



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC CASE NO. 22 OF 2017**

**AHMED ABDULLAHI ABDILLE.....PLAINTIFF**

**VERSUS**

**ABDILLE NUR ABDI.....1<sup>ST</sup> DEFENDANT**

**ABDI DIRIYE ABDI.....2<sup>ND</sup> DEFENDANT**

**ABUKAR YUSSUF ALI ABDI.....3<sup>RD</sup> DEFENDANT**

**COUNTY GOVERNMENT OF WAJIR.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before me is the Notice of Motion dated 27<sup>th</sup> July 2017 brought under Section 1A, 1B and 3A CPA and Order 51 Rule 1 Civil Procedure Rules. The Applicant seeking the following orders:

**1. Spent.**

**2. THAT this Honourable Court be pleased to issue an order directing the 4<sup>th</sup> Defendant surveyor to conduct a survey and prepare a report in respect of the parcel of land known as UNS.Residential Plot No.T.5 Wajir Town, UNS.Residential Plot No. T.6 Wajir town and Plot No. R4245 Wajir township.**

**3. Costs of this application be in the cause.**

2. That application is supported by an affidavit sworn by the Applicant and grounds shown on the face of the said application. Attached to the supporting affidavit is a letter of allotment in favour of one Rukia A. Subow dated 31<sup>st</sup> August 2010. In his supporting affidavit, the Applicant deposed that one Dr. A. M Subow and Amb. Rukia Subow were allotted parcels of land by the 4<sup>th</sup> Defendant being Land Parcel Nos. T.5 and plot No. T6 in 31<sup>st</sup> August 2010. He further deposed that he filed the instant suit on behalf of the proprietors of the two plots after the Defendants encroached and trespassed into the plots. He stated that it is important that the 4<sup>th</sup> Defendant surveyor do conduct a survey and prepare a report touching on the disputed parcel of land. He stated that the alleged report will not prejudice any of the parties but will go a long way in assisting this Honourable Court in arriving at an informed position in determining the issues in froversy.

3. In their response to the said application, the defendants through Abdi Diriye Abdi (2<sup>nd</sup> Defendant) filed a replying affidavit opposing the application saying that the orders if granted will be tantamount to the court assisting the Plaintiff to procure evidence on his behalf. Which will be abdicating its responsibility of remaining an impartial umpire.

4. The Defendants further deposed that the court is an umpire and should not be used by parties in a suit as a vessel to compel or intimidate witnesses to give evidence in favour of one litigant as against another. The Respondents further stated that the dispute between the parties in this case is a plot ownership and not boundary dispute and that the report being asked by the Plaintiff will not determine the ownership of the property at this interlocutory stage. The Defendants also contend that the 4<sup>th</sup> Defendant is a party to this suit and cannot be compelled to produce documents in his custody before the hearing of the suit as he will not have an opportunity to interrogate the same by way of cross-examination.

**APPLICANTS SUBMISSIONS**

2. The Plaintiff/Applicant through the firm of Odiya & Associates Advocates submitted that the parcel of land which is the subject of this suit has two different documents which each party is suing as proof of ownership. The Plaintiff submits that it is important that the 4<sup>th</sup> Defendant conducts a survey and prepare a report touching on the disputed parcel of land vis-avis the different documents of ownership and prepare a report. The Plaintiff/Applicant stated that no party will be prejudiced by the surveyors report and that the said report will aid the court in arriving at a just decision.

3. They cited Section 21, 22 and 23 Civil Procedure Act. They cited no authority.

**RESPONDENTS SUBMISSIONS**

4. The Respondents through the firm of Stephen G. Wanyoike Advocates submitted that what the Plaintiff is introducing in the application is disguised as a boundary dispute while the real issue in controversy as pleaded in the plaint is a ownership dispute. He submitted that the application has introduced a new cause of action disguised as a boundary dispute which it allowed will have a ripple effect in the direction and the court may lose the real issues in controversy. In conclusion, the Respondents urged this court to dismiss the application with costs.

**DISPOSITION**

5. In order to remain focused, the Plaintiff filed this suit seeking an order of permanent injunction against the Defendants or anybody claiming under them from trespassing, alienating, setting, or dealing with the suit land described as unsurveyed Residential Plot No. T.5 Wajir town and UNS. Residential plot No. 6 Wajir town. In their joint statement of defence dated 23<sup>rd</sup> September 2015, the Defendants denied the Plaintiffs claim. At paragraph 4 of their defence, the Defendants averred as follows:

**“The Defendants jointly and severally denies having knowledge of the Plaintiffs being allocated any land in Wajir town, as alleged by the Plaintiff in paragraph 7,8 and 9 of the plaint and in particular the 2<sup>nd</sup> Defendant strongly dispute that plot Number R 4245 in which he has documents of ownership is one and the same as plot Number T.5 or T.6 and will be putting the Plaintiffs into strict prove thereof”.**

6. The Applicant who is the Plaintiff filed this suit on 19<sup>th</sup> August, 2015. Order 3 Rule 2 Civil Procedure Rules provides the documents to accompany the filing of a suit as follows:

- a. The affidavit referred to under Order 4 Rule 1 (2);
- b. A list of witness to be called at the trial;
- c. Written statements signed by the witnesses excluding expert witnesses; and
- d. Copies of documents to be relied on at the trial including a demand letter before action.

7. From the provisions of the rules, a claimant who files a suit is required to file his suit accompanied with all the evidentiary documents he intends to rely during the hearing. The application which the applicant has filed seeks to procure more evidence in his favour to the prejudice of the Respondent. This court is an impartial umpire and cannot assist one of the parties to procure evidence to his advantage. This court is an impartial umpire and cannot exercise its discretion to assist a party to procure evidence to the disadvantage of the opposite party.

8. The only instance where this court can assist the parties in determination of their disputes is way of issuing summons to Enter Appearance and witness summons where it is requested by any of the parties. Compelling witnesses to prepare reports in a civil suit flies against its mandate as an impartial umpire. I therefore find the application before me incompetent, bad in law and an abuse of the court process. The same is hereby dismissed with costs to the Defendants.

**Read and delivered in the Open Court this 21<sup>st</sup> day of June, 2019.**

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**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Plaintiff/Advocate: Absent

2. Defendants/Advocate: Absent

3. Amina-Court Clerk: present