



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC NO. 124 OF 2019

MONICAH WATHONI MBURU (Suing in her capacity and as the

Legal Representative of the Estate of John Mbogo Kinyanjui)PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....1ST DEFENDANT

SALIM ALI JAMADAR (Sued in his personal capacity and as the

Legal Representative of the Estate of Ali Jemedari Omar).....2ND DEFENDANT

RULING

(Application for injunction; plaintiff claiming to have purchased two plots from a larger piece of land owned by the 2nd defendant; plaintiff contending that the 2nd defendant is only offering to her one plot yet she has purchased two; plaintiff further alleging that the 2nd defendant has deliberately left out one plot from the subdivision plan; plaintiff further contending that an enforcement notice issued by the 1st defendant is illegal as her structure was approved; defendants asserting that what the plaintiff is claiming is a road reserve and that she has built an unapproved food kiosk; the disputed plot not shown in the subdivision plan of the parent title; no evidence from the plaintiff on exactly where the disputed plot is situated on the ground since it is not on the survey map for the land from which it is supposed to be carved out; difficult to see how a prima facie case is established if the plaintiff herself cannot point out where on the map the disputed plot is; failure to do so lends credence to the argument that the plot is actually a road reserve; no prima facie case established; application dismissed)

1. This suit was commenced through a plaint which was filed on 2 July 2019. The plaintiff avers to be the lessee and/or beneficial owner of a portion of land identified as Plot No. 58 within the land parcel LR No. 64/II/MN which is said to be owned by the 2nd defendant since the year 1984. It is pleaded that the plaintiff initially constructed a temporary structure on the suit property, but in the year 2002, constructed a permanent building which is claimed to have been approved by the Chief Building Inspector of the 1st defendant. The plaintiff has pleaded that despite the approval, the 1st defendant, through its officers, has been harassing the plaintiff and threatening to demolish the structure, alleging that it is unauthorised and standing on a road reserve. It is pleaded that there was a threat to demolish the structure in the year 1996 before the notice was rescinded, and another notice followed in the year 2015, which was withdrawn. It is averred that the 1st defendant issued another notice dated 19 June 2019, threatening to demolish the structure within 7 days.

2. The plaintiff has pleaded that in the year 2011, the 2nd defendant offered to sell to the persons who had

leased land in the parent title. She was offered to buy her assigned plot at KShs. 300,000/= which price she avers to have substantively paid with the landlord accepting payment by instalments. She has pleaded that she also purchased another plot, Plot No. 70, at KShs. 300,000/=, and that so far, for the two plots, she has paid the sum of KShs. 295,000/=. It is pleaded that despite the purchase, the 2nd defendant has drawn a map that does not indicate the Plot No. 58.

3. It is contended that there is collusion between the 1st and 2nd defendants to deprive her of the Plot No. 58. She has pleaded that the threat to demolish her structure is unreasonable, as it targets her plot, while leaving other properties adjacent thereto and along the same row. In the suit, she has asked for orders of a permanent injunction to stop the intended demolition of her structure; an order of mandatory injunction to cause the 2nd defendant to include the Plot No. 58 in the subdivision of LR No. 64/II/MN; in the alternative, compensation of the market value of the property and loss of rental income and future earnings; in the alternative, refund of the purchase price.

4. Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the defendants from demolishing the structure on the Plot No. 58 (the suit plot) or interfering with her enjoyment of the property pending hearing and determination of the case. She has averred that the structure on the suit plot faces demolition pursuant to the notice issued on 19 June 2019 by the 1st defendant. In her supporting affidavit, she has more or less averred what she has pleaded in the plaint, which I have set out above. She has reiterated that she built the structure in the year 2002 and that the structure was approved by the 1st defendant. She has annexed a copy of the alleged approved building plan; the notices issued on 30 April 2015 and 19 June 2019; a letter dated 2 December 2011 from M/s Stephen Oddiaga & Company Advocates referencing sale of House No. 70 on the Plot No. 64/III/MN; and an assortment of receipts which she avers are for the purchase of the properties. She has also annexed a sketch plan of the subdivision of LR No. 64/II/MN and has deposed that the same does not include the Plot No. 58. She is of the view that she has a prima facie case and therefore the injunction should issue.

5. The 1st defendant/respondent filed a Replying Affidavit sworn by Jimmy Waliaula, the Director of Legal Services of the County Government of Mombasa. He has deposed inter alia that on 1 October 1996, the Municipal Council of Mombasa issued to the plaintiff a notice to demolish an illegal structure on LR No. 64/II/MN. It is said that this was a temporary structure built without approval. He has deposed that on 19 June 2019, the County Chief Building Officer issued to the plaintiff an enforcement notice to demolish the illegal structure. He has deposed that although the plaintiff has annexed an approved building plan, she has not produced a survey report to show the position of the building vis-à-vis the road reserve. He has averred that she has produced no evidence to show that the structure in issue is not on the road reserve. He has deposed that the public stand to suffer if the application is allowed for they will be deprived of the use of an access road.

