



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**Civil Suit 65 of 2008**

**DEXTER MUNGA MWAMBENI (*suing in his capacity as Administrator of the Estate of MWAMBENI MWANGILA JITWA*) – DECEASED.....PLAINTIFF**

**VERSUS**

**A. J. OMAR.....DEFENDANT**

**RULING**

The application dated 29-8-08 by way of Chamber Summons under Order XXXIX Rules 1, 3 and 9 CPR and Section 3A prays for grant of restraining orders against the defendant/respondent, his agent or servants from developing, disposing, wasting or damaging the plot No. Kilifi Block 3/1136 (formerly Plot No. 5054/81) pending hearing and determination of the suit.

It is based on grounds that the applicant's deceased father is the legal owner and entitled to possess Plot No. Kilifi Block 3/1136 (formerly Plot No. 5054/81)

- That the respondent has illegally, without any colour of right occupied and is currently either through himself or servants/agents employee's, developing the suit property
- The applicant's father reported the matter to the Provincial Administrator as well as Lands Department but the dispute has never been determined.
- That apart from the development being carried out by the respondent, the respondent put up some other buildings/structures on the suit property and has been getting rental income from the tenants who have been occupying the same.
- That it is in the interest of justice that the court do grant the orders prayed for in order to preserve the suit land and/or stop further development, damage, wastage or alienation of the suit land by the respondent, his servants/agents.

In the supporting affidavit, the applicant has stated that the suit plot is situate in Kilifi opposite Matatu/Bus Stage terminus and belonged to his late father, Mwambeni Mwangila Jitwa.

The same was allocated to his father vide allotment letter date 6-11-87 which stated that the plot was a residential plot No. 5054/82 Kilifi Township – copies of the District Plots Allocation Committee minutes and the allotment letter are annexed and marked DMMI (a) and (b).

Payment was made in the sum of Ksh 3140/- on 25-1-99 and receipts issued annexed as DMM2.

His father subsequently paid land rate and rents as per annexed receipts DMM 3 (a) (b) (c) and (d).

Later a dispute arose between the respondent and appellant's late father and correspondence from the District Commissioner and Commissioner of Lands are annexed. The respondent encroached onto a portion of the suit property when he developed his plot No. 5054/81 now Kilifi Block 3/1137. A re-survey of the suit plot was done and applicant's father was given another allotment letter DMM5 dated 22-12-95. The size of the plot is shown in DMMI as 0.0606 hectares before the respondent encroached onto it and the size of the suit land after survey is approximately 0.50ha.

Even after the re-survey, the dispute over ownership persisted, despite letter from the Director Survey to the Commissioner of Lands and to the District Surveyor Kilifi – the content of which was that plot 504/81 belonged to respondent and that the suit plot belonged to applicant's father. Applicant's father died before obtaining title document as he was in arrears for the land rent.

The lands department had written to applicant's father vide DM3 to pay Ksh 8250 being contribution in lieu of rates for 1<sup>st</sup> January to 31<sup>st</sup> December 2006.

Meanwhile respondent has started and is developing the suit land and photographs of the development are marked DMM 15.

On 15-4-08, Town council of Kilifi gave the respondent a notice to stop developments but he ignored.

The application is opposed and the respondent in his replying affidavit stated that applicant has no locus to bring this suit on behalf of his deceased father Mwambeni Mwangila Jitwa as he is not in possession of any valid letters of grant of administration further that the suit is bad in law, as it is a claim for recovery of land and the same has been brought after 12 years contrary to section 7 of the Limitation of Actions Act cap 22 Laws of Kenya.

He insists that he applied for plots NO. 5054/81 and 5054/82 in 1986 when the two were advertised by the Kilifi Town Council for sale and the same were allocated to him as a combined plot and the same were unavailable to the deceased for allotment and any purported reallocation was null and void. After the said allocations, he commenced construction of a commercial building on the two combined plots and the same was inspected and duly approved by the Kilifi Town Council and an occupation permit duly issued on 18-5-93 – annexed as A.

It is his contention that due to the dispute over the plot, the Kilifi Town Council Works, Town Planning, Education and Social Services Committee held a meeting on 27-4-89 and recommended that the two plots be allocated to respondent and this decision was communicated to the respondent. A copy of the minutes of the meeting is marked B and letter BB.

Further that the committee ordered the deceased to surrender the original allotment letter in respect of plot No. 5054/82 but he failed to do so. On 14-8-89, the Kilifi District Lands Officer confirmed to the Commissioner of Lands, the Ministry of Lands and the parties hereto, that an alternative plot had been earmarked for the deceased and that's why he was ordered to surrender the original letter of allotment and as a result of failure to do so, the same was treated as a lost document by its issuer and therefore had no effect at all and the applicant cannot therefore rely on the said letter of allotment as proof of ownership of plot No. D 5054/82.

On 29-8-89, the District Lands Officer affirmed the ministry's decision to allocate Plots No. 5054/81 and 5054/82 to the respondent and deceased was requested to furnish the officer with approved building plans which he failed to do so.

Consequently on 21<sup>st</sup> November 1994, respondent was issued with an allotment letter for the combined plots 5054/81 and 5054/82 – the letter is marked G.

