



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC 226 OF 2014

FATUMA MBAKE DIE.....PLAINTIFF

- VERSUS-

1. KENYA PORTS AUTHORITY

2. BAKARI MOHAMMED BILAL

3. THE NATIONAL LAND COMMISSIONDEFENDANT

RULING

[1] The applicant in this case Fatuma Mbake Die filed an application for a temporary injunction against the 1st defendant restraining it from paying and/or giving any compensation on plot 6 situate at Lamu to the 2nd defendant or anybody else pending the hearing and determination of this application. She supported her application with her affidavit sworn on 1st August, 2014. In that affidavit she explained that she is the owner occupier of plot known as Number 6 in Lamu County. She went on to explain how the Government of Kenya has acquired her parcel with other lands for the construction of the new port at Lamu under the Lamu Port South Sudan Ethiopia Corridor Project (LAPSSET). She explained how she was once married to the 2nd defendant and how she invited him to come and live with her in the suit land. She stated that she is now divorced and that the 2nd defendant has always tried to be registered as the owner of the suit land. She said that the 1st defendant is in the process of compensating the land owners affected by LAPPSET Project and that the 2nd defendant has been included as an owner of the suit land and her name has been removed. She avers that she will suffer irreparably and will be rendered destitute if the money is paid to the 2nd defendant. She therefore prays for an order for injunction.

[2] The second defendant Bakari Mohamed Bilal filed a replying affidavit on 20th August 2014. He admits that the applicant and himself were husband and wife until the year 2007 when she abandoned him and went to live in Lamu Town. That she has married and divorced three husbands since then. He states that it is the applicant who joined her and not the other way round. He averred that in 2011 the applicant filed a suit in the *Lamu Kadhis Court in suit No. 20 of 2011 Fatuma Mbake Die vs Bakari*

Mohamed Bilal claiming among other things that the subject land be shared between the parties. That the suit land was said to belong to the respondent therein and there has been no appeal. That this matter is therefore *res judicata*. The respondent produced various documents to show ownership and where his land is situate. He says that this suit is therefore brought to court in bad faith. Finally that the balance of convenience favours him. He annexed all the pleadings, proceedings, judgment, order and memorandum of appeal in the *Lamu Kadhis Civil Case No. 20 of 2011* between himself and the respondent.

[3] In the judgment of the Kadhi, he set the claim by Fatuma Mbake Die (applicant herein) as

- a) *Past Maintenance*
- b) *Marriage and divorce certificates*
- c) *Eddah maintenance*
- d) *Dowry of Kshs. 4000.*
- e) *Division of the farm*
- f) *Cost of this suit and*
- g) *Any other relief.*

The farm mentioned in (e) above is also the subject matter herein. The Kadhis Court concluded its judgment as follows;

The court concludes this case as hereinunder:

- (a) *Plaintiffs prayers are hereby rejected except for dowry only*
- (b) *The shamba belongs to the defendant*
- (c) *No relief and each party to bear its own costs.*

Under Article 170(5) of the Constitution of Kenya, the Kadhis Court have jurisdiction to determine questions relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhis courts. In this case both parties submitted to the Kadhis court on the issue of their divorce and on division of the property they had acquired during their marriage namely the suit land. A final decision was made by the Kadhi on 31st May 2012. The applicant filed a memorandum of appeal vide *Malindi Civil Appeal No. 16 of 2012* dated 3rd July 2012. The court was not told what came of that appeal, whether it was determined or is still pending at the Malindi High Court.

It would appear therefore that the issue of the ownership of the suit land is settled and can only be reopened by the said appeal. Under the circumstances therefore, I find the application filed herein unmerited. The plaintiff has no reason to interfere with the respondents land. The application is dismissed with costs to the respondents.

Dated and delivered in open court this 6th day of November

2014.

S. MUKUNYA

JUDGE

6.11.2014

In the presence of:

Omuya advocate holding brief for Mokaya advocate for the plaintiff.

Oloo advocate holding brief for Mrs.Osino advocate for the 2nd defendant.

Mrs. Ikega advocate for the 1st defendant.