



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 114 OF 2017**

**TIMA MAULANA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SAIB FUAD RUDENY.....DEFENDANT/APPLICANT**

**RULING**

1. Before me for determination are two applications. The 1<sup>st</sup> application dated 15<sup>th</sup> May 2017 was filed by the Plaintiff herein. By that application, Tima Maulana, the Plaintiff herein makes the following prayer:-

***3. That this Honourable Court do issue a restraining order directed against the Respondent herein either by himself, agents, servants, employees or any other person acting for or on his behalf from in any way constructing or further continuing with the construction of a perimeter wall on a portion of all that Unsurveyed Residential "Plot A" Malindi Municipality thereon (sic) or in any way adversely dealing with the Plaintiff's/Applicant's use and enjoyment of the access road to her residence pending the hearing and determination of this suit or further orders of this Honourable Court.***

***4. That costs be in the cause.***

2. The application is supported by the Plaintiff's affidavit annexed thereto and is premised on the following:-

***a) That the Plaintiff purchased two portions of land hived from all that unsurveyed residential "Plot A" Malindi Municipality about 11 years ago and has been enjoying the access road adjoining the Defendant's plots;***

***b) That the Defendant has without any colour of right whatsoever so callously and whimsically dug a trench with the aim of putting up a perimeter wall and which wall will block the Plaintiff's access to her property;***

***c) That the Applicant stands to suffer irreparably should a restraining order not issue forthwith.***

3. Upon the filing of the Plaintiff's application aforesaid under Certificate of Urgency, the same was placed before the Honourable Justice Yano on 18<sup>th</sup> May 2017 and the Learned Judge granted temporary orders of injunction against the Defendant pending inter-partes hearing on 29<sup>th</sup> May 2017. The said Orders were extracted and issued on 19<sup>th</sup> May 2017.

4. Subsequently, by the second application herein dated 22<sup>nd</sup> May 2017, the Defendant Saib Fuad Redeny moved to Court again under Certificate of Urgency seeking the following:-

***3. That pending the hearing and determination of this application (sic) and (the) suit, this Honourable Court be pleased to set aside the orders dated (sic) 19<sup>th</sup> May 2017 and restrain the Plaintiff by way of temporary injunction from trespassing, passing through, alienating or dealing with the Defendant's Plot.***

***4. Costs of this application to the Plaintiff (sic).***

5. The second application is supported by an affidavit sworn by the Defendant in which he states that the orders granted ex-parte were granted on account of material non-disclosure of facts and half-truths. It is the Defendant's case that the Plaintiff misled the Court that she had no access to her property by annexing a misleading sketch map.

6. The Defendant avers that the Plaintiff failed to demonstrate how a road was created in the middle of the Defendant's Plot and why she had

no alternative route to her property. It is the Defendant's case that the right of way cannot be created by legal fiat and that it is imperative that the orders granted be set aside to allow him continue with his project and to avoid further trespass to the Defendant's property.

7. It was subsequently agreed by the parties that the two applications be heard and disposed off together. I have accordingly considered the two applications and the responses thereto. I have equally considered the written submissions placed before me by the Learned Advocates for the parties.

8. From the material placed before me, it is evident that both parties have adjacent plots which are both unsurveyed. From a Sale Agreement annexed to her application dated 15<sup>th</sup> May 2017, the Plaintiff bought a portion measuring 1 acre from one John Charo Shutu on 4<sup>th</sup> July 2003. The portion sold to the Plaintiff is described in passing at paragraph two of the Sale Agreement as follows:-

***“WHEREAS the Vendor is seized, possessed of and otherwise beneficially entitled to and/or is the owner of all that parcel or piece of land measuring one (01) acre or thereabouts, a sub-division of parent land known as unsurveyed Residential Plot No. “A” Malindi Municipality as per the Letter of Allotment dated 12<sup>th</sup> April, 2001.***

***AND WHEREAS the vendor is willing to sell and the purchaser willing to purchase and the two parties have agreed on the same.”***

9. While the said Letter of Allotment is not annexed to the Sale Agreement attached to the Supporting Affidavit, it is evident that the Plaintiff has been using the same ever since until sometime- on or about 15<sup>th</sup> May 2017 when according to her, the Defendant embarked on building of a perimeter wall that would block the only access road to her premises.

10. On his part, the Defendant avers that he bought his portion of land in the year 2013 from one Agnes Mutindi Kilonzo. It is the Defendant's case that upon purchase of the two plots, he undertook due diligence and visited the site to establish the boundaries thereof. Having done so, he put up a barbed wire fence around the property but the same was destroyed almost immediately by the Plaintiff/s agents.

11. It is evident from the Sale Agreement signed between the Defendant and the said Agnes Mutindi Kilonzo as well as the sketch maps attached by both parties that the portions of land in dispute are adjacent to each other both having been hived off what is described by both parties as Unsurveyed Residential Plot No “A” Malindi Municipality.

12. It is also evident that as at the time the Defendant purchased his portion of land, the Plaintiff had been enjoying the use of her portion of the property for about 11 years. The Defendant does not state that he engaged the use of any official surveyors to establish the boundaries and any access roads that may have been on the land. As it were, he only relied on the word of the seller the said Agnes Mutindi Kilonzo before he embarked on fencing the land.

13. As it turned out, a portion he embarked on fencing is also for some reason, the area used by the Plaintiff to access her land. Given that the whole area is unsurveyed and that there are no official records to guide this Court at this interlocutory stage on which of the parties is entitled to which portions of the land and/or access thereto, I think it would be in the interest of justice that the Plaintiff be allowed access to her land pending the hearing and determination of this suit.

14. Accordingly I make the following orders:-

***a) The Defendant's application dated 22<sup>nd</sup> May 2017 is hereby dismissed.***

***b) The Plaintiff's application dated 15<sup>th</sup> May 2017 is hereby allowed in terms of Prayer No. 3 thereof.***

***c) The cost of the two applications shall be in the cause.***

15. Arising from the foregoing, I did not find merit in the Plaintiffs application dated 10<sup>th</sup> May 2017. The same is dismissed with costs to the Defendants/Respondents.

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of September, 2018.**

**J.O. OLOLA**

**JUDGE**