



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 43 OF 2019

BETWEEN

BROOKSHELL LIMITED

ASHBROK LIMITED.....PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF KWALE

THE NATIONAL LAND COMMISSION

THE CHIEF LAND REGISTRAR

THE HONORABLE ATTORNEY GENERAL.....RESPONDENTS

AND

SULEIMAN ALI MWADGUGWE

SALIM HUSSEIN OMAR

HATIBU MJAKA MTENGO.....INTERESTED PARTIES

RULING

1. The matter before the court for ruling is in respect of :-

a) The Notice of Motion dated 9th October 2019 filed by the Petitioner on 11th October 2019

b) Notice of Preliminary Objection dated 21st October 2020 by the 1st Respondent County Government of Kwale.

2. In the case of **Owners of Motor Vessel 'Lillian Vs. Caltex Oil (Kenya) Ltd (1989) eKLR**, the court pointed that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. It therefore behooves me to address the issue of jurisdiction first before I consider the Notice of Motion, for without jurisdiction the court would have no power to make one more step in this matter.

3. The 1st Respondent objection is on the hearing of both the Application and the Petition on the following grounds: -

1) This Court has no jurisdiction to superintend, supervise, direct, shepherd and or review a decision real or perceived by the County Government of Kwale to suspend the issuance of approval permit.

2) This Petition is frivolous, misconceived, bad in law and an abuse of the court process.

4. The 1st Respondent prays that the both the application and the petition herein be struck out with costs. In the 1st Respondent submissions

dated 26th January 2021 this court is beseeched not to undermine the prescribed alternative dispute resolution mechanisms as provided by the Physical Planning Act Cap 286 (repealed) (herein PPA, the dispute having arisen from the suspension of an approval by the 1st Respondent. That by dint of Sec. 10 of the PPA the right forum for the Petitioner to air their grievances is the Physical Planning Liaison Committee. This was to be done within 60 days and if aggrieved then appeal lay to this court by dint of Sec 15(4) of the said Act. Moreover where an Act of Parliament provides a mechanism for dispute resolution, that mechanism must be exhausted. The Petitioners had not tendered any evidence before the court of having exhausted or at least attempted to use the laid out dispute resolution mechanism. The 1st respondent cited the Court of Appeal cases in **Samson Vuko Vs Nelson Kilimo & 2 others (2016)eKLR; Speaker of The National Assembly Vs Karume; Mutanga Tea & Coffee Company Ltd Vs. Shikara Ltd & Ano. (2015)eKLR** to buttress their position that the Petitioner has sidestepped an elaborate dispute resolution procedures and taking their dispute directly to the High Court.

5. This Court has also been invited not to consider the above affront as a mere technicality curable under Article 159(2)(d) of the Constitution, since the same Constitution under Article 159(2) expressly provide for alternative dispute resolution. It is further argued that; -

The Petitioner is hoodwinking the court to believe that the dispute was on ownership of the SUIT PROPERTY LR.KWALE/DIANI BEACH BLOCK 1526 when it was in fact on suspension of construction approval. That the Petitioners should not benefit from their indolence having filed the Petition one year later.

6. The Preliminary objection is opposed by the Petitioner in the Petitioners submissions dated 17th June 2021 on the following grounds;-

1) The 1st Respondents contention that the Petitioners entire case begins and ends with the suspension of the development permit is not correct as this forms but just a part of the Petitioners case brought before this court. The material facts and grounds set out in the Petition not only lies on the unfair and unlawful administration actions of the 1st Respondent in suspending the development permit but also on ownership and quiet possession of the suit properties and sets out in paragraph 9 - 18 of the said submissions.

2) The Petitioners sought albeit unsuccessfully, to resolve the issue of the unlawful suspension of the development permit by formal letters of 19/12/2018 explaining their proprietorship over the suit properties which were received but responded to by the 1st Respondent leaving them with no option but to seek redress before this Court.

3) The provisions as to the dispute resolution mechanism provided under the PPA now repealed are not applicable to this case.

a. That Sec.33 (3) thereof is extremely specific as to what type of dispute should be placed before the liaison committee, that is only when there is refusal can one follow the mechanism set out in the PPA. In this case the application had been approved and not rejected and the dispute herein is over the suspension.

b. There are no provisions in the PPA that provide for suspension of an approved development permit. There is therefore no laid out dispute resolution process in the PPA that would be applicable in this case.

c. That the case of Mutanganga Tea and Coffee Company cited by the 1st Respondent is distinguishable from the Petition herein as the decision was on approval of change of user and consent for development and in such a case there is a dispute resolution mechanism laid out in the PPA

7. The 2nd and interested parties supported the Preliminary Objection and associated themselves with the submissions of the 1st Respondent.

8. I have considered the documents filed by the Parties and the precedents cited by the parties to support their arguments in respect of the Preliminary objection. From the documents presented before this court, plainly an ownership dispute has emerged over LR.KWALE/DIANI BEACH BLOCK 1526 the subject of the suspension of the building permit herein. This is further buttressed by the 1st Respondent Cross Petition dated 5th October 2020 seeking among others to be declared the legitimate proprietor of the suit property.

While this Court recognizes the Court of Appeal position that where an Act or parliament has expressly provided for a dispute resolution mechanism such mechanism should be exhausted, this case calls for a unique consideration that will address the core issues and ensure that justice is not delayed by technicalities that would not resolve the issues for the benefit of all the parties. The balance tilts in the favor of all the parties in this dispute and in the public interest to have this matter heard substantively and attain closure. In this courts view upholding the preliminary objection would be abdicating the tenets of justice. I therefore invoke Article 159 (2) (d) of the Constitution in this regard.

9. In view of the foregoing it is this Courts finding that the Petition is properly before the Court on the basis of a dispute having arisen on ownership of the suit property.

Having determined that this Court has Jurisdiction to hear this case I proceed to look into the main application by way of Notice of Motion dated 9th October 2019

The Petitioners application seeks for

1) A conservatory order restraining the Respondents and the Interested Parties , their agents, officers, assigns or anyone howsoever claiming through them or under them , Pursuant to letter dated 28th November 2018, issued by the 1st Respondent purporting to suspend the Petitioners construction of a perimeter wall on the suit property from in any way howsoever dealing and or interfering with the suit property LR.KWALE/DIANI BEACH BLOCK 1526 and LR

2) Order of temporary injunction staying the decision and or order of the 1st Respondent purporting to suspend the Petitioners construction of a perimeter wall on the suit property pending the inter parties hearing and determination of the Petition herewith.

3) Order of temporary injunction restraining the Respondent and the Interested Parties from proceeding with any investigations and or in any way howsoever interfering or pronouncing itself regarding the ownership of and title to the SUIT PROPERTIES LR.KWALE/DIANI BEACH BLOCK 1526 and LR KWALE/DIANI BEACH BLOCK/1527, pending the inter parties hearing and determination of the Petition herewith.

4) That owing to the security threat arising from the interested parties and the unknown persons who carried out the illegal acts complained of, the orders ensuing be served and enforced with the assistance of the Diani Police Station (OCS) being the officers vested with the mandate to deal with security incidents arising from the area where the properties are situate, pending the inter parties hearing and determination of the Petition herewith.

5) Costs

The application is supported by the affidavit sworn by Betty Kageni Counsel for the Petitioners dated 22nd October 2019.

10. The application is opposed by the 1st Respondent vide grounds of opposition filed on 5th March 2020 and the replying affidavit of Ali Budzuma dated 12th June 2020.

11. It should also be noted that on the 9th March 2020 this court was informed by Ms. Kageni Counsel for the Plaintiff that the 2nd, 3rd and 4th Respondent indicated that they would not be participating on the application dated 9th October 2019.

12. I have considered the Notice of Motion dated 9th October 2019, the supporting documents, submissions filed by the parties herein as well as the case precedents cited by the Petitioners.

13. This court is guided by the following principles set out in the case of **Giella Vs. Cassman Brown**. These are:-

1) An applicant must show a prima facie case with a probability of success.

2) An interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

3) If the court is in doubt of 1) and 2) above principles it will decide an application on the balance of convenience.

I have also noted the principles as detailed in **Law Society of Kenya Vs. Office of the Attorney General & Ano. Judicial Service Commission (Interested Party) 2020 eKLR**

14. Having perused the Petition, the supporting affidavits and documents in support thereof and without going into the merits of the case, I find that the Petitioners have established a prima facie case having produced documents of title to the property whose legality shall be canvassed at the full hearing of the main Petition. I therefore grant the conservatory orders as prayed as follows:-

1. A conservatory order restraining the Respondents and the Interested Parties, their agents, officers, assigns or anyone howsoever claiming through them or under them, Pursuant to letter dated 28th November 2018, issued by the 1st Respondent purporting to suspend the Petitioners construction of a perimeter wall on the suit property from in any way howsoever dealing and or interfering with the SUIT PROPERTY LR.KWALE/DIANI BEACH BLOCK 1526 and LR KWALE/DIANI BEACH BLOCK/1527.

2. The prayer seeking an Order of temporary injunction staying the decision and or order of the 1st Respondent purporting to suspend the Petitioners construction of a perimeter wall on the suit property pending the inter parties hearing and determination of the Petition herewith is not granted. This Court finds no prejudice that will be occasioned to the Petitioners if the boundary wall is not constructed pending the full determination of the ownership dispute herein. Moreover any damage suffered is capable of being quantified for by compensation.

3. The prayer seeking an Order of temporary injunction restraining the Respondent and the Interested Parties from proceeding with any investigations and or in any way howsoever interfering or pronouncing itself regarding the ownership of and title to the SUIT PROPERTIES LR.KWALE/DIANI BEACH BLOCK 1526 and LR KWALE/DIANI BEACH BLOCK/1527, pending the inter parties hearing and determination of the Petition herewith is partially allowed/denied to the extend that :-

a) A temporary injunction restraining the Respondent and the Interested Parties in any way howsoever interfering or pronouncing itself regarding the ownership of and title to the SUIT PROPERTIES LR.KWALE/DIANI BEACH BLOCK 1526 and LR KWALE/DIANI BEACH BLOCK/1527, pending the determination of the case shall issue.

b) Any party to the case shall be at liberty to conduct any investigations they deem will be necessary to buttress their case and also assist the Court in fair and informed findings on the case before the Court. Parties shall introduce such evidence in accordance with the laid down procedures.

4. This Court invokes its inherent powers to give orders that the status quo be maintained, the Respondents and Interested Parties are restrained from trespassing on the suit properties pending hearing and determination of this case.

5. The orders herein shall be served and enforced with the assistance of the Officer Commanding Station Diani Police Station (OCS) being the officers vested with the mandate to deal with security incidents arising from the area where the properties are situate, pending determination of the case.

15. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF JULY 2021.

C.K. YANO

JUDGE

In the presence of:

Court Assistant – Yumna

C. K. YANO

JUDGE