



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 190 OF 2016**

SAADIYA SHEIKH MUHIDDIN.....1<sup>ST</sup> PLAINTIFF

ZAKARIA MOHAMED SHEIKH BANA.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

NASEEM SALIM KARAMA.....1<sup>ST</sup> DEFENDANT

COUNTY GOVT of MOMBASA DEPARTMENT

OF LANDS, PLANNING & HOUSING.....2<sup>ND</sup> DEFENDANT

**RULING**

1. The plaintiffs file the present application dated 13<sup>th</sup> July 2016 seeking the following orders'

1. Spent

2. Spent

3. That this court be pleased to grant a temporary order of injunction restraining the 1<sup>st</sup> Respondent either by herself or her servants, agents and or representatives from further trespassing, encroaching, constructing, building and or otherwise tampering with the plaintiffs' parcel of land MSA/BLOC XVI/891 pending hearing and determination of this suit.

4. That the court be pleased to order that the building permit issued to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> defendant pursuant to an application refe P/591/2014 in the PPA Form is suspended, cancelled and revoked and or annulled pending hearing and determination of this application and suit.

5. Costs of the application be provided for.

2. The application is premised on several (17) grounds listed on the face of it inter alia that the 1<sup>st</sup> Respondent has proceeded to construct buildings/apartments which has encroached on the plaintiffs'

parcel of land by five (5) metres. The applicants complained vide their letter dated 18<sup>th</sup> April 2016 to the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent wrote to the 1<sup>st</sup> Respondent but the 1<sup>st</sup> Respondent did nothing.

3. The application is supported further by the affidavit of Saaidya Sheikh Muhiddin and Zakaria Mohamed Sheikh Bana. They averred that they are registered owners of plot no **MSA/Block VX1/891** which is adjacent to the 1<sup>st</sup> Respondents' land no **MSA/Block XVI/883**. They depose that vide a survey carried out on November 2015, it revealed the 1<sup>st</sup> Respondent had encroached on their land by 0.0045 ha. or five (5) metres. They took up the matter with the 2<sup>nd</sup> Respondent who their ordered the 1<sup>st</sup> Respondent to stop the on-going Constructions. However the 1<sup>st</sup> Respondent ignored and therefore they moved the court to protect their property from being wasted. The applicants' annexed copy of the survey report and correspondences exchanged before the matter was filed in court.

4. The application is opposed by the Respondents vide an affidavit filed on 09<sup>th</sup> September 2016 and sworn by Moona Salim Karama. Ms Moona deposes to hold a power of attorney donated by the 1<sup>st</sup> defendant. She also deposed that she is one of the registered proprietors' of the land. She continued that they have lived on this land for over 30 years and sometimes in 2014 they decided as a family to bring down their house and construct a commercial & residential house.

5. To achieve this, they engaged the services of a professional who drew up the plan. Ms Moona deposed that during this process, they discovered that there was an error in the acreage of their land which needed to be corrected. Consequently they wrote to the Land Registrar, Mombasa vide their advocates' letter of 25<sup>th</sup> November 2015. The Land Registrar responded by giving a date for site visit on 16<sup>th</sup> December 2015.

6. The 1<sup>st</sup> Respondent deposed further that the Land Registrar invited owners of all neighbouring plots but the previous owners of L.R No 891 did not attend this meeting. The 1<sup>st</sup> Respondent deposed further that the exercise was undertaken anyway and a report prepared. They were thus surprised by a claim of encroachment brought through these pleadings. It is their defence that the director of surveys has confirmed the surveyor's report and he recommended the rectification of the registry index map to reflect the actual ground positions.

7. It is further the 1<sup>st</sup> Respondent deposition that the applicants and the previous owners were all aware of the ongoing boundary verification process but refused to be part of it. They contend this suit was prematurely and maliciously filed. The 1<sup>st</sup> Respondent contends they followed the right channels and they have not encroached on any property as alleged by the plaintiff. The 1<sup>st</sup> Respondent urged the court to dismiss the application with costs to them.

8. The applicants filed a supplementary affidavit in which they contested the facts brought forth by the 1<sup>st</sup> Respondent. The applicants deposed that the 1<sup>st</sup> Respondent had realised they had encroached from the report of their surveyor but they ignored and continue with their illegal encroachment and construction. The applicants' depose that this survey done by the 1<sup>st</sup> Respondent is unlawful and illegal and in due course shall apply to have the same nullified. They urged the court to grant the orders sought.

9. From the pleadings it is clear there exist a boundary dispute between the two plots **MSA/Block/XVI/883** and **891**. This is evidenced by the correspondences exchanged by the Lands office and the 1<sup>st</sup> Respondent. Secondly the 1<sup>st</sup> Respondent admits the applicants did not participate in the re-survey process because they failed and or neglected to attend the meetings despite having been invited. It is the 1<sup>st</sup> Respondent's contention that the applicants should not now complain through this court process. Thirdly both parties have admitted through their pleadings that there is some construction being undertaken on plot no.883 and which developments extend to a portion being claimed by the applicants. The applicants may be found to be right or wrong at the conclusion of this case but with all the facts presented to the court, they have shown that they have a prima facie case with a probability of succeeding.

10. While considering whether to grant an order of temporary injunction or not, a party need only satisfy any of the three principles laid out in the case of **Giella vs. Cassman Brown**. The applicant has proved the first one of prima facie case. The second issue I will consider is on whose favour the balance of convenience tilts. The Land Registrar's report is dated 16<sup>th</sup> December 2015. This suit was filed on 13<sup>th</sup> July 2016 about six months after the report. The rectification of the R.I.M was requested on 21<sup>st</sup> July 2016 and go-ahead given by the Director of Surveys on 11<sup>th</sup> August 2016.

11. The R.I.M has thus not been amended. The balance of convenience would be to withhold the implementation and or rectification of the R.I.M until this matter is heard and determined. Further the 1<sup>st</sup> Respondent did not tell the court what level the construction had reached. The convenient thing would be to withhold completing the construction until the dispute is fully resolved. The applicants have also proved another principle to be considered while granting an order of injunction.

12. In conclusion, I am satisfied there is merit to grant the orders sought on account of facts presented to this court. Consequently I do grant the orders no.3 of the motion but the words trespassing and encroaching deleted. The 1<sup>st</sup> Respondent is ordered restrained from further constructing, building or registering any amendments on either of the two titles pending hearing and determination of this suit. Prayer 4 is not granted and shall await the determination of this suit on merits. The costs of the application to be borne by each of the parties.

**Dated and signed at Mombasa this 11<sup>th</sup> Day of January 2017**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this 12<sup>th</sup> Day of January 2017 by**

**M. THANDE**

**JUDGE**