



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 100 OF 2011

FLEETWOOD ENTERPRISES LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI.....1ST DEFENDANT

ARBI MUSSANI.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated 25th July 2011 as amended on 31st March 2016, M/s Fleetwood Enterprises Ltd (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for:-

- a) A declaration that there is no public road from Tuva Road passing through Plot No. 514 R, Malindi to Muyeye;*
- b) A declaration that the Defendants are not entitled to enter or use Plot No. 514/R Malindi or any portion of its save for such Portions as have been set apart for public utility;*
- c) A declaration that the 1st Defendant's predecessor's resolutions passed on 17th May 2011 concerning the opening of a road on Plot No. 514/R, Malindi are null and void and are of no legal effect;*
- d) A mandatory injunction requiring the Defendants to forthwith remove construction and road-making materials, equipments and machinery from Plot No. 514/R, Malindi;*
- e) Surrender to the Plaintiff of possession of such portions of Plot No. 514/R, Malindi as are in occupation of the Defendants;*
- f) A permanent injunction restraining the Defendants, their employees, servants or agents or contractors from entering upon Plot No. 514/R, Malindi or any part thereof for the purposes of creating, making or grading a road through the same save for such roads that appear in the sub-division scheme that was approved by the 1st Defendant's predecessor on 10th July 2008;*
- g) A permanent injunction restraining the Defendants, their employees, servants or agents from having any dealing howsoever with Plot No. 514/R, Malindi or any portion thereof save as may be authorized by law;*
- h) A permanent injunction restraining the Defendants from interfering with or demolishing the fence that the Plaintiff has put up around Plot No. 514/R Malindi or any Portion thereof;*
- i) A permanent injunction restraining the Defendants from barring or stopping the Plaintiff from putting up a fence or any other barricade to block the public from using Plot No. 514/R, Malindi or any portion thereof as a road save for such as are provided for in the sub-division scheme approved by the 1st Defendant's predecessor on 10th July 2008;*
- j) Damages for trespass;*
- k) Costs of and incidental to this suit; and*

J) Any other or further relief deemed appropriate by this Honourable Court.

2. Those numerous prayers arise from the Plaintiff's assertions that at all times material to this suit, it was the registered proprietor of the said Parcel of land known as Plot No. 514/R Malindi measuring approximately 43.02 Ha or thereabouts. On 12th June 2008, the Plaintiff submitted an application for permission to undertake sub-division on the said Plot to the 1st Defendant's Predecessor, the Municipal Council of Malindi.

3. The Plaintiff avers that upon receipt of the application, the Council by a letter dated 13th June 2008 proposed certain changes before the application could be approved. The Plaintiff thereafter effected the changes in consultation with the Council and the application was approved subject to certain conditions.

4. The Plaintiff is however aggrieved that soon after it commenced the sub-division and selling of the Plots, it received a letter on 5th May 2011 from the Council purporting that there was an oversight in the approval of the scheme as the same did not take into consideration a 30 metres road which was said to run from Tuva Road to Muyeye across the suit property.

5. The Council further demanded that the Plaintiff immediately paves way for a Contractor who was already on the site to upgrade the said road. The Plaintiff however contends that there is no such road running through the suit property and that the Council intended to unlawfully create the same for the 2nd Defendant who is the Proprietor of the neighbouring plots of land.

6. In this regard, the Plaintiff accuses the Council of proceeding to pass a Resolution on 17th May 2011 to create an access road through the property for the 2nd Defendant who has been described as a donor/developer in the Resolution. It is the Plaintiff's case that the said Resolution is unlawful, illegal and without basis and hence the orders sought herein above.

7. In its Statement of Defence dated and filed herein on 13th June 2016, the County Government of Kilifi (the 1st Defendant) admits that its predecessor wrote the letter dated 24th April 2011 which was served upon the Plaintiff on 5th May 2011 notifying the Plaintiff of the oversight in giving the approval for the sub-division.

