



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 138 OF 2011

THE HON. ATTORNEY GENERAL

NATIONAL MUSEUMS OF KENYA.....PLAINTIFFS

=VERSUS=

FLORENCE MWARUMBA

JACOB SOREI.....DEFENDANTS

JUDGEMENT

1. The two plaintiffs filed this suit on 26th May 2011 vide their plaint dated same day. They sought the court to grant them the following reliefs:

- a) **A permanent injunction restraining the defendants either by themselves, their servants, employees from entering into, encroaching into, alienating, leasing, interfering with or in any other manner dealing with the suit property otherwise than as a monument for the use by the plaintiff and general public.**
- b) **A mandatory injunction do issue directed at the defendants to compel the defendants to restore the suit property to its original condition as provided for by section 111(1) of the Environmental Management and Co-ordination Act of 1999.**
- c) **General damages on the destroyed vegetation and habitat**
- d) **Exemplary damages**
- f) **Cost of the suit**
- g) **Any other relief that this honourable court may deem fit or just to grant.**

2. The defendants did not file any defence as I found none on record. The only pleadings I found they filed was a replying affidavit to the plaintiffs application dated 26th June 2011 and an application for stay of execution dated 12th July 2011. In the replying affidavit the defendants deposed that Kilifi/Group V/7 is registered to the Wakf of Khadija Binti Suleiman Bin Hemed and they were in occupation as tenants. The defendants claimed that the 2nd plaintiff was irregularly issued with a letter of allotment. The defendants failed to prosecute their application of 12th July 2011 and same had to be dismissed for want

of prosecution.

3. This suit was thus fixed for formal proof on 26th September 2017. Mr. William M. Tsaka gave evidence on behalf of the plaintiffs. He told Court that Mnarani ruins was gazetted in 1935 and he produced a copy of the gazette notice as P-exhibit 1. The witness said the 1st defendant has 5 fish ponds two of which are on their land parcel V/452. He has produced a copy of the title as Pex 2. PW 1 also produced a survey report as Pex 3 which confirmed the encroachment by the two defendants. That the defendants claimed they bought the land from the community without annexing any evidence. He urged the Court to grant the orders stopping any developments in the area to protect the heritage of Mnarani. PW 1 also added that the fish ponds are no longer in use but left scars on the land.

4. I have considered the pleadings filed, documents annexed in support of the pleadings and the oral evidence adduced. I note that the defendants sued are not claiming ownership to the suit land or the adjacent plots having clearly stated that they were tenants of a Wakf of Suleiman Bin Hemed who owned plot No.V/7. The plaintiffs herein having been made alive to this fact did not endeavour to join the trustees of the said Wakf or the Wakf Commissioners of Kenya. I shall therefore refrain from making determinations as to the boundaries of the two suit plots Nos. V/452 said to be owned by the plaintiffs and V/7 said to be owned by the Wakf. In effect I cannot make a determination on whether there was encroachment for non-joinder of parties.

5. I will however make a determination only as regards the activities undertaken by the defendants over the disputed area. The surveyor in his report observed that any development within a radius of 100m from a national monument has to be subjected to cultural heritage impact assessment before approval is given. That some of the ponds were on a radius of 10m from the Mnarani Heritage site. Given that they were undertaken from a separate title with permission of the title owner the 2nd plaintiff shall serve the title owner if they deem necessary with notice for the impact assessment to be conducted; given that the plaintiffs' witness informed the court the ponds are no longer in use before they can be re-opened for utilization.

6. In regards to the two ponds nos. 4 & 5 that are said to be within the heritage land, I do hereby issue orders of permanent injunction directed against the defendants and or their agents/employees to forthwith stop their use and operation. The suit thus succeeds in terms of prayer (1) of the plaint, with an order that each party to bear their respective costs of the suit.

Dated, signed & Delivered at Mombasa this 25th January 2018.

A. OMOLLO

JUDGE