



REPUBLIC OF KENYA



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Macharia v Muses & 2 others (Environment and Land Case Civil Suit 30 of 2014 & Miscellaneous Case E006 of 2022 (Consolidated)) [2022] KEELC 3983 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3983 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 30 OF 2014
& MISCELLANEOUS CASE E006 OF 2022 (CONSOLIDATED)

M SILA, J

JULY 20, 2022

AND

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
MISC NO. E006 OF 2022
FIVE ELEVEN TRADERS & AUCTIONEERS

APPLICANT

VERSUS

ALI KHAN ALI MUSES 1ST

RESPONDENT

ESTATE SONRISA LTD 2ND

RESPONDENT

BETWEEN

SAMUEL KAMAU MACHARIA PLAINTIFF

AND

ALI KHAN ALI MUSES 1ST DEFENDANT

ESTATE SONRISA LTD 2ND DEFENDANT

LAND REGISTRAR, KWALE (SUED THROUGH ATTORNEY) GENERAL ... 3RD DEFENDANT



RULING

1. In a ruling delivered on June 13, 2022, Naikuni J, who was then handling the suit miscellaneous application No E006 of 2022, made orders inter alia that the said suit and four other cases be placed before me as the presiding judge, Environment and Land Court, Mombasa, for directions. These other files are as follows :-Mombasa ELC No 30 of 2014 – Samuel Kamau Macharia v Ali Khan Ali Muses, estate of Sonrisa Limited and the Land Registrar, Kwale.Court of Appeal (Mombasa) civil appeal No 14 of 2014 (consolidated with civil appeal No 32 of 2016), Estate of Sonrisa Limited, Ali Khan Muses v Samuel Kamau Macharia.Kwale ELC No E001 of 2021 – The Estate of Sonrisa Limited v Land Registrar, Kwale, Regional Surveyor, Coast Region, the Honorable Attorney General and Samuel Kamau Macharia.Mombasa CMCC miscellaneous application No 36 of 2022, Samuel Kamau Macharia and Five Eleven Traders and Auctioneers v Ali Khan Ali Muses and estate of Sonrisa Limited.
2. It will be seen that these cases were spread in different courts thus the need for directions on the way forward. I have looked at all of the files. I have found as follows.
3. The real dispute is between Samuel Kamau Macharia (SK Macharia) against Ali Khan Muses and Estate Sonrisa Limited. SK Macharia is owner of the land parcel Galu/Kinondo/50. He filed the suit Mombasa ELC No 30 of 2014 against Ali Khan Muses (Ali Khan), Estate Sonrisa Limited (Sonrisa) and the Land Registrar, Kwale, complaining that the 1st and 2nd defendants have encroached into his land and were issued with a title deed by the 3rd defendant which covered his property. He sought for orders *inter alia* for the eviction of the 1st and 2nd defendants and for any titles held by them to be cancelled. The defence of the 1st defendant was that he purchased the plot Galu/Kinondo/50 (plot No 50) in April 2007 and became registered as proprietor. The defence of the 2nd defendant (Sonrisa) was that she is the proprietor of the plot Galu/Kinondo/48 (plot No 48) which was adjacent to the plot Galu/Kinondo/50. There were thus two issues to be tried; first, who was the owner of the plot No 50, and secondly, whether the owner of the plot No 48 has encroached on the plot No 50.
4. The matter was heard by Mukunya J, who delivered judgment on October 13, 2014. On the issue of the competing claims of ownership over the plot No 50, the judge held that the proper title is that held by Mr Macharia. He ordered the 1st defendant to remove his structures within 30 days. If he failed, the plaintiff was at liberty to demolish them. On the issue of the alleged encroachment by the owner of the plot No 48, the judge found that the plot No 50 is 1.7 ha, whereas the plot No 48 is 0.9 ha and not 1.9 ha as it was attempted to press based on the registry index map. He ordered that the beacons between the two plots be fixed by a surveyor taking into account the area in the respective titles and the survey fees be paid equally. He further ordered that any party found to have encroached in the other party's land shall have 60 days to demolish all structures and vacate forthwith. He further ordered :-

