REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 45 OF 2009

RAND INVESTMENTS LTD.....PLAINTIFF

VERSUS

TANZINI ARMANDO

COMMISSIONER FOR LANDS

DIRECTOR OF SURVEYS

ATTORNEY GENERAL .....DEFENDANTS

R U L I N G

By an application dated 22nd June 2010 made by way of Chamber Summons under Order XXXIX Rule 1, 2 and 3 and section 3A, the applicant seeks for orders of injunction to issue restraining the 1st defendant from continuing with development and construction on the premises in dispute pending hearing and determination of the suit.

It is premised on grounds that the 1st defendant has started construction on the suit premises and unless the court issues the orders sought, then defendant will continue to interfere with the premises and render them of no value.

In the supporting affidavit sworn by Sergio Lolli, a director of the plaintiff/applicant it is deponed that the plaintiff is the registered owner of plot no 5783 Malindi as per the Title marked SL 1 whilst 1st defendant owns plot no. 10593. A survey report by M/s ARC SURVEYS (annexed and marked SL2) is relied on to show that plot No. 10593 MLND has overlapped the plaintiff's Plot No. 5782.

Since the institution of this suit, the 1st defendant has persistently interfered with part of the land by erecting on access road and car park, and committing other acts of trespass, thus making it impossible for the applicant to carry out any meaningful development on his land and unless the 1st defendant is restrained, he will continue with his acts.

The application is opposed, and in a replying affidavit sworn by Tanzini Armando (1st respondent), he confirms that he is the registered proprietor of portion no. 10593 whose Title is annexed as TA1(a) and the Deed Plan as TA1(b).
He had applied to the Department of Lands, for the allotment of the parcel as per his application TA 2(a) and the same was approved as per exhibit TA 2(b). Thereafter he was issued with an allotment letter exhibit 3.

The plaintiff's portion No. 5782 or 5783 is said to be distinct from the respondent's parcel and he has annexed a copy of a Part Development Plan (PDP) marked TA4. Respondent states that plaintiff has not produced any report by a competent surveyor with a sketch plan to confirm the alleged overlap.

The matter was disposed off by way of written submissions, where Mr. Wasunna appeared for the applicant and Mr. Otara is on record for the 1st respondent.

It is Mr. Wasunna's submissions that although there is no dispute as regards the numbering of the two parcels, the dispute is on the physical positioning of the two parcels on the ground which is why the applicant engaged the services of ARCH SURVEYS whose report dated 4th March 2007 is relied on. It is his submission that this report has not been challenged or rebutted. Mr. Wasunna's contention is that plaintiff applicant's plot is clearly described on the Grant and the Deed Plans cannot on themselves show the current dispute of overlap as there has been no known case that the Director of Surveys would seal a Deed Plan that would show its extent of overlap on the adjacent plot and the overlap can easily be established by a surveyor physically visiting he plots concerned. He maintains that plaintiff has demonstrated the overlap by annexing the surveyor's report and this has resulted in interference which must be arrested.

Mr. Wasunna points out that in the Surveyor's report, plot no. 5782 and 10893 refer to the same parcel of land and since plaintiff was issued with Title much earlier than respondent, then the respondent's activities must be stopped and the court ought to find that applicant has made out a prima facie case with every chance of success.

In reply Mr. Otara for the respondent submits that the applicant has not proved the alleged overlapping saying that although there is a letter from a private surveyor suggesting such an overlap, the same is not accompanied by diagrams or sketches. furthermore, that the applicant has not annexed a copy of the Deed Plan and from the part development plan annexed by the respondent marked T4, it shows the positioning of the two parcels which are distinct from one another and there is a road between the plaintiff's plot and that of the 1st defendant, so there can't be an overlap. It is on account of these observations that Mr. Otara submits a prima facie case has not been made out by the applicant – I cannot fault that so since the applicant has failed to establish a prima facie case, then on what limb would the court be pegging its consideration as to whether damages would be adequate compensation for the applicant in the event that his claim succeeds?

From what is availed to this court and from what the applicant states, if indeed there is an overlap created by the road, then the road as per the Deed Plan is already in existence and simply alleging irreparable damage without demonstrating it, does not suffice.

This then compels me to look at the third option i.e the balance of convenience. It is Mr. Otara's argument that applicant has failed to demonstrate to this court the size of his plot and on that account only, given the documents the respondent has produced, he urges the court to find that the balance of convenience tilts away from applicant. The whole purpose of an injunction order is intended to preserve the property so that in the event that a litigant succeeds that it will not have been so altered as to render

the successful litigation meaningless. It is on this that Mr. Otara's submissions actually offer a lifeline to the applicant. He submits that:

"The injunction is sought against the 1st defendant to restrain him from carrying on developments on his property. The ongoing multimillion project by the 1st defendant has been greatly affected."

It is not clear whether the development is taking place on the entire parcel owned by defendant or only on the portion where the purported overlap is situate. Whatever the case, the fact that it is acknowledged defendant is carrying out certain developments, then tilts the scales in favour of the applicant that the defendant and/or his servants and agents must be restrained from continuing with any development and or construction on the disputed portion pending the hearing of this suit and further directions of the court.

Meanwhile I direct that the District Surveyor do visit the disputed portion in the company of both parties and confirm whether indeed there is an overlap of the two parcels. The parties and their Counsel will agree on a mutual date for that purpose. The District Surveyor to file his report within 21 days from today.

Further the respondent who is said to be carrying out developments on the portion is directed to file an appropriate assessment report showing the stage of the developments, the cost and quantify of materials already purchased, and the incidental costs.

This report should be filed within 14 days from today to enable me give appropriate directions on the undertaking for damages which I intend to order.

In the meantime to also secure the materials on the ground both parties must agree within 2 (two) days thereof on a mutual security provider who will assign persons to guard the developments from vandalism. The costs of such security shall be shared equally.
The matter shall then be mentioned on **28th March 2011**.

Delivered and dated this **2nd** day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE

Mr. Mayaka holding brief for Wasunna for plaintiff
Mr. Mwadilo holding brief for Otara for 1st defendant