



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 270 OF 2015

1. AWADH SALEH SAID

2. SAID SWALEH SAID.....APPLICANTS

=VERSUS=

COUNTY GOVERNMENT OF MOMBASA....RESPONDENT

RULING

1. The plaintiffs moved this court by their application dated 22nd October 2015 seeking the following orders;

1. Spent

2. Spent

3. That the defendant by itself, servants, agents, employees or otherwise be restrained by temporary injunction from continuing with digging, excavation and damage on that land known as parcels no. **MOMBASA/BLOCK 16/1310, 1311, 1312, 1313, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1322, 1327, 1331, 1333 and 1335** registered in the names of the plaintiffs pending the hearing and determination of this suit.

4. Costs of the application be provided.

2. The application is supported by the grounds on the face of it and the affidavit of Swaleh Hussein Saleh who holds a power of attorney from the 1st and 2nd plaintiffs. The applicant pleads that they are the owners of the suit parcels which the defendant invaded on 8th October 2015 by excavating, digging trenches & levelling, thus damaging the same.

3. The applicants avers the defendant's action amounts to breach of their right to property as envisaged in article 40 of the Constitution and that unless the defendant is restrained, the applicants shall suffer irreparable loss. The applicants deposed that they are willing to give undertaking as to damages.

4. The application is opposed by the defendant vide a replying affidavit sworn by Caxton Mbaru Kai the County Surveyor. Mr. Kai deposed that the suit plots **MSA BLOCK XVI/130 to 1315** were irregularly created from the road reserve thus changing the width of the road from 30 metres to 15 metres as shown in their survey plan. That the allocations were never circulated to the relevant agencies as is the norm for

their input. Mr. Kai deposed further that these plots were recommended to be revoked and revert back to original usage by the Ndungu report.

5. Both parties filed written submissions forming part of their arguments for and against the granting of the orders sought. I have had occasion to read and consider the same. From the contents of the affidavit in support of the application, it's not in dispute the applicants are holding title to the suit properties. It is also not in dispute. It is also not denied by the defendant that it is excavating, digging and levelling the suit parcels without the consent of the applicants.

6. The defendant argues that the suit parcels were irregularly created and allocated to the plaintiffs. The plaintiffs deposed that they have owned these parcels of land for the last 20 years. The copy of the title deed annexed shows the applicants were issued with title on 22nd April 1994. The defendant has put reliance on the recommendation of the Ndungu report that was compiled way back in June 2004. From 2004 to date, the defendant did not take any steps to actualise the recommendations made by the Ndungu report or challenge the applicants' title in the manner provided under the law.

7. Instead the defendant has sought to repossess what they state is a road reserve without first serving the applicants with any form of notice in line with the rules of natural justice (now put in the law under article 47 of the Constitution). The fact that the applicants title has not been cancelled and that the works are being undertaken on their without their consent or notice is a clear demonstration that the applicants have shown a prima facie case with a probability of succeeding. The defendant may have a valid defence but it should not be allowed to put the cart before the horse in blatant breach of the law as this may result to a reign of lawless.

8. The applicants also deposed that this land is in Majengo area which is located within the Central business district of Mombasa thus it is prime land. Land is valuable commodity that should not be taken without affording the owner compensation or a fair hearing. The defendant has not pleaded their willingness to compensate the applicants in the event this suit succeeds. In the circumstances of this case, if defendants are allowed to continue with the works before the issues in controversy are resolved then the applicants are likely to suffer irreparable loss since if the road is done, getting back the land to the state it was in before may be may be no mean task.

9. The defendant through their survey plan document sought to explain that the applicants' titles were curved out of a road reserve. However such an allegation can only be proved by adducing evidence as the survey plan does not give the measurements stated in the replying affidavit.

10. Consequently, I am satisfied this application meets the threshold set for granting temporary order of injunction as the applicants have demonstrated through their pleadings the principles to be considered in law in granting such orders. I do allow it in terms of prayers 3 & 4 of the motion.

Dated and Delivered at Mombasa this 24th day of Jan 2017

A. OMOLLO

JUDGE