On 18<sup>th</sup> May, respondent paid to Garissa County Council for an occupation licence as per exhibit H.

Respondent then paid all the fees necessary for registration of the said plot in his names as per Exh.1.

On 3-10-95, the survey plan for both plots was approved and a deed plan issued (marked K) which consolidated the two plots into one and became known as No. 5054/1301.

As for the directions by the District Commissioner, respondent avers that they were unauthorized and therefore illegal and were rejected by the Ministry of lands, so that the requirements of the letter of 8<sup>th</sup> November 1995 were never satisfied and therefore never took effect and the re-survey was irregular as the conditions set by the Director of Surveys was never met. Respondent prays that the application be dismissed with costs.

At the hearing, the matter proceeded ex parte and Mr. Odhiambo, counsel for the applicant submitted that the various annexures referred to by applicant in the supporting affidavit disclose that the plot was allocated to the applicant's father basing the claim on the letter dated 6-11-87. He argues that DMM5 clearly explains why a second allotment letter had to issue and that the director of survey was misled to combine the two plots.

It is prudent to start from the main issue raised by respondent i.e does the applicant have locus to file the suit and therefore bring this application?

Mr. Odhiambo did not address the issue in his submissions. I have perused the court file and find a copy of Grant of letters of Administration issued on 6-12-01 to Dexter Mungai Mwambeni – so the applicant has locus to file this suit.

The claim to the plot in question is based on the letter dated 6-11-87 and fortified by another letter of allotment dated 22-12-95 confirming plot No. 82 as being allotted to deceased and requiring him to make the necessary payments thereto.

It is equally true that respondent applied for and subsequently obtained documents allotting to his plot 5054/81 and 5054/82. A letter from the Department of Lands of the Director of Survey (DMM10) stated that:

- 1) Plot 5054/81 was allocated to one AJ Omar where plot 5054/82 was allocated to Mwambeni Mwangila Jilwa.
- 2) The allottee of plot 5054/81 developed his plot and in the process encroached on a portion of 5054/82.
- 3) The allottee of plot 5054/82 Mwambeni agreed to have a title of the remainder of 82 prepared for him.

Then the letter states this:

***“I regret to note that you were misled somewhere into preparing the survey documents combining plots No. 5054/81 and 82 since only a portion of 5054/82 was encroached. Please note that the allocation of these two plots has already been amended to reflect the situation on the ground. Therefore please cancel the approved survey plan comprising No. 9581 and issue a new Deed Plan as Indented for LR. No. 5054/82...”***

On the face of that letter the portion would appear to favour what the applicant states. The respondent is relying on the Deed Plan which combined the two plots to claim ownership – that Deed Plan has been challenged.

The situation is compounded by the fact that even by 15-5-96, Department of Lands communication was that deceased had accepted the allotment, by 1998, demands were being sent to deceased vide letter DMN 9, for payment of Land Rent in respect of the said subject plot.

The authorization by the Director of Survey appears to have put several officials in a quandry because the records showed that the two belonged to two different parties.

- No wonder B M Kanye wrote to the Commissioner of Lands on 21-4-99 regarding the Deed Plan for respondent and the allotment letter in respect of applicant annexure B – by respondent (Minutes of meeting at Kilifi Town Council from that plot No. 5054/82 actually belonged to Mwamburi, but recorded that since an error had already been made whereupon respondent was allocated the two plots, they resolved in favour of respondent and noted that deceased could be considered for allocation of other plots. Was this ever done as a way of mitigating or compensating for deceased's loss? Nothing has been demonstrated to this court. All there is a letter from District Lands Offices Kilifi showing an alternative site but as to whether this was effected is not clear. And while all this was happening what explanation did Kilifi County Council and the Director of Survey give to deceased? It seems none as the next correspondences simply requested him to return the original letter of allotment dated 6-11-97 and asking respondent and indicate whether he would be interested in an alternative plot.

At the end of the day the two parties ended up with various correspondence from the government departments, each giving assurance to each party and that mess cannot be wished away simply on the strength of minutes of a meeting by the Kilifi County Council. My finding is that the applicant has established a prima facie with probability of success. Would damages be adequate compensation for the loss if the orders were not granted? The applicant has not stated the kind of loss he will suffer.

Which leads me to the third principle – the balance of convenience.

The respondent is already constructing not just on part of the disputed parcel, respondent has himself confirmed that he is intent on that construction – that would be to the disadvantage of the applicant who if the applicant were to succeed would end up with an altered landscape. It would certainly be more convenient to halt any further construction and occupation of the disputed parcel until the matter is heard and determined. The balance of convenience therefore tilts in favour of the applicant.

Consequently I make orders that temporary restraining orders do issue against the Defendant/respondent, his servants and/or agents from developing, wasting, damaging, alienating or dealing with plot No. Block 3-1136(formerly No. 5054/81) in any way whatsoever until the suit is heard and determined.

Costs of the application shall be borne by the respondent.

Delivered and dated this 2<sup>nd</sup> day of December 2008 at Malindi.

**H. A. Omondi**

**JUDGE**

Mr. Kenga hb for Odhiambo for applicant

Mr. Busieka hb Kanyi for respondent.