO** who was familiar with the dispute here and had even previously identified the plot to be the one to testify. It has been sufficiently explained why this was not possible. I am inclined to belief that it is due to this development that the request appears to be made late in the day. Order 11 Rule 3 (1) provides that with a view to furthering expeditious disposal of cases and case management the court shall explore methods to resolve the contested issues, narrow or resolve outstanding issues. Although this ought to be done within 30 days after the close of the pleadings, I think due regard must be given to the objective of this rule. My view is that the provision is for expeditious disposal in line with the overriding objectives contemplated by the provisions of section 1A and 1B of the Civil Procedure Act.

I think it would be unfair to use technical arguments such as issues already being settled and no further discoveries should be made, as that would amount to shutting out vital evidence, on which this dispute actually hangs and therefore hamper fair administration of Justice. To refuse the application on the basis of procedural technicalities would defeat the spirit of the Constitution as provided under Article 159 (2) (d) which clearly states that justice shall not be hampered by undue technical procedures.

To be fair to the 3rd and 4th Defendant, certainly the first announced visit by the surveyor was improper and rightfully rejected. I agree with **MR WAGARA** that a tourist premises cannot be invaded by strangers seeking and obtaining assistance from the local administration. Such survey would certainly have to be conducted in a structured manner and with minimal interruptions to the Defendant's business. The bottom line however is that survey is necessary in achieving or just resolution of this case.

I therefore direct that Plaintiff's surveyor be allowed access to the suit property so as to carry out survey. This exercise must be carried out in the presence of the Deputy Registrar Malindi. The parties counsel to agree on a date for such exercise which date must be communicated in writing to this Court within the next seven (7) days in default of which the court will set a date. Mention on 26th July 2011.

DELIVERED AND DATED this 19th day of July 2011 at Malindi

H A OMONDI

JUDGE

Mr Otieno for applicant

Mr Otara holding brief for Doctor Khaminwa