



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL NO. 159 OF 2017

AMON MUTURI KIARIE.....PLAINTIFF

VERSUS

BEI INTERNATIONAL LIMITED

TRADING AS SCORPIO VILLAS.....1ST DEFENDANT

OFFICE OF THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

KENYA WILDLIFE SERVICES.....3RD DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....4TH DEFENDANT

RULING

1. By a Plaintiff dated 19th July 2017 and filed herein on 20th July 2017, Amon Muturi Kiarie (the Plaintiff) prays for:-

- a) A declaration that the constructions on the beach front encroaching into the Plaintiff's and the public land at the beach front are illegal;*
- b) An order that the access road be permanently closed and there be rectification of the boundaries of the Portion No. 10496 Malindi;*
- c) An order that the said construction on the beach front be demolished without any further delay/vacant possession(sic);*
- d) A permanent injunction restraining the 1st Defendant, his servants, agents, relatives, employees or otherwise howsoever from further trespassing on the suit land cutting down the vegetation thereon, building any dwelling or other structures whatsoever, cultivating on the suitland or in any other way interfering with the suitland;*
- e) General damages for trespass;*
- f) Costs of this suit together with interest and*
- g) Any other order or relief this Honourable Court may deem fit and just to grant.*

2. The basis of seeking those orders is the Plaintiff's contention that at all material times he has been the registered proprietor of all that parcel of land known as Portion No. 10496 Malindi measuring 0.2 hectares in Malindi town. It is the Plaintiff's case that after purchasing the land in January 2017 he engaged a surveyor to have the land surveyed upon which it was discovered that the wall surrounding the plot does not respect the boundary on the western side and leaves out a stretch ranging from 2 to 4 metres which would have been part of the portion he bought but is currently being used as an access road to the beach by the 1st Defendant.

3. It is further the Plaintiff's case that the 1st Defendant has built a structure used as a rest area by its guests which encroaches into the Plaintiff's right to enjoy 60 metres into the beach front and the structures stretch to the high watermark and thereby stretching into public land.

4. The Plaintiff avers that the 1st Defendant colluded with the 2nd, 3rd and 4th Defendants in acquiring approvals to have the structures erected at the beach front without due procedure being followed and to the detriment of the Plaintiff and hence the Orders sought in the suit.

5. In response thereto and by a Notice of Preliminary Objection dated 26th September 2017 but filed herein on 27th September 2017, Bei International Ltd T/A/ Scorpio Villas (the 1st Defendant) objected to the entire suit on the grounds listed as follows:-

a) That the Plaintiff's suit is scandalous, frivolous and vexatious;

b) That the Plaintiff's suit is fatally defective as it offends the express provisions of the law, and especially the Land Titles Act (Repealed) under which the suit property was registered. Section 23, 27(1), 27(4) of the Act demands that land registered under the Act must have fixed boundaries;

c) That the Plaintiff's suit is fatally defective as it offends the express provisions of the law, and specifically, Section 218(1) of the Land Titles Act(Repealed) excludes the holder of a certificate of title any rights over the foreshore and bestows the rights over the foreshore on the Government;

d) That the Plaintiff's suit is fatally defective as it offends the express provisions of the law, and specifically the Constitution of Kenya at Article 62(1); and

e) That the 1st Defendant has no proprietary interest over the suit premises.

6. I have considered the Plaintiff's suit and the Preliminary Objections raised thereto by the 1st Defendant. I have equally considered the submissions filed in support of and in opposition to the objection by the Learned Advocates for the parties.

7. The essence of a Preliminary Objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors (1969) EA 696**. At page 700 of the decision, Law, JA stated that:-

“.....a “Preliminary Objection” consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. Sir Charles Newbold P. added as follows at page 701 of the Mukisa Biscuits Case;

“A Preliminary Objection is in the nature of a what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. Arising from the foregoing, it is quite clear that a Preliminary Objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See **Hassan Nyanje Charo –vs- Khatib Mwashetani & 3 Others, Civil Application No. 14 of (2014) eKLR**.)

10. On that basis, two questions emerge for this Court's consideration. One, what pure point of law has the 1st Defendant raised in her Preliminary Objection? Two, are the facts in issue, settled?

11. The first ground of objection is that the Plaintiff's suit is scandalous, frivolous and vexatious. Prima facie, this is a factual issue, to be established by evidence from both parties. The Court cannot be able to dispose of that question, without first evaluating the evidence from the parties.

12. As Aburili J stated in **Transcend Media Group Ltd –vs- Independent Electoral & Boundaries Commission(2015)eKLR:-**

“ A pleading is scandalous if it states (i) matters which are indecent or (ii) matters that are offensive, or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party, or (v) that charge the opposite party with bad faith.....

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court.....

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the Defence (pleading) is brought merely for the purpose of annoyance...”

13. Certainly, an objection based on the 1st ground stated herein is not based on a pure point of law as it would require an evaluation of the evidence in its totality for a conclusion to be made that the pleadings are scandalous, frivolous and vexatious.

14. The second ground of objection is that the suit is fatally defective as it offends the express provisions of the law, in particular Sections 23, 27(1), 27(4) of the Land Act which demands that land registered under the Act must have fixed boundaries. In their submissions in support of this Objection, the 1st Defendant submits that the Land Title Act under which Plot No. 10496 was registered and the Registration

of Titles Act only allows the registration of plots that are enclosed on all sides by artificial boundaries and demarcated as such. The 1st Defendant further submits that Section 22 of the Land Titles Act demands that land registered under the Act must have fixed boundaries.

15. From the Plaintiff's pleadings, I did not understand him to be stating that his portion of land did not have fixed boundaries. What I understand the Plaintiff to be stating is that from a survey report that he commissioned, there appears to have been some interference and/or encroachment on some part of the fixed boundary. Again whether or not the parcel of land has fixed boundaries as envisaged under the law is a matter of fact that requires evidence to be ascertained. That ground of objection is equally misconceived.

16. A perusal of the third and fourth grounds of objection indicate that they raise issues similar to those raised as the Second Ground of Objection. The last ground to the effect that the 1st Defendant has no proprietary interest over the suit premises again cannot be raised as a bar to the suit as it is the basis the Plaintiff has filed this suit and it can only be proved to be either true or false upon a consideration of the facts and evidence surrounding the ownership of the structures which the Plaintiff claims to have been built on some part of the suit property.

17. As the Supreme Court of Kenya observed in *Independent Electoral Boundaries Commission –vs- Jane Cheperenger & 2 Others (2015)eKLR:-*

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the Originator of the Objection-against profligate deployment of time and other resources. And Secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.

18. In the instant matter before me, the objection herein has been brought more as a sword than a shield. Such a course is not to be permitted as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest.

19. Accordingly, the 1st Defendant's preliminary objection dated 26th September 2017 and filed herein on 27th September 2017 is disallowed and is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE