



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 95 OF 2017

LOICE CHARO JEFA.....PLAINTIFFS

VERSUS

HARRISON KALAMA.....1ST DEFENDANT

CLEMENCE MUYUGO.....2ND DEFENDANT

RULING

1. Before me for determination is a Notice of Motion application dated and filed herein on 25th April 2017. By the said application, the Plaintiff Loice Charo Jefa prays for an order of injunction to restrain the Defendants from entering upon, re-entering, trespassing onto, excavating building blocks, cultivating, building structures, interfering with or in any other manner dealing with the suit property or any Portion thereof pending the hearing and determination of this suit.

2. The application is premised on the grounds:-

a) That the Applicant is one of the registered owners of all that property known as Title No. Kilifi/Roka/117 measuring approximately 12.4 acres together with Daniel Charo Jefa, her husband;

b) That the Applicant had the boundaries to her land re-established by the District Land Registrar when it was established that 0.5249 hectares of the land where the 1st Respondent had set up his quarry to excavate building blocks is in the Applicant's land;

c) That the 1st Defendant has trespassed upon and continues to trespass upon a portion of the Applicant's property where he has put up a quarry, has excavated building blocks and continues to excavate the blocks to the detriment of the Plaintiff; and

d) That the Applicant stands to suffer irreparable loss unless the orders sought herein are granted.

3. In his Replying Affidavit filed herein on 26th February 2018, the 1st Defendant/Respondent Harrison Kalama denies encroaching on the Plaintiff's land as alleged or at all. According to the 1st Defendant, he has been in possession of his parcel of land without interference since 1978 while the Applicant herein only got his title in 1998. It is therefore his case that it is the Applicant who is mistaken as to her parcel of land.

4. Further and in addition to the foregoing the 1st Defendant while admitting that he has been excavating coral blocks from his land denies that the section from which he does excavation is on the Plaintiff's parcel of land. In this regard, the 1st Defendant states that while he is the owner of land parcel number Kilifi/Roka/116 which parcel neighbours that of the Plaintiff, the Plaintiff never invited him when the Land Registrar purportedly went to the land to re-establish boundaries. It is his case that as a neighbour and one likely to be affected, he ought to have been invited to be present during the exercise.

5. I have considered the application and the response thereto. The 2nd Defendant despite being served by way of substituted service is yet to enter appearance and/or file a response herein.

6. Before granting an order of temporary injunction as sought herein, the Court is obliged to consider the following:-

i) Whether the applicant has demonstrated a prima facie case with a probability of success;

ii) Whether the applicant is likely to suffer irreparable harm if the injunction is not granted; and

iii) Where the Court is in doubt, the Court will consider in whose favour the balance of convenience tilts.

7. Arising from the foregoing, it is first and foremost necessary that the Plaintiff establishes the existence of a prima facie case of the likelihood of success of her case at the trial before such an order is granted.

8. From the material placed before me, it is evident that the Plaintiff together with her husband one Daniel Charo Jefa are the registered owners of Plot No. Kilifi/Roka/117 which plot is said to measure approximately 12.4 acres. On the other hand the Respondent is the registered owner of the neighbouring Plot No. Kilifi/Roka/116. According to the 1st Defendant, he has been in occupation of his parcel of land since 1978 and uses a portion thereof for excavation of coral blocks.

9. According to the Plaintiff, sometime in February 2016, the owner of another Plot No. 118 had his plot boundaries re-established and the Plaintiff therefore thought it fit and proper that their own boundaries with the Defendant also be re-established. However before that could be done the 1st Defendant started excavating building blocks from the disputed area of land.

10. Subsequently, the Plaintiff invited the District Land Registrar who visited the area, carried out an exercise to confirm the boundaries and who established that Plot No. 116 encroached upon the Plaintiff's Plot No. 117 by approximately 0.5249 Ha.

11. Section 18 of the Land Registration Act states as follows:-

“18 (1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel of land have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate situation only of the parcel.

(2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap 299).

12. While the matter before me is essentially a boundary dispute, it was unclear from the material placed before me whether in this case, it had been noted in the registers concerned that the boundaries of the two adjacent plots had been fixed. Unless and until that has been done, it is clear to me that Section 18(2) of the Land Registration Act expressly bars this Court from entertaining the present action.

13. Under Section 19 of the said Act, the Land Registrar cannot fix boundaries which are general in nature unless and until he gives notice to the owners and occupiers of the land adjoining the boundaries in question of his intention to ascertain and fix the boundaries.

14. From the material placed before me, it is evident that there was an attempt to comply with the procedure as set out under Section 19 aforesaid. A perusal of annexure “LCJ-3” of the Plaintiff's Supporting Affidavit however reveals that while a number of neighbours were summoned by the Land Registrar vide his letter dated 6th April 2016 to attend at the disputed boundary on 28th April 2016, the 1st Defendant's name is not in the list of those who were invited.

15. Indeed even the Survey Report dated 11th November 2016(Annexure LKJ 2) prepared by the County Government of Kilifi's Assistant Director, Lands, Surveys and Valuation which traces its authority to the letter from the Lands Office dated 6th April 2016(Annexure LCJ 3) does not have the 1st Defendant's name among the witnesses who were present on the undisclosed date when the exercise was done.

16. That being the case and in light of the Plaintiff's own admission that the 1st Defendant resides on Plot No. 116, I think it would be improper at this stage to rely on the said report to grant the orders sought herein. As the 1st Defendant contends that he has resided on what he considers his portion of land since 1978 and that the Plaintiff came in much later in 1998, I think the balance of convenience tilts in his favour as he is more likely to be inconvenienced if the orders sought herein are granted.

17. In the circumstances, I find no merit in the application dated and filed herein on 25th April 2017. The same is dismissed with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

J.O. OLOLA

JUDGE