



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 265 OF 2013

SPARKLE PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

1. JOHANA NGAI
2. FATUMA MWAMBURI
3. SULEIMAN KIBIO MWANYAMBO
4. HAMISI KALELA
5. ALOIS MWAMBI
6. ASHA MWAKE
7. FATUMA KODI
8. BATA SHOE CO. LIMITED
9. THE ATTORNEY GENERAL (Sued on behalf of the commissioner of
Lands, Registrar Mombasa & National Land
Commission.....DEFENDANTS/RESPONDENTS

RULING

1. The present application is brought under the provisions of Section 1A, 1B & 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. The plaintiff/applicant prays that the Court does grant the following orders:

1. Spent

2. Spent

3. That the Honourable Court be pleased to grant an order for demolition of the building structures erected on the PLOT L.R. NO. 1956/506 VOI TOWNSHIP which evidence is annexed to the Supporting Affidavit herein.

4. That the Honourable Court be pleased to grant such orders or further orders as it may deem fit;

5. That the cost of this application be provided for.

2. The application is premised on the grounds that the plaintiff is the legal owner of the suit plot 1956/506 – Voi Township. That unknown parties have built structures on the suit premises against the orders issued by this Court. Further that if the orders prayed for are not granted, the property will continue to be severely inconvenienced and prejudiced. The application is further supported by the affidavit of Francis Mulili who deposed that this Court had given an order on 6th December 2013 that no party should carry out any constructions until the suit is heard and determined. But unknown persons who are neither the plaintiffs nor the defendants have built structures on the suit property as shown by the photographs he annexed. This necessitated the plaintiff to move the Court vide the present application.

3. The application is opposed by the 1st – 7th defendants. Mr Kimbo Mwanyambo the 3rd defendant swore a replying affidavit on his behalf and on behalf of the 1st, 2nd and 4 – 7th defendants. He denied that the plaintiff is the owner of the suit property. He also denied the photographs of the structures annexed are on the suit property as the same is not dated nor was a map showing the boundary of the plot annexed; hence the photographs cannot discharge proof required to establish ownership.

4. The 3rd defendant deposed further that no certificate of competency of the person who took the photographs has also not been annexed. The 3rd defendant stated that the orders should not be granted unless the 3rd parties who the order will affect are enjoined to this suit to afford them an opportunity to be heard in the interests of justice. Lastly that the hearing of the main suit will address all the issues and the same should proceed.

5. The Court record does show that on 6.12.2013, the following proceedings took place. Kadima for the 7th defendant/Respondent Abuodha for plaintiff/applicant

Kadima: We are agreeable that this case do proceed for hearing on 26.2.2014. Parties comply fully with the pre-trial procedures. The application dated 2.11.13 is hereby withdrawn and the motion dated 4.12.2013 allowed as prayed. Leave to serve the 2nd defendant & Attorney General granted. ***“There shall be no construction by any party in this suit on the suit premises till the suit is heard and determined”***

Signed by advocates

Court: Consent above quoted and signed by the counsels for the parties is adopted as an order of the Court.

6. In the Application dated 4.12.2013 by the defendants, they sought orders for:

b) The Court grant leave to the defendants in the suit & plaintiff in the counter – claim to be representatives of the community and residents of the disputed land in this suit.

c) Leave be granted to the 1st & 3rd plaintiffs to execute documents on behalf of the community.

d) Costs be in the cause.

7. Therefore by the application of 4th December 2013, the 1st – 7th defendants are authorised representatives of the residents of the community and persons living on the suit land. The deposition by the 3rd defendant that the orders herein should not be granted unless those 3rd parties are joined in these proceedings show an act of bad faith having undertaken to act on their behalf. Secondly, they entered a

consent which was signed by their advocates on record that none of the parties should carry out any constructions on the suit property until this suit is determined. Whether or not they dispute the ownership of the suit property as claimed by the plaintiff, the defendants have an obligation to ensure the order of 6th December 2013 is respected.

8. The photographs annexed by the plaintiff shows two houses under construction with timber for roofs being put up and one with very new iron sheets put up. The houses are incomplete as the windows and doors have not been fixed as gleaned from the said photographs. Both parties know the boundaries of the land they are claiming. The issue in dispute is not a boundary dispute but a claim of ownership of land. Therefore if an activity is ongoing on a land which you know you are claiming you do not need a map to show boundaries to demonstrate the existence of such activities in an interim application. I therefore find the 1st, 2nd & 4 – 7th defendants opposition to the grant of the orders as mere denials since they have not disputed that some people are putting up buildings on the land.

9. As propely pointed by the plaintiff in his submissions while the quoting Ibrahim J (as he then was) in the case of **Muslims Human Rights (MUHURI) & 2 others vs A.G & 2 others in HCC Petition No 7 of 2011** that, ***“a conservatory order would enable the Court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the petition and the trial was not a futile academic exercise or discourse.”*** The purpose of the consent order herein was meant to preserve the suit property and both sides should ensure no construction takes place as was agreed. The order to preserve the suit property is an order in rem not in persona thus does not require the said 3rd parties to be joined to comply.

10. Therefore, for the suit property to be preserved, no constructions should be undertaken on the land as was agreed on 6th December 2013. Any constructions done after this date (of 6.12.2013) are in contempt of this Court yet this Court has powers to guard against abuse of its orders which if left unchecked may result into a breach of the rule of law. The plaintiff did well to bring this up instead of taking the law into its hands. I am satisfied that there is merit in the application. I shall not grant the order of demolition as prayed in No 3 of the motion. Instead I issue the following orders under prayer 4 of the motion:

- i) I reiterate the order issued on 6th December 2013 that no one should carry on constructions on the suit land till this case is heard & determined or those orders set aside as the case may be.**
- ii) Any constructions of whatever nature that are on-going on the suit property must cease forthwith.**
- iii) No one is allowed to take occupation of these houses that were under construction (The houses shown in applicant’s affidavit until this suit is heard & determined.**
- iv) The OCPD and OCS Voi Police Station to assist in supervising to ensure that the Order is obeyed for purposes of maintaining peace, law & order in the suit premises.**

10. Since the application succeeds, the costs are awarded to the plaintiffs to be paid by 1st, 2nd, 4th – 7th defendants. The costs are in the cause.

Dated, signed & delivered at Mombasa this 31st day of July 2017

A. OMOLLO

JUDGE