



Abdulrhman v Ministry of Lands, Planning and Housing, Mombasa County & 5 others; Khimji & another (Interested Parties) (Civil Suit 225 of 2016) [2017] KEELC 3858 (KLR) (17 February 2017) (Ruling)

Abdalla Ali Abdulrhman v Ministry of Lands, Planning and Housing & 5 others [2017] eKLR

Neutral citation: [2017] KEELC 3858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 225 OF 2016
AA OMOLLO, J
FEBRUARY 17, 2017**

BETWEEN

ABDALLA ALI ABDULRHMAN APPLICANT

AND

THE MINISTRY OF LANDS, PLANNING AND HOUSING, MOMBASA COUNTY 1ST RESPONDENT

THE CHIEF OFFICER, MINISTRY OF PLANNING 2ND RESPONDENT

THE COUNTY SURVEYOR 3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

THE REGISTRAR MOMBASA DISTRICT 5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 6TH RESPONDENT

AND

MAHMOUD HAIDERALI KHIMJI INTERESTED PARTY

SUKAINA MAHMOOD KHIMJI INTERESTED PARTY

RULING

1. The Applicant herein, Abdalla Ali Abdulrhman, commenced this case by way of Originating Summons filed on 17th August 2016. The Applicant originally listed a total of 14 plot owners as Interested Parties in this suit. However, on 31st August 2016, the Applicant withdrew the suit as against the 3rd to 14th Interested Parties, leaving only the 1st and 2nd Interested Parties. The substantive prayer



- in the Originating Summons is that the court do issue an order granting the Applicant an access order, granting reasonable access to Plot No. Mombasa/block Xvii/108 which is landlocked.
2. Contemporaneously with the Originating Summons, the Applicant filed a Notice of Motion dated 15th August 2016 in which the Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. Pending hearing and determination of this suit this court be pleased to maintain the status quo and that is to say; that the applicant be allowed to continue using the temporary road of access going through Plot Titles Nos. Mombasa/block Xvii/107 and Mombasa/block XVII/106 joining Tom Mboya Avenue.
 - d. Costs of the application be provided for.
 3. The Applicant contends that in the year 2000, the land surrounding the suit property was surveyed and allocated to different persons. That after the owners of the plots commenced developments on them, it dawned on the Applicant that his land was totally blocked from all sides, without access.
 4. The Applicant further contends that he and the 1st and 2nd Interested Parties share an access road along the side of Mombasa/block Xvii/107 owned by the 1st and 2nd Interested Parties and crossing through Mombasa/block Xvii/106 and joining Tom Mboya Avenue.
 5. The Applicant's case is further that the 1st and 2nd Interested Parties have threatened and continue to threaten the Applicant with a possible closure of the temporary road of access.
 6. Although from the record it appears that 1st, 2nd, 3rd and 4th Respondents filed Grounds of Opposition to the Application, I was not able to trace the same in the court file. In their Submissions, the 1st, 2nd, 3rd and 4th Respondents contend that the suit is res judicata since the issue raised in both the Notice of Motion and the Originating Summons have been dealt with in past suits. The 1st, 2nd, 3rd and 4th Respondents further submitted that no cause of action has been established by the Applicant as against them, to warrant the granting of the orders sought
 7. The 1st and 2nd Interested Parties (hereinafter simply jointly referred to as "the Interested Parties"), who are a husband and a wife, opposed the Application through Notice of Preliminary Objection dated 8th September 2016 as well as through a Replying Affidavit sworn by the 1st Interested Party on 29th August 2016.
 8. The Interested Parties contend that the suit is barred by the doctrine of res judicata as there is HCCC No. 236 of 2002 and an appeal in the Court of Appeal that is pending determination. Further, that the Originating Summons violates section 140 of the Land Act and is void and unsustainable.
 9. The Interested Parties stated that they are the registered owners of Plot No. Mombasa/block Xvii/107. That on 17th October 2011, the Applicant entered onto the Interested Parties' said plot accompanied by hooligans and demolished the boundary wall and the steel metal gate erected thereon.
 10. The Interested Parties also stated that the Applicant's land is not landlocked at all because he built a three story building thereon without using the access road that he now seeks to be granted access through.



11. It is the Interested Parties' case that the High Court in HCCC No. 236 of 2002 rightfully determined that the court cannot grant access to the Applicant's parcel of land through a third party proprietor's parcel of land.
12. The Interested Parties submitted that the Applicant did not comply with section 140 of the Land Act which requires that a copy of the application for access order shall be served upon the owners of each piece of land adjoining the landlocked land since the Applicant withdrew the case against the 3rd to 14th Interested Parties. The Issue for Determination the main issue for the court's determination is whether the order sought should be granted.
13. The Interested Parties contend that this suit is barred by the doctrine of res judicata since the issues raised herein had been conclusively dealt with in HCCC No. 236 of 2002. Further, that an appeal has been preferred from HCCC No. 236 of 2002 which is pending determination in the Court of Appeal. In rejoinder, however, the Applicant contends that this suit is not barred by the doctrine of res judicata because the issues and the parties herein are not the same as in the previous suit. That the issue of access order under section 140 of the Land Act has been introduced for the first time in this suit. On whether the issue was conclusively dealt with in HCCC No. 236 of 2002, the Applicant's position is that the said case is still pending in the High Court since only interlocutory applications have been determined in it.
14. I have taken the liberty to study the relevant rulings made in both HCCC No. 236 of 2002 and the Court of Appeal. It is unfortunate that the Applicant only mentioned that he had filed a suit in the High Court but failed to disclose the nature of that case and how far it went. Instead, it is the Interested Party who gave details of the case and even annexed the relevant rulings made both in the High Court and the Court of Appeal.
15. What is before court for determination is an interlocutory application and not the main suit. It is therefore not appropriate at this stage to arrive at a conclusive finding on whether the main suit is barred by the doctrine of res judicata or not. However, in deciding whether to grant the order sought, I must put into perspective and consider the history of the dispute herein.
16. In summary, the history of the dispute may be stated as follows. The Applicant's property Mombasa/block Xvii/108 (also called "the suit property") abutts Mombasa/block Xvii/107, which was previously owned by Aliya Apartments Limited but was subsequently sold and transferred to the Interested Parties herein.
17. By a plaint dated 12th June 2002 and amended on 15th April 2011, the Applicant filed a suit against Aliya Apartments Limited and the Interested Parties herein contending that the Mombasa Municipal Council had allowed him to access the main road through two properties, namely the Interested Parties' property and Mombasa/block Xvii/106, whose owner was not made a party to the dispute. The Applicant pleaded that the Interested Parties had closed the access through their land and prayed for an order compelling them to unconditionally open the road of access through their property.
18. By an order issued on 14th May 2012, Muriithi, J. directed the Land Registrar, Mombasa, in accordance with section 21 of the repealed Registered Land Act, to ascertain the boundary between the two properties, the existence or otherwise of an access road through the Interested Parties' property, and to report to court within 30 days.
19. The Registrar duly visited the two properties and submitted to court a report dated 15th June 2012. The salient points of the report were that neither parcel had an access road; that the closest road to the Interested Parties' property is along Tom Mboya Avenue across Plot No. Mombasa/Block XVII/106; that the closest road to the suit property was an access road southeast, between Plots Nos. Mombasa/



Block XVII/1298 and 1299; that the said access road was 2.5 meters from the actual position and was no better option; and that the road which could have best served the suit property was blocked due to uncontrolled construction of Hantoosh Filling Station and extension of kiosks and bandas which were recommended for demolition to create access.

20. After hearing counsel for the parties and considering the Registrar's report, the learned judge issued the following orders:

- “ 1. That the county Government of Mombasa and the Land Registry, Mombasa do create a permanent access road to parcels of land namely Mombasa/Block XVII/107 and Mombasa/Block XVII/108 from Hantoosh Filing Station as per the Town Planning Act which will involve demolition of all kiosks and part of the illegal structures...
2. That for avoidance of doubt the court does not make any order for the creation of an easement or right of way in favour of the plaintiff's parcel of land Mombasa/Block XVII/108 on the defendant's parcel of land Mombasa/Block XVII/107 as proposed in recommendation No. 3 of the Land Registrar's Report dated 15th June 2012;
3. That the defendants who are aggrieved by the road of access sought to be created through their parcel of land do serve the order of the court on the County Government of Mombasa and the land Registrar, Mombasa;
4. That this matter shall be mentioned after sixty 60 days to confirm compliance with the order of the court herein and for final orders for the settlement of the dispute in the suit;
5. That the parties be at liberty to apply.”

21. On 29th September 2014, the Applicant went back to the High Court, seeking review of the above orders. The grounds for review were that it was not feasible to create the road of access as ordered by the court and that the information was not within the applicant's knowledge. By the ruling dated 3rd May 2016, the learned judge dismissed the application for review.

22. The Applicant then filed an appeal in the Court of Appeal against the ruling of 3rd May 2016, which declined review. The appeal is still pending. The Applicant also filed an application in the Court of Appeal, being Civil Application No. 24 of 2016, for an order that pending hearing and determination of the appeal, an order of injunction be issued restraining the Interested Parties from closing an existing temporary road of access to the suit property, in essence allowing the Applicant to access the suit property through the Interested Parties' land.

23. On 15th July 2016, the Court of Appeal dismissed the Applicant's application and held as follows:

“The applicant concedes that the respondents are not responsible for his predicament. He has not controverted the respondent's submissions that when he developed his property, he used an alternative road of access to his property, which did not entail passing through the respondents' property. The order of the High Court that the applicant sought to review identified a road of access to his property which, to actualize, required removal of illegal constructions and structures.

In our view, it is not possible to hold, in these circumstances, that the balance of convenience favours the applicant; it will be tantamount to saying that his right to his property is superior



to the right of the respondents to their property, particularly when the applicant readily concedes that the respondents are not to blame for the prevailing situation. We are satisfied that the applicant has not established that his intended appeal will be rendered nugatory, in the absence of an order of injunction. Accordingly, the Motion dated 24th May 2016 is hereby dismissed with costs to the respondents.”

24. After losing the application in the court of appeal, the Applicant then filed this suit by way of an Originating Summons as well as the present application.
25. I have considered the rulings in both HCCC No. 236 of 2002 and Court of Appeal Civil Application No. 24 of 2016. It is clear to me that the issue that was raised in those cases was the access of the suit property by the Applicant. Muriithi, J. in his ruling delivered on 14th May 2014, while acting on a Report by the Land Registrar, issued an order on how access to both the Applicant’s and the Interested Parties’ properties would be created. He subsequently declined to review his ruling. The Court of Appeal in its wisdom declined to issue an injunction stopping the Interested Parties from closing an existing temporary road of access to the Applicant’s property. In effect, both the High Court and the Court of Appeal have declined the Applicant’s request to access his property through the Interested Parties’ parcel of land.
26. The Applicant states that he is presently using a temporary access through the Interested Parties’ plot which he wants this court to permit him to continue using by issuing an order of maintenance of the status quo. The Applicant did not however controvert the Interested Parties’ contention that he was able to access his land during construction of his three story building without passing through the Interested Parties’ parcel.
27. In my view, the order that the Applicant is seeking will effectively grant him what both the Court of Appeal and the High Court declined to grant him. Muriithi, J. specifically and expressly declined to create an easement of right of way in favour of the Applicant’s parcel of land on the Interested Parties’ parcel of land. The Applicant has neither fixed HCCC No. 236 of 2002 nor the appeal for hearing. I do not see why this court should grant the Applicant what he has previously been denied by both the High Court and the Court of Appeal. Doing so would be tantamount to sitting on appeal against the decisions of both the High Court and the Court of Appeal, a jurisdiction that this court lacks.
28. Finally, I do not think that the parties in this suit are substantially different from the parties in HCCC No. 236 of 2002. I say so because the persons listed herein as the Respondents are merely government officers/offices but it is manifestly clear that the dispute herein pits the Applicant against the Interested Party just as it was in HCCC No. 236 of 2002.
29. In conclusion therefore, the Applicant’s Notice of Motion dated 15th August 2016 is dismissed with costs. I will not strike out the suit because the initial suit has not been heard and concluded on its merits.

DATED AND DELIVERED IN MOMBASA THIS 17TH DAY OF FEBRUARY 2017

A. OMOLLO

JUDGE