“If the party encroaching fails to move and vacate, the party whose land is encroached shall be at liberty after the said sixty (60) days to demolish such encroaching structures with the help of the court bailiff who will be assisted by the nearest police officers and nearest administration police officers. The cost of such demolition (sic) shall be borne by the party that has encroached. Any public path between the said parcels No 50 and 47 accessing the sea shall not be interfered with or blocked.”
5. This judgment was subjected to an appeal before the Court of Appeal filed separately by Ali Khan and Sonrisa. These are Mombasa civil appeals Nos 14 of 2016 and 32 of 2016. The two appeals were consolidated. Judgment was delivered on April 24, 2020. The appeal by Ali Khan was dismissed with



the Court of Appeal upholding that S.K Macharia is the rightful proprietor of the plot No 50. On the issue of encroachment, there was first a dispute on the acreage with Sonrisa contending that her land is 1.9 ha and not 0.9ha as reflected in the title. The CoA held as follows :-

“We conclude this aspect and the last ground of appeal by agreeing, respectfully with the learned Judge that, strictly on the evidence on record Kwale/Galu Kinondo/48 is 0.9 hectares.”

6. The Court of Appeal found nothing untoward with the order that beacons be fixed by the surveyor. The only part that the Court of Appeal interfered with was presented as follows :-

“The only part of that order that we do not, with respect, agree with is where the judge directed that “ any party found to have encroached on the other parties land shall have sixty days to demolish all structures that might have been erected therein and move and vacate therefrom.” By that order, the Judge, as it were, jumped the gun because the registrar had, first to conduct the proceedings to determine the extent of the parties’ respective parcels, and cause to be defined by survey, the precise position of the boundaries in question. By sections 79 (3)A, 80, 86 and 91 (9) of the *Land Registration Act* that decision may be challenged in court. To stress the point, we cite section 86 which states :- (same quoted)

“ If an question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the registrar by this act, the registrar or any aggrieved person shall state a case for the opinion of the court, and thereupon the court shall give its opinion, which shall be binding upon the parties.”

It is only after determining the dispute can parties move to court to challenge it... The order for demolition was, in the result, premature... We set aside that order and instead direct the land registrar, Kwale together with the government surveyor, Kwale county to determine whether Kwale/Galu Kinondo/48 has encroached upon the suit land.”

7. According to Sonrisa, after the judgment of the Court of Appeal, the land registrar, Kwale, invited parties to the ground for the determination of the boundary dispute on May 18, 2021. It is stated that the surveyor used a map which Sonrisa objected to. Aggrieved by the findings Sonrisa filed the suit Kwale E001 of 2022 on September 27, 2021, before the Environment and Land Court at Kwale, for the opinion of the court pursuant to section 86 of the *Land Registration Act*. An objection was raised, and in a ruling delivered on June 13, 2022, Dena J, struck out the suit on the reasoning that Sonrisa should not have filed a new suit. She stated as follows :-

“In my view the end result of the case stated for the opinion of the court is ultimately to enable execution of the decree in Mombasa ELC No 30 of 2014 which awaits the outcome of the precise setting of the boundaries by the land registrar as ordered by the court of appeal. Consequently, the provisions of section 34 (1) of the *Civil Procedure Act* should kick in. In my view the plaintiff should have moved the court before the Mombasa ELC No 30 of 2014 and not file a fresh suit before another court when there is still an existing suit whose decree has not yet been fully realised.”

8. Between September 27, 2021, when the suit in Kwale was filed, and its dismissal on June 13, 2022, two miscellaneous applications were filed. The first was filed on January 24, 2022 before the Chief Magistrate’s Court Mombasa as miscellaneous civil application No 36 of 2022. It was filed by S K Macharia and Five Eleven Traders and Auctioneers. It sought orders for police assistance to be given to the auctioneer to execute the decree of October 13, 2014. The application was placed before Hon



Nabibya, Principal Magistrate, and allowed *ex parte* on January 24, 2022. It was however withdrawn on February 15, 2022 without any return being made on execution of the orders.

9. The other miscellaneous application was filed on February 16, 2022 before the Environment and Land Court, Mombasa and registered as miscellaneous application No. E006 of 2022. It was filed by Five Eleven Traders and Auctioneers against Ali Khan and Sonrisa. It sought the same orders as that sought in CMCC miscellaneous application No 36 of 2022, that is an order for police assistance to be given to the auctioneer to execute the decree of October 13, 2014. The file was placed before Naikuni J, who granted the orders *ex parte*. It is said that following this order, a demolition of the property of Sonrisa occurred. Within the miscellaneous cause, there is an application dated February 21, 2022 seeking a variety of orders, including the orders for stay of the *ex parte* orders, consolidation with Mombasa ELC No 30 of 2014, that the auctioneer and others be investigated for criminal intent, that status quo ante be restored, and that what was destroyed be built, brick by brick.
10. Before the two miscellaneous applications that I have referred to above were filed, SK Macharia had filed an application dated July 14, 2021 within the suit Mombasa ELC No 30 of 2014 seeking orders to execute the decree. The application was made on grounds inter alia that the appeal has already been heard and dismissed. That application was opposed. It was heard by Matheka J who found no merit in it and dismissed it in a ruling delivered on November 9, 2021. Part of the reasons for dismissing the application was that there was the pending case in Kwale and the court had issued orders of injunction.
11. I do not hesitate to categorically state that the filing of miscellaneous applications when there is an existing substantive suit ought not to be encouraged. If there is a substantive suit, then applications which seek orders purporting to emanate from that suit need to be filed in the substantive suit and not in miscellaneous applications. In the instance herein, I even observe that a miscellaneous application was filed in the Magistrate's Court, seeking orders to execute a decree of a court of the status of the High Court. The lower court cannot have jurisdiction to order execution of orders made by the High Court. I will say no more on that but I will direct that any application must be filed within the substantive suit which is the suit Mombasa ELC No 30 of 2014. That is where the decree was made and if any party wishes to execute the decree, or seek any orders arising out the judgment therein, then he/she must apply within that file and nowhere else.
12. At the moment, we do not have miscellaneous application No 36 of 2022 that was filed in the Magistrate's Court as it was withdrawn. We also do not have Kwale E001 of 2021 as it was dismissed. What we still have is miscellaneous application No E006 of 2022 and the original file Mombasa ELC No 30 of 2014. Orders of police protection to execute the decree appear to have been made *ex parte* in miscellaneous application No E006 of 2022. I already stated that using the said orders there was demolition, of the property of Sonrisa. There is a pending application seeking various orders which I have already spelt out. There was an application for recusal of Naikuni J which was dismissed. Since this file is still live, I will refer it back to Naikuni J, to deal with it to its logical conclusion but I will reiterate that any future applications touching on execution of the decree must be filed in the substantive suit. If any party or person wishes to have any order arising from the subject judgment in Mombasa ELC No 30 of 2014, then such party or person must make his application within the suit Mombasa ELC No 30 of 2014.
13. It in fact appears, as if that was the reasoning of Dena J, when she dismissed the suit Kwale ELC No E001 of 2021. Her orders stand and need to be adhered to unless and until set aside. Abiding by those orders, I direct that if Sonrisa is of opinion that there is an issue regarding the surveyor's report, then Sonrisa is at liberty to make an application to this court within the file Mombasa ELC No 30 of 2014. Similarly, if SK Macharia is of the view that he wants an order of execution of the decree, or an order to affirm the decision of the surveyor, then he needs to seek those orders from this court through the



file Mombasa ELC No 30 of 2014. My unbridled opinion in all this is that unless and until the survey report is agreed by the parties, or the court gives its opinion on it because it is disputed, it is difficult to say that the decree is settled and is one that is capable of being executed.

14. It is so directed.

DATED AND DELIVERED THIS 20 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:

Mr. Orenge for S. K Macharia

Mr Mwangi for Five Eleven Traders & Auctioneers.

Mr. Khan and Ms. Oluoch Wambi for Estate of Sonrisa Ltd.

Mrs. Waswa for the Attorney General.

Court Assistant – Wilson Rabong’o.