8. The 1st Defendant however denies that it asked the Plaintiff to pave way for the 30 metres road.

9. Without prejudice to those denials, the 1st Defendant avers that when it made the approvals, it had failed to take into consideration a road that runs from Muyeye and Kasufini/Casuarina areas for the benefit of residents of the two areas. It further asserts that the permission granted to the Plaintiff was subject to terms and conditions which included the requirement that the Plaintiff surrenders all roads within the Scheme to the Council for the public use.

10. The 1st Defendant further denies that there was a resolution made in respect of the road. Instead it asserts that the road has always been in existence and that it only resolved to open it up. The 1st Defendant asserts that the Deed Plans for the sub-division are not cast in stone and that the same can be amended at any time with sufficient justification especially in cases where the public interest is directly affected.

11. The 1st Defendant further avers that the suit property is as a matter of fact agricultural land and that at no point has the Plaintiff applied for change of user and as such the sub-division was in itself illegal as the Plaintiff intends to unprocedurally turn agricultural land into a residential area.

12. Arbi Mussani (the 2nd Defendant) equally filed a Statement of Defence herein dated 10th February 2012 denying the Plaintiff's claim. The 2nd Defendant in this respect avers that the approval given by the 1st Defendant to the Plaintiff was based on the wrong assumption that there was no public road cutting through the Plaintiff's parcel of land.

13. The 2nd Defendant asserts that the Malindi Development Plan shows that there was a public road running from Tuva Road to Muyeye. The said road is meant for the common good of the public but not to the advantage of the 2nd Defendant alone as stated by the Plaintiff.

14. The 2nd Defendant avers in the alternative that any mistake done in the process of approval by the 1st Defendant should not be visited upon himself or any other member of the public. It is his case that he has already surrendered over 25 acres of his own land for public use and the Plaintiff should be forced to surrender the access road as well.

THE PLAINTIFF'S CASE

15. At the trial herein, the Plaintiff called one witness in support of its case.

16. PW1-Firoz Jusab Sumar is the Plaintiff Company's Property Manager. He adopted as his evidence-in-chief his Statement dated 8th April 2014 as filed herein on 10th April 2014. In the said Statement, he asserts that on or about 23rd July 2011, he was on a routine tour of the suit property when he saw several heavy equipment and bulldozers on an adjacent parcel of land.

17. PW1 told the Court that when he confronted the workmen, they informed him that the equipment was meant for the creation of an access road to Plot No. 507 which belongs to the 2nd Defendant through the suit property. PW1 then rang up the Plaintiff's director Salim Juma who in turn proceeded to instruct the Company's lawyers to demand an explanation from the then Municipal Council of Malindi.

18. PW1 further testified that on 24th July 2011, the bulldozers broke through the fence of the suit property and his attempts to stop them came to nought when the 2nd Defendant threatened him with dire consequences. PW1 then took Photos of the damaged fence, the “road” that had been created and the bulldozers.

THE DEFENCE CASE

19. Both the 1st and the 2nd Defendants failed to produce witnesses to testify at the trial and their respective cases were closed without any oral testimony and/or production of documents.

ANALYSIS AND DETERMINATION

20. I have perused and considered the pleadings herein, the oral testimony of the Plaintiff’s witness as well as the evidence adduced at the trial. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the Plaintiff and the 1st Defendant. The 2nd Defendant did not file any submission herein.

21. From the pleadings and the material placed before me, it was not contested that the Plaintiff is the registered proprietor of the suit property measuring approximately 43.02 Ha. On 12th June 2008, the Plaintiff submitted an application to the 1st Defendant’s predecessor- the Municipal Council of Malindi (the Council) seeking approval and permission to sub-divide the property.

22. Upon receipt of the application, the Council wrote back to the Plaintiff vide its letter dated 13th June 2008 proposing certain changes to be made to the sub-division scheme before it could give its approval thereto. The letter written by the Town Clerk Geoffrey C.K Katsolleh read in full as follows:-

“REF: Proposed Subdivision Scheme for Plot No. 514/R- Malindi

The above subject refers vide your application lodged in this Council on 12th June 2008.

On examining your proposal, we have noted that an approximated population of over 2500 people will be accommodated within the Scheme.

Consequently we have noted that some important facilities should be provided within the Scheme before being circulated to various government departments for comments and subsequently to warrant our approval.

Note the following to be included in your Scheme:-

1. Primary School – 3 acres

2. Shopping Centre- 2 acres

3. Church- ½ acre

4. Mosque- ¼ acre

5. Health Facility -1.5 acre

6. Waste Collection Point-1/4 acre

7. Recreation area-1 acre

Note that the Primary School and the Health Facility should be placed in a central place to enable easy accessibility.

Additionally be advised that the Minimum Plot size within Casuarina area is 900m² and therefore your proposal should conform to this.

Meanwhile liase with our Town Planner to effect such changes.

Please be advised accordingly.”

23. It was in this respect the Plaintiff’s evidence that upon receipt of the Council’s letter, its representatives met and consulted with both the Council’s Town Planner and the Town Clerk upon which they effected all the changes required to the sub-division Scheme.

24. Subsequently and by its letter dated 10th July 2008, the 1st Defendant notified the Plaintiff that its application to sub-divide the suit property had been approved and granted but subject to:-

- a) *The Plaintiff surrendering all public utility land to the 1st Defendant free of charge for public use;*
- b) *The Plaintiff surrendering all the roads within the Scheme to the 1st Defendant for public use;*
- c) *The land not constituting part of the disputed public utility land /allocation or encroachment; and*
- d) *The Plaintiff satisfying all other lawful requirements of its approval.*

25. Following the approval, the Plaintiff submitted to the Director of Surveys the Deed Plans for the portions comprised in the Sub-division scheme for approval and authentication. The Deed Plans for the 536 Portions were subsequently approved and authenticated in December 2008 and the Plaintiff then commenced the process of selling the sub-divided plots of land to prospective developers.

26. However more than two years down the line, the Plaintiffs were stopped on their tracks when they received a letter from the Council dated 27th April 2011 stating as follows:-

“Re: Sub-Division of Plot 514/R-Malindi

It has come to our notice that there was an oversight in approving the proposed sub-division scheme on Plot No. 514/R.

This is because the sub-division scheme never took into consideration the 30 metres road running from Tuva road to Muyeye as depicted in the Malindi Development Plan.

We do write to inform you to pave way for the 30 metre access road. There is a Contractor on site who has to grade the same.

Please comply.”

27. According to the Plaintiff, the suit property is private land and there was no such public access road measuring the alleged 30 metres or at all as alleged by the Defendants. It was the Plaintiff's case that the 1st Defendant was merely acting at the behest of the 2nd Defendant herein who was trying to create an access road to his properties that are adjacent to the Plaintiff.

28. In its pleadings filed herein, the 1st Defendant vehemently denied acting at the behest of the 2nd Defendant. It was its case that when it had made the approvals, it had failed to take into consideration a road that runs from Muyeye and Kasufini/Casuarina areas for the benefit of the residents of the two areas.

29. While conceding that it subsequently made resolutions authorizing the opening of the road, the 1st Defendant asserts that the road has always been in existence and that the resolution was merely meant to open it up and not to create a new road.

30. I have equally considered the evidence placed before the Court. While the Plaintiff insists that the suit property was private land and that there was no road-reserve as alleged, the Defendants contend that the road was always there and that it was by oversight that the 1st Defendant failed to make reference to it while approving the Plaintiff's application to sub-divide the suit property.

31. In his letter dated 27th April 2011 asking the Plaintiff to pave way for the road, the Town Clerk Ahmed H. Hemed attributes the existence of the road to be “as depicted in the Malindi Development Plan.” That plan is however not annexed to the letter. As it turned out, that was not the first time the Council was referring to the said Plan.

32. In a Replying Affidavit filed herein deponed on 14th March 2012 by Stephen M Mbondo, the then Town Clerk of the Council shortly after this suit was filed, the predecessor to the 1st Defendant asserts at Paragraph 8 thereof as follows:-

“8. That after the Municipal Council of Malindi made the approvals to the Sub-division Scheme, it was discovered that the said scheme had a serious over-sight in that, it did not take into consideration and had thereby blocked part of the road that runs from the Marine Park to Muyeye and Kasufini/Casuarina areas which road had already been earmarked to serve the residents of Muyeye and Kasufini/Casuarina as well as serving as an access road to the public beach and the Marine Park. I now exhibit hereto the Malindi Development Plan indicating the full stretch of the said road and the points where the same has been blocked by the Plaintiff's sub-division scheme clearly shown in RED. The same is now exhibited and marked as exhibit “SMM-3”.

