

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NO 30 OF 2014

SAMUEL KAMAU MACHARIA.....PLAINTIFF/APPLICANT

VERSUS

ALI KHAN ALI MUSES

ESTATE SONSIRA LIMITED LAND REGISTRAR KWALE

(SUED THROUGH THE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 14th July 2021 and is brought under Sections 1A, 1B, 3A, 38B(F) of the Civil Procedure Act and Order 22 Rule 29, of the Civil Procedure Rules seeking the following orders;

1. That in the first instance, the application be certified urgent and service with and prayer (2) herein below be granted *ex parte*.
2. That pursuant to clause (5) of the decree herein, Officer Commanding Police Station (OCS) Diani Police Station, be and is hereby directed to supervise execution of the decree by providing security and maintaining public order.

It is based on the grounds that the decree herein was issued in favour of the plaintiff on 6th November 2015. The defendants appealed against the judgment and the decree which appeal was dismissed on 24th April 2020 as evidenced by annexure "JO1". The Land Registrar as directed by the Court of Appeal made a determination that the 2nd defendants land Kwale/Galu Kinondo/48 has encroached upon plaintiff's land Kwale/Galu Kinondo/50 (suit land) as evidenced by annexure "JO2". That efforts the decree in terms of clause 5 annexure "JO3" have become futile since the police are unable to assist as directed reason being that, the order directing them to help is vague and ought to be specific as to which police officer and police station is to assist. Orders sought in the application are intended to give clarity to clause (5) of the decree, being specific so that the police can supervise enforcement of the decree by providing security and maintaining public order. Unless orders sought are granted, police assistance will not be accorded thus defeating clause (5) of the decree, which will be a clog to execution. In the circumstances, the plaintiff will not enjoy the fruits of his judgment.

The 2nd respondent reiterated the contents of the notice of grounds of opposition filed before this Honourable Court on 29th September, 2021. That the application as filed is misconceived and an abuse of the court process. That the Honourable Court of Appeal in Civil Appeal No. 14 consolidated with 32 of 2016 did not just pronounce itself through a judgment but also later pronounced itself through a ruling on 11th March, 2021 after its judgment on 24th April 2020 annexed and marked as exhibits "IS1" and "IS2" a copy of the judgment and ruling of the Court of Appeal. The Honourable Court of Appeal in the aforesaid judgment and ruling ordered the 3rd defendant to determine the boundary dispute between the properties of the aforesaid parcels of land. That the Honourable Court of Appeal faulted the decisions of the Honourable Justice S Mukunya (as he then was) in this suit and acknowledged the provisions of Section 79 (3A), 80.96 and 91(9) of the Land Registration Act which gives parties the right to state a case for the opinion this Honourable Court in the event a party is aggrieved by the decision of the 3rd defendant. That the Honourable Court of Appeal faulted the decision of the Honourable Justice S Mukunya (as he then was) in directing any party found to have encroached to demolish the encroaching structures within sixty (60) days or risk being evicted by the Court Bailiff. This is order No. 5 of the decree of this Honourable Court which the plaintiff now seeks to enforce through its application herein. The Honourable Court of Appeal faulted the decision of the Honourable Justice S Mukunya (as he then was) in directing the 1st defendant/respondent in determining the boundary dispute in accordance with the acreage shown in the respective titles. It is clear that the decree of this Honourable Court was varied by the Honourable Court of Appeal both in its judgment and ruling and specifically the order that the plaintiff seeks to enforce an order that was dismissed by the Honourable Court of Appeal and parties directed appropriately on how to deal with the issue should they be dissatisfied with the decision of the 3rd defendant.

That the 2nd defendant upon being served with the decision of the 3rd defendant on 3rd September, 2021 accordingly invoked the provisions of Section 79 (3A), 80.96 and 91 (9) of Land Registration Act which gives parties the right to state a case for the opinion of the court and filed a case stated as against the 3rd defendant in Kwale ELC NO. E001 of 2021 in line with the directions of the Honourable Court of Appeal. Annexed hereto and marked as exhibit "AS3" a copy of the 3rd defendant's report dated 2nd July 2021 and served upon the 2nd Defendant on 3rd September, 2021. Annexed hereto and marked as exhibit "IS4" a copy of case stated duly served upon the plaintiff and the 3rd defendant herein. That the Honorable Court in Kwale ELC No. E001 of 2021 accordingly issued orders of injunction restraining the plaintiff and the 3rd defendant herein from dealing adversely with the 2nd defendant's property. Marked as exhibit "IS5" a copy of the court order duly served upon the plaintiff and the 3rd defendant herein.

This court has perused the application and submissions therein. The applicant submitted that the decree herein was issued in favour of the plaintiff on 6th November 2015. The defendants appealed against the judgment and the decree which appeal was dismissed on 24th April 2020 as evidenced by annexure "JO1". The Land Registrar as directed by the Court of Appeal made a determination that the 2nd defendants land Kwale/Galu Kinondo/48 has encroached upon plaintiff's land Kwale/Galu Kinondo/50 (suit land) as evidenced by annexure "JO2". I have carefully perused the Court of Appeal judgement dated 24th April 2020 and a ruling in the same matter dated 11th March 2021 which amended the draft decree. The phrase "in accordance with the acreage shown in the respective titles" was deleted. I wonder how this court can order the supervision of a decree which was amended by the Court of Appeal. If the applicants seek clarity on the same then it is only that court that can do so. This court also noted that the Honorable Court in Kwale ELC No. E001 of 2021 accordingly issued orders of injunction restraining the plaintiff and the 3rd defendant herein from dealing adversely with the 2nd defendant's property marked as exhibit "IS5. I find this application is misconceived and an abuse of the court process. The application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH NOVEMBER, 2021

N.A. MATHEKA

JUDGE