



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 280 OF 2012

1. **KULSUMBAI ABDULLABHAI SULEMANJEEE ESSAJI**

a.k.a KULSUMBAI ABDULLABI SULEMAN

2. **HABIBA ABDULLABHAI SULEMANJEE ESSAJEE**

a.k.a. HABIBA ABDULLABAI SULEMANJEE

3. **FATIMA ABDULLABHAI SULEMANJEE ESSAJI**

4. **ZAIBUN ABDULLABHAI SULEMANJEE ESSAJI a.k.a.**

ZAINABUNISSA ABDULLABHAI SULEMANJEE

5. **ZAINAB ABDULLABHAI SULEMANJEE ESSAJI**

a.k.a ZAINUBAI ABDULLABAI ESSEJEEPLAINTIFFS

- V E R S U S -

JETHA RAMJI.....DEFENDANTS

RULING

[1] The Plaintiffs /Applicants owns 1/3 share and the Defendant owns 2/3 undivided share of Mombasa Municipality (Mkomani) subdivision No. 835 Section I Mainland North comprising of 6.90 acres or thereabouts. The defendant lives on the land where he has a dwelling house while the Plaintiffs do not live on the land. In the land there is a well. The land abutts Nyali Nakumatt and a tarmac road on its North East side. This makes one side of the suit land more attractive and valuable than the rest of the land. This is also the side the dwelling house is situate.

[2] It is also agreed by the parties that the land has been subdivided by a surveyor and various plots have been created therefrom but those subdivisions have not been registered.

It has been alleged by the Applicants that the Defendant has started developing the suit land without the Applicant's consent and that he has been harvesting water and selling for gain, that he has turned the suit premises into a scrap yard, that he has refused with the deed plans and has used the premises to the

exclusion of the Plaintiffs.

The Defendant on his part argues that subdivision scheme was carried out and deed plans issued at a cost of Kshs. 12 million and that he informed the Plaintiffs to reimburse him 1/3 of the same with no response. He denies harvesting water on the premises. He argues that he has been residing on the premises since 1979, has grown trees and he has been parking his lorries therein on a space he cleared to construct a parking lot. He says he started construction with the consent of the previous shareholder who built on the south side chicken pens for poultry farming. He argues that the Plaintiffs do not live on the premises. He reiterated that it was mutually agreed that since the deceased original owner had poultry on the south side, he would occupy that area while the Defendant occupies the front portion where he has built his house and sank a well and where he was farming to date. He stated that he had paid municipal rates without the participation of the Plaintiffs. He argues that this case is not a tort, not a contract and it is not founded on any Law. The Defendant argues that the only way is to look at the case from the area of limitations of actions and that therefore it is time barred by limitation.

[4] This matter came before the court before Tuiyott J and an order of stay to develop, building, digging the foundation on the suit land was granted against the Defendant pending the hearing of Notice of Motion dated 27th November 2012. This order was granted on 3rd December 2012 and has been subsisting till then. The order was granted upon an undertaking as to damages. The undertaking was given on 4th December 2012 and filed in court on the same date.

[5] This land is registered in the names of the Plaintiffs and Defendant in 1/3 and 2/3 undivided shares respectively and therein lies the dispute herein. Whereas the shareholding is not disputed, and most of the facts are indeed not disputed, the issue is what side of the land should the Plaintiffs take and what side should the Defendant take. The parties are in agreement on the law that in a tenancy of undivided share, each party has his undivided share in the whole of the property. Under the circumstances then, the Plaintiffs have their 1/3 of the whole and the Defendant has his 2/3 of the whole.

Two survey plans suggesting how the land should be divided among the parties were submitted. They were rejected. A site visit by parties and their respective counsels bore no fruit. The crux of the matter is that one side of the land abuts a very busy commercial centre called Nakumatt Nyali or Cinemax and a busy tarmac road while the other side is not so attractive and abuts a creek. The court has been told that the Defendant lives on the land that there is a well. There is an issue whether he should continue to develop while this matter pends in this court. He has currently been estopped by the court. Determining these issues on the basis of submissions alone, would mean determining the suit at a preliminary stage. This would not be desirable since parties have not given their evidence. The cost of the alleged subdivisions would have to be adduced on evidence. For the court to decide who takes what portion of the land, evidence as to previous and current usage, value of the land or the resultant parcels from the alleged subdivision is vital. The court is not sure at this stage whether parties may wish to call on evidence of experts in that regard. Issues of whether this is a tort and/or contract or neither and whether this court has jurisdiction have been raised. They need to be canvassed fully prior to and at the trial. It is not denied that the Defendant lives on the land that he owns 2/3 of the whole. That there is a well on the land. He cannot be stopped from using water from the well or parking his vehicles. He has denied selling the water. This issue of selling water can only be canvassed on evidence. The Defendant cannot continue developing while the portion of land he will take has not been determined. This is indeed a matter that should no longer pend in this court. Parties must quickly fix the same for hearing to determine the pertinent issues herein.

[7] This matter commends itself for an order of status quo to be maintained. The Defendant shall be estopped from any further construction on the suit premises until the full hearing and determination of this suit. He shall otherwise continue with his occupation of farming and will be entitled to use of well water and parking his vehicles until this suit is determined by the court while the Plaintiffs undertaking as to damages shall continue to the end of the case. Each party shall bear their costs for this application.

Dated and Delivered at Mombasa in open court this 14th day of February, 2014.

S. MUKUNYA

JUDGE

14.2.2014

In the presence of:

Miss. Muyaa Advocae for the plaitniffes/applicants