33. I have perused and re-perused the annexures to the Replying Affidavit. No such thing as the alleged Malindi Development Plan was annexed thereto. While the Defendants did not adduce any evidence at the trial herein, given the allegation of public interest herein, this Court took the liberty to peruse the 1st Defendant's List of Documents as filed herein on 23rd May 2017. That document lists Malindi Physical Development Plan as one of the documents the 1st Defendant would rely on. Interestingly, the Plan listed as Document No. 7 is again, not one of the Documents annexed.

34. As it were, it is a fundamental principle of law that he who alleges must prove. In this regard Section 107 of the Evidence Act (Cap 80) stipulates that:-

“1) whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he

asserts must prove that those facts exists.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

35. In my respectful view, the Defendants have spectacularly failed to discharge the burden arising from the contention that there existed a Malindi Development Plan whose provisions created a 30 metre access road on the suit property prior to the approval of the sub-division scheme.

36. In the absence of the alleged Plan, it was clear to me that the 1st Defendant was hiding under the guise of public interest to create an access road for the 2nd Defendant herein. In an Affidavit sworn in reply to an application for injunction by the Plaintiff and filed herein on 23rd February 2012, the 2nd Defendant indeed reveals that some one week before the 1st Defendant wrote the letter alleging oversight in the approval of the Plaintiff's suit property, he had by a letter dated 19th April 2011 asked the 1st Defendant for permission to grade roads leading to his plots Nos. 507, 508 and 509 adjacent to the suit property.

37. That permission was promptly granted in writing by a letter written by the Council the very same day the permission was sought. At paragraph 6 of that Replying Affidavit, the 2nd Defendant avers that the Plaintiff refused permission to go ahead with the upgrading of the roads on the grounds that the same would interfere with his property. There was nothing from the 2nd Defendant to demonstrate that the road he was offering to grade existed in the first place.

38. In the pleadings as filed before me, I did not hear the Defendants to be objecting to the Sub-division on account that the Plaintiff had failed to follow due process. The Sub-division Scheme was approved by the Council upon receipt of a "No Objection" response from all relevant authorities. The issue of the road ought to have been brought out by the Defendants before the Plan was approved and not after.

39. At any rate, I did not think that it was the business of the Council to create roads through private property for persons who require such roads for access. The Plaintiff could not without due process be compelled to surrender a portion of his land so as to create an access road. Under Article 40(3) of the Constitution and Section 107 of the Land Act, where such land was required for such a purpose, it is the National Land Commission and not the 1st Defendant that would initiate the process factoring in appropriate compensation for the Plaintiff.

40. Otherwise, I was persuaded that the Defendants' Claims over the Plaintiff's property are unfounded. In attempting to create a road through the Plaintiff's property, the 1st Defendant acted ultra vires its mandate.

41. The Defendants did not deny that in an attempt to benefit the 2nd Defendant with an access road they had cut through the Plaintiff's fence and installed the 2nd Defendant's road construction materials therein. That was not their property and they needed to obtain the consent and authorization of the Plaintiff before entering his property.

42. That they entered the property without such authorization was an act of trespass. It was not denied that as a result of their actions, the Plaintiff's fence was damaged and the process of sub-dividing the plots for sale was halted.

43. Accordingly I am persuaded that the Plaintiff has proved its case to the required standard. As a Victim of trespass the Plaintiff is entitled to damages. Taking into account the circumstances herein, I hereby assess the damages payable by the Defendants jointly and severally at Kshs 5 Million.

44. Judgment is otherwise hereby entered for the Plaintiff as against the Defendants as prayed in the Plaint.

45. The Plaintiff shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF MAY, 2020.

J.O. OLOLA

JUDGE