6. The 2nd defendant on his part filed a Replying Affidavit and Grounds of Opposition to oppose the motion. In the replying affidavit, he has deposed that he is only aware of one Plot which he is selling to the plaintiff at the sum of KShs. 700,000/= which the plaintiff has been paying by instalments. He has annexed a letter dated 13 December 2012 from the law firm of M/s Stephen Oddiaga & Company Advocates, offering her to purchase her space within LR No. 64/II/MN at KShs. 700,000/= whereby a deposit of KShs. 200,000/= was required. He has deposed that the plaintiff was so notified and advised to sign the sale agreement but she has refused insisting that the vendor must promise to sell to her a small portion where she has developed a food kiosk. He has deposed that this portion is on a road reserve. He has averred that he cannot promise to give the plaintiff public land. He has stated that the plaintiff has no other claim other than the portion where her house stands and that she is attempting to acquire public utility land through the back door.

7. Counsel agreed to dispose of the application by way of written submissions. I have taken note of the submissions filed by counsel. In his submissions, counsel for the plaintiff submitted inter alia that a prima facie case has been established. He submitted that the plaintiff leased the property in the year 1984 and constructed on it with the approval of the 1st defendant. He referred to the notices of 1996 and 2015 which were rescinded. He questioned why the plaintiff was issued with a building approval if the property was on a road reserve and further questioned why the previous notices were withdrawn. He submitted that

his client stands to suffer irreparable harm.

8. Counsel for the 1st defendant inter alia submitted that the plaintiff has not proved any proprietary right over the disputed land. It was submitted that though the plaintiff pleads that the suit plot was offered to her, she has not produced any ownership documents. It was submitted that the plaintiff has not satisfied the principles for the grant of an injunction.

9. On behalf of the 2nd defendant, counsel submitted inter alia that it is the 2nd defendant who knows where the plaintiff's house stands and that this is on a sub-plot referred to as MN/II/14916 (same as what the plaintiff referred to as Plot No. 70). Counsel submitted that the 2nd defendant cannot be made to give the plaintiff land that he does not have. Counsel asserted that the temporary structure of the plaintiff is on the road reserve and title for it cannot be processed.

10. I have considered the matter. It is of course the contention of the plaintiff that the 2nd defendant offered to her (or the estate that she represents) purchase of two plots, which she has identified as Plots No. 58 and 70 within the larger LR No. 64/II/MN. I have gone through the documents of the plaintiff. First, I have not seen any sale agreement that she has annexed which would demonstrate exactly what the 2nd defendant has sold to her. The 2nd defendant in his affidavit of course averred that what he has offered to the plaintiff is purchase of the Plot No. 70, where she has a house, but the plaintiff herself has refused to attend to sign the sale agreement, insisting that where she has built a structure (a food kiosk, I believe) also ought to be sold to her by the 2nd defendant. The 2nd defendant has asserted that he does not own this portion where the structure is situated since this is a road reserve. Secondly, the plaintiff has not annexed any survey report to show where exactly her structure lies, and importantly, to show that the said structure falls within LR No. 64/II/MN. What she has annexed is a subdivision plan, and although I could hardly read the copy that she has annexed, she herself has stated that the Plot No. 58 (the disputed plot) is not within the subdivision plan. Now, if the suit plot is not within the subdivision plan, then this begs the question where exactly it is on the ground. Without demonstrating that this Plot No. 58 is actually within the larger LR No. 64/II/MN, I do not see how it can be said that the plaintiff has demonstrated a prima facie case with a probability of success. If it is not on the larger LR No. 64/II/MN, then where exactly is this Plot No. 58? The plaintiff has failed to point out where it is on the ground, and given that position, it is difficult not to believe the claim that this structure is not on LR No. 64/II/MN but is a road reserve.

11. The plaintiff has made heavy weather of the fact that some earlier enforcement notices were withdrawn. I wouldn't know the circumstances under which the earlier notices were withdrawn. Be that as it may, the fact that they were withdrawn, does not by itself prove that the structure is on LR No. 64/II/MN and not within a road reserve. It remained for the plaintiff to demonstrate, prima facie, that the structure in dispute is actually on LR No. 64/II/MN which from the material before me she has failed to so demonstrate.

12. I am not thus persuaded that the plaintiff has demonstrated a prima facie case with a probability of success. But assuming that I am wrong on this, the plaintiff has within her suit, an alternative claim for damages. It means therefore that if the 1st defendant proceeds with its enforcement notice, the plaintiff can be compensated by way of damages. I do not see how it can be argued that she stands to suffer irreparable loss.

13. Given the foregoing, I see no merit in this application. This application is hereby dismissed with costs. The plaintiff will need to prove her case without the benefit of an injunction.

14. Orders accordingly.

DATED AND DELIVERED THIS 24TH DAY OF SEPTEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA