



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 284 OF 2016

ABDULAZIZ SWALEH ABDISHEIKH.....PLAINTIFF/APPLICANT

=VERSUS=

SWALHA AHMED SALIM.....DEFENDANT/RESPONDENT

RULING

1. I have before me a Notice of Motion application dated 26th October 2016. The motion brought under Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rule makes the following Prayers:

(a) THAT Judgment on admission be entered for the Plaintiff against the Defendant as prayed in the Plaintiff; and

(b) that the defendant be condemned in costs of this suit, this application and ELCC Misc Application No. 12 of 2016, Malindi.

2. The Application is premised on the grounds *inter alia* that there is a clear admission of the Plaintiff's claim in its entirety by the Defendant in paragraphs 6 and 7 of the Defence and also in the Defendant's Witness Statement.

3. The Application is supported by the affidavit of Abdulaziz Swaleh Abdisheikh, the Plaintiff herein sworn on 26th October 2016.

4. When the Application came up for hearing on 6th February 2017, there was no appearance for the Defendant/Respondent.

5. Mr. Henry Muranje, counsel for the Plaintiff/Applicant informed the court that his office took a date for the hearing of the application ex-parte on 26th October 2016. According to Counsel, on 27th October 2017, he personally proceeded to the Defendant's Advocates office, at Kituo cha Sheria whereupon he effected service of the Notice of Motion upon the Advocate's secretary one Ms Kabibi.

6. In support of the fact that he served the application as afore-stated, Mr. Muranje filed a return of Service duly sworn by himself in this court on 7th December 2016. Having perused the Affidavit of Service and the amendments made therein, this court was satisfied that Counsel had indeed effected service upon the Respondent's Counsel on record and proceeded to hear the application in the absence of the Respondent and/or her Counsel.

7. In his submissions Mr. Muranje urged this court to grant the prayers sought in his application as set out herein above on the basis that the same were uncontroverted as the Defendant/Respondent has neither filed a reply to the application nor did she appear in court to controvert the arguments raised in the application.

8. I have in the circumstances studied the Plaintiff's application dated 26th October 2016 together with his supporting Affidavit sworn and filed herein on the same day.

9. Order 13 Rule 2 of the Civil Procedure Rules provides as follows:

“ Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such Judgment or Order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the Parties, and the Court may upon such application make such Order, or give such Judgment as the Court may think just.”

10. I have perused the Plaint filed herein on 20th April 2015. According to the Plaintiff, he was at all material times the owner of a portion of Plot Number 1253 (Original No. 117/05) situated at Mambrui Town within Kilifi County. It is the Plaintiff's further contention that the Defendant is the Owner of an adjacent Portion of a Plot No. 1254 situated at the same Mambrui Town.

11. According to the Plaintiff, sometime in January 2015, the Defendant commenced construction of a house on her plot but the said construction encroached into the Plaintiff's Portion of land and in spite of the Plaintiff's demand and notice of intention to sue, the Defendant has refused, neglected and/or ignored to demolish the construction which encroached on the Plaintiff's Portion.

12. The Plaintiff avers in the Affidavit in support of the Motion sworn and filed herein on 26th October 2016 that the Defendant has wholly admitted the claim both in the Defendant's Statement of Defence and in her Witness Statement dated 17th May 2015 and filed herein on 25th May 2015.

13. The 9th Edition of Black's Law Dictionary defines an admission as

“ Any statement or assertion made by a party to a case and offered against that party; an acknowledgement that facts are true.

14. In her Statement of Defence dated 18th May 2015 and filed in court on 25th May 2015, the Defendant states at paragraphs 6 and 7 thereof as follows:-

6. The Defendant avers that she has encroached 5 metres to the Plaintiff's Plot No. 1253 and she is willing to demolish the part she has encroached in.

7. The defendant further avers that if she would have known about the encroachment before the construction, she would have stopped them.

15. In their plain and ordinary meaning, the averments as contained in Paragraph 6 and 7 of the Defence amount to a clear acknowledgement by the Defendant that the claims of trespass and encroachment made by the Plaintiff are indeed true.

16. Further and in addition to the foregoing, I have also had occasion to look at the Defendant's Statement dated 17th May 2015 aforesaid. In Paragraphs 3 and 4 of the Statement, the Defendant states as follows:

“That in the year 2005, someone came and told me I had encroached into his plot, so I went and called a Surveyor who confirmed that I had indeed encroached into the neighbour(sic) Plot by either 4 or 5 metres.

That it was not my intention to encroach into my neighbour's Plot but the contractor did not follow or see the beacons and that I have agreed to remove the illegally constructed part of the plot....”.

17. A reading of both the Defence and the Defendant's Statement therefore leave no doubt that the Defendant wholly admits the Plaintiff's claim. While the encroachment may have resulted from the negligent acts of the contractor she engaged to construct the house, she cannot avoid liability for the acts and/or omissions of the agent she engaged to construct her house.

18. Indeed the moment the Defendant realised she had encroached on the Plaintiff's land, she should have moved with speed to remove the offending part of the construction in order to avoid this litigation.

19. In the foregoing circumstances I am persuaded that the Notice of Motion application dated 26th October 2016 is merited and I allow the same as prayed.

Dated, signed and delivered in Malindi this **8th** day of **February**, 2017.

J. OLOLA

JUDGE