



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 203 OF 2021

KHALID HADI AHMED

SALMA MBARAK ABUD.....PLAINTIFFS/APPLICANTS

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT/RESPONDENT

RULING

The application is dated 4th October 2021 and is brought under Section 1 A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That the Application be certified as urgent and be admitted for hearing ex-parte in the first instance.
2. That pending the hearing of this application, the Defendant be restrained by way of a temporary injunction whether by itself, it's servants or agents or persons claiming authority under it or otherwise, howsoever from further demolishing the permanent structures and developments or in any way whatsoever interfering with the Plaintiff's peaceful occupation of all that parcel of land containing by measurement nought decimal nought three four two (0.0342) hectares or thereabouts known as Title Number MOMBASA/BLOCK XVI/1539
3. That, pending the hearing and determination of the main suit the Defendant be restrained by way of an injunction whether by itself, it's servants or agents or persons claiming authority under it or otherwise, howsoever from further demolishing the permanent structures and developments or in any way whatsoever interfering with the Plaintiff's peaceful occupation of all that parcel of land containing by measurement nought decimal nought three four two (0.0342) hectares or thereabouts known as Title Number MOMBASA/BLOCK XVI/15394.
4. That costs of the Application be provided for.

It is based on the grounds that the Plaintiffs are the duly registered joint owners of all that parcel of land containing by measurement nought decimal nought three four two(0.0342) hectares or thereabouts known as Title Number MOMBASA/BLOCK XVI/1539. That prior to the resulting suit property being Title Number MOMBASA/BLOCK XVI/1539, the Plaintiffs were the duly registered owners of Title Number Mombasa/Block XVI/1300 and Title Number Mombasa/Block XVI/1301 which properties were next to each other separated by a 5 Meters road. In the year 2019, the Plaintiffs applied to the County Government of Mombasa to have properties Title Number Mombasa/Block XVI/1300 and Title Number Mombasa/Block XVI/1301 consolidated and road re alignment which application was made through a proposed road re alignment and consolidation plan. Upon receipt of the application, the County Government of Mombasa wrote to the Regional; Coordinator, the County Land Officer, the Regional Surveyor and National Land Commission for their comments, consideration and approval which were all approved. The Ministry of Lands and Physical planning confirmed that they had no objection to the proposal of consolidating the aforementioned two plots into one and the re-alignment of the 5 Meters road. The County Government of Mombasa through the County Physical Planning Department also confirmed that it did not have any objection to the proposed consolidation and re-alignment of the 5 Meter Road. The Plaintiffs duly paid a sum of Kshs. 101,000/= being consolidation and road re-alignment fees vide a paying in slip dated 31st May, 2019. On 19th July, 2019 the Plaintiffs were duly issued with a Notification of Approval of Consolidation and Road Re-alignment. Upon approval of the consolidation and road re-alignment exercise the Chief land Administration Officer Mombasa vide a letter dated 3rd September, 2019 informed the Plaintiffs that their request had been approved subject to accepting the conditions which were contained in the approval letter. The Plaintiffs vide a letter dated 12th November, 2019 duly agreed to comply with the approval conditions. The Plaintiffs were thereafter issued with a certificate of Consolidation which was duly registered at the Lands office. Vide a letter dated 18th November, 2020 the Director of Surveys then wrote to the Director of Land Administration informing the office that the Registry Index Map had been duly amended to reflect the consolidation and road re-alignment parts of Parcel Numbers 1300 and 1301 and thus was reflecting the new property number being MOMBASA/BLOCK XVI/1539. That the Registry Index Map was duly amended and the

Plaintiffs were issued with a new title reflecting property MOMBASA/BLOCK XVI/1539 and a new scheme plan was also issued reflecting the amendments together with the new 5 Meter Road which was created from the Plaintiffs Plot Number 1300. Despite the Plaintiffs complying with all the requisite procedures as enumerated hereinabove, the Defendant has without any justifiable cause commenced and is still demolishing the Plaintiffs structures erected on MOMBASA/BLOCK XVI/1539 which was as a result of the consolidation of 1300 and 1301. That unless this Honourable Court grants the restraining orders sought, Defendant will continue to illegally and unlawfully demolish the Plaintiffs properties and developments on the suit property thereby exposing the Defendant to irreparable loss and damage. The Plaintiffs/Applicants have a prima facie case with a high probability of success as against the Defendant as demonstrated hereinabove.

The respondent submitted that the Application does not satisfy the conditions for granting of injunctions and should thus be dismissed with costs. That the Applicants are using the Court process to circumvent administrative procedure. That the Applicants have not approached the Honorable Court with clean hands contrary to the maxim "He who comes to equity must come with clean hands". That the applicants are laying claim upon a road reserve and the suit land is grabbed land. That it was earmarked among plots on the road reserve for demolition. That the issuance of the said title and amalgamation was illegal. That the Application is frivolous and should be dismissed for being an abuse of the Court process.

This court has considered the application and submissions therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd* 1973 E.A 358 and which are:-

1. The applicant must show a prima facie case with a probability of success at the trial
2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,
3. If in doubt, the Court will decide the application on a balance of convenience.

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The applicants submitted that they are the duly registered joint owners of all that parcel of land containing by measurement nought decimal nought three four two (0.0342) hectares or thereabouts known as Title Number MOMBASA/BLOCK XVI/1539. That prior to the resulting suit property being Title Number MOMBASA/BLOCK XVI/1539, the Plaintiffs were the duly registered owners of Title Number Mombasa/Block XVI/1300 and Title Number Mombasa/Block XVI/1301 which properties were next to each other separated by a 5 Meters road. In the year 2019, the Plaintiffs applied to the County Government of Mombasa to have properties Title Number Mombasa/Block XVI/1300 and Title Number Mombasa/Block XVI/1301 consolidated and road re alignment which application was made through a proposed road re alignment and consolidation plan which was done. The respondent submitted that the applicants are laying claim upon a road reserve and the suit land is grabbed land. That it was earmarked among plots on the road reserve for demolition. That the issuance of the said title and amalgamation was illegal. I find that the respondent raises triable issues and an injunction cannot be issued at this stage. I find the application has no merit and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8TH DECEMBER, 2021

N.A. MATHEKA

JUDGE