



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 152 OF 2015

RICHARD NYAMAI KIMINDU.....PLAINTIFF

VERSUS

PATRICK NDONYE .....1<sup>ST</sup> DEFENDANT

RHODA MUTUA .....2<sup>ND</sup> DEFENDANT

RULING

1. In the Application dated 2<sup>nd</sup> July, 2015, the Plaintiff is seeking for injunctive orders in the following terms:

*a. That this Honourable Court be pleased to issue an order of temporary injunction to the Defendants, their agents, servants, employees and or anybody acting on behalf of the Defendants from interfering, encroaching, alienating, cultivating, contracting, constructing and or dealing in any manner on that parcel comprising Plot No. F Sultan Hamud pending hearing and determination of this Application and suit.*

*b. That in the alternative this Honourable Court be pleased to issue an order of status quo be maintained, that the Defendants be restrained from further construction and encroachment of Plot No. F Sultan Hamud pending the hearing and determination of this Application and suit.*

2. The Application is premised on the grounds that the Plaintiff is the allottee of a plot known as Plot No. F Sultan Hamud of Plan No. MKS 87/94/16 measuring 0.07Ha; that the Defendants have encroached on the said plot and that the Defendants are in the process of putting up a permanent structure on the suit land.

3. In response, the 1<sup>st</sup> Defendant deponed that he is the owner of unsurveyed Business cum Residential plot number A Sultan Hamud which he purchased from Apollos Nzioki Thengele; that the said Apollos Nzioki was issued with a letter of allotment for the said plot and that he paid the requisite fees.

4. It is the Defendants' case that from the Part Development Plans, the two plots are in different locations and that the whole suit is misconceived and should be dismissed.

5. In the Supplementary Affidavit, the Plaintiff deponed that while locating the beacons, the Surveyor discovered that the Defendants' buildings have encroached on his plot and that the Defendants are proceeding with the construction despite the orders of the court.

6. It is the Plaintiff's cases that the Part Development Plan that the Defendants are relying is suspect

because it is not accompanied with proper approvals.

7. The Plaintiff's advocate submitted that the Plaintiff was allocated the suit land by way of a letter of allotment dated 14<sup>th</sup> December, 1995; that the survey report shows that the Plaintiff is the registered proprietor of the land and that the *status quo* should be maintained pending the hearing of the suit.

8. The Defendants' counsel submitted that the Plaintiff has failed to avail any evidence to prove his claim and that there is no report by the Surveyor to prove the allegation of encroachment.

9. Counsel submitted that bearing in mind that the two properties are located in different locations as per the Part Development Plan, the Plaintiff's Application should be dismissed with costs.

10. The Plaintiff's case is that he was allocated parcel of land known as Plot No. F Sultan Hamud.

11. The Plaintiff has annexed on his Affidavit a letter of allotment dated 14<sup>th</sup> December, 1995 together with a Part Development Plan. The annexed copy of the Part Development Plan shows the location of a plot marked "F".

12. In the Beacon Certificate annexed on the Plaintiff's Affidavit, a Surveyor by the name of Jackson Mutinda has stated that there is an encroachment on Plot No. "F". According to the said Surveyor, there is an ongoing construction on the said land.

13. On the other hand, the 1<sup>st</sup> Defendant's claim is that he purchased a piece of land which is different from what the Plaintiff is claiming.

14. The 1<sup>st</sup> Defendant annexed on his Affidavit a letter of allotment that was issued to the person who sold to him the land dated 30<sup>th</sup> November, 1998 together with an approved Part Development Plan.

15. Considering that the two letters of allotment are supported by two different Part Development Plans, and in the absence of a comprehensive report from either the Physical Planner or Surveyor, this court is unable to determine at this stage the location of either plots on the ground.

16. Considering that the Plaintiff's complaint is that the Defendants have encroached on the land he claims to be his, an order of injunction restraining both parties from developing the suit land should issue until after the court has heard the matter.

17. I say so because without the evidence of the Physical Planner and the Surveyor, the court cannot make an informed decision as to who has a *prima facie* case with chances of success.

18. For those reasons, I allow the Application dated 2<sup>nd</sup> July, 2015 in the following terms:

***a. An order of status quo prevailing now to be maintained, meaning that neither the Plaintiff nor the Defendants should alienate, transfer, develop or deal with the plot known as Plot No. F Sultan Hamud and/or Plot A Sultan Hamud pending the hearing and determination of the suit.***

***b. Each party to bear his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JUNE, 2017.**

**O.A. ANGOTE**

**JUDGE**