



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO 250 OF 2016**

**HAMISI RAMADHAN CHIBENDO. ....PLAINTIFF/APPLICANT**

**VERSUS**

**1. HAMISI MWAWIMO**

**2. MOHAMED S. MWARAZIKI**

**3. SWALEH SAID.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By Notice of Motion Application dated 7<sup>th</sup> September 2016 the Plaintiff/applicant is seeking the following orders:

**1. Spent**

**2. Spent**

**3. That this Honourable Court be pleased to issue orders of injunction restraining the Respondents by themselves, their servants and/or agents jointly and severally from interfering, trespassing, cultivating, constructing, selling, Sub-dividing and/or in any manner dealing with the Applicant's plot Number Kwale/Ukunda/5194 and Kwale/Ukunda/5195 pending hearing and determination of this suit.**

**4. That the Honourable Court be pleased to order the Kwale District Surveyor and the Land Registrar Kwale to conduct a survey on the Applicant's Plot Numbers Kwale/Ukunda/5194 and Kwale/Ukunda/5195 to determine the boundaries thereof.**

**5. That should any of the Respondents, their servants and/or agents found to have trespassed on the Applicant's plots an order for eviction do issue.**

**6. That the OCS Diani Police Station to ensure compliance with the order herein.**

**7. That any other order the Court may deem fit in the circumstances.**

**8. That costs of this Application be provided for.**

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of the Plaintiff sworn on 7<sup>th</sup> September 2016. In his said Affidavit the Plaintiff has deponed that he is legal

and registered owner of **Plots Kwale/Ukunda/5194 and Kwale/Ukunda/5195**. He further deposes that the 1<sup>st</sup> Respondent has encroached on his **Plot No. Kwale/Ukunda/5194** and built a structure thereon while the 3<sup>rd</sup> Respondent has by himself and/or his agent encroached on **Plot No. Kwale/Ukunda/5195** and has also built a structure thereon without any colour of right and/or authority. The Plaintiff avers that since he purchased the suit plots, the Respondents have jointly and severally refused and/or declined to allow him conduct a survey to determine their boundaries and have declined and/or frustrated the Plaintiff's efforts to have peaceful possession of the plots. The Plaintiff deposes that the Respondents actions are prejudicial to him as he has not been able to enjoy peaceful possession of his plots. It is the Plaintiff's contention that it is in the interest of justice that an injunction order to issue to restrain further acts of trespass and/or any other illegal dealings by the Respondents and further that a survey be conducted to determine the boundaries, and should any of the Respondents their servants and/or agents be found to have trespassed and/or encroached on the suit plots, they be ordered to vacate therefrom. The Plaintiff has attached copies of Title Deed for Title **Number Kwale/Ukunda/5194 and Kwale/Ukunda/5119**.

3. The Application is opposed by the Defendants who filed a Replying Affidavit dated 7<sup>th</sup> November 2016 sworn by Hamisi Salim Mwawimo the 1<sup>st</sup> Defendant. It was deposed on behalf of the Defendants that the Defendants are the registered proprietors of all that parcel of land Known as title **Number Kwale/Ukunda/4889** jointly with their relatives not named in this suit and whereon they have built their respective homes and where they have resided and cultivated from time immemorial. The Defendants have given a history of several sub-divisions that gave rise to title **Number Kwale/Ukunda/4889** and have also attached a survey map sheet showing the location of their land and the Plaintiff's plots. According to the Defendants, their land does not share a boundary with the Plaintiff's plots and aver that the same are separated by several other parcels of land which do not belong to any of them. It is further deposed that the Defendants do not have any boundary dispute with their immediate neighbouring parcels of land as to warrant the need of a survey. The Defendants further aver that the Plaintiff has not been stopped from surveying or from occupying his parcels and deny having built structures or interfered with the Plaintiff's parcels of land. The Defendants have denied encroaching, interfering and/or trespassing on the suit premises in any way.

4. Both parties filed Written Submissions which I have read and I need not reproduce their contents herein in full. The Plaintiff has submitted that he has satisfied the first principles for granting of injunction that there is a *prima facie* case with a probability of success as he has proved that he is the registered owner of the suit properties while the Defendants claim interest in title number **Kwale/Ukunda/4889** which he agrees is a different plot. The Plaintiff has also submitted that he has suffered irreparable loss and damage as since the purchase of the suit properties he has not been able to enjoy peaceful occupation of the same and the loss cannot be quantified and cannot be compensated by award of damages. It is also the Plaintiff's submission that the balance of convenience tilts in his favour as the orders sought will not only preserve the properties but if granted will have the effect of substantially if not wholly resolve the issues before Court. The Plaintiff relied on the case of **Joseph Ndungu – v – Ruth Anyango (2016) eKLR** to support his submission for an order for survey.

5. On their part, the Defendants have submitted that the Plaintiff has failed to establish any of the principles set out in the **Giella –V- Cassman Brown Case**. The Defendants have cited the failure by the Plaintiff to establish the link or nexus between his plot and theirs and failure to annex a copy of the plot number **Kwale/Ukunda/5194**, instead he annexed one for 5119. The Defendants have submitted that their evidence that they do not share a physical boundary with the Plaintiff has not been rebutted. They also submitted that the relief seeking an order against the Kwale District Surveyor and the Land Registrar who are not parties to this suit are in vain.

6. I have carefully considered the Application herein. The Plaintiff has exhibited documentary evidence showing that he is the registered owner of title **Numbers Kwale/Ukunda/5194 and Kwale/Ukunda/5195**. The Defendants have equally demonstrated that they are the registered owners of title **Number Kwale/Ukunda/4889**. The Defendants have stated that these plots do not share a physical boundary and have deposed and displayed a survey map sheet showing that the Plaintiff's parcels of land and that of the Defendants are far apart. This evidence has not been rebutted or challenged by the

Plaintiff. The Defendants have also demonstrated that they are in occupation of their own parcel and are not trespassers on the Plaintiff's plots as claimed by the Plaintiff. The Plaintiff has sought for an injunction to restrain the Defendants as well as an order directing the Kwale District Surveyor and the Land Registrar, Kwale to conduct a survey on his plot **Numbers Kwale/Ukunda/5194 and Kwale/Ukunda/5195**. I am in agreement with the submissions of the Defendants that this prayer does not mention their plot at all. Further, the said District Surveyor and the Land Registrar are not parties to this suit. They may however be called as witnesses at the trial. The applicant has failed to satisfy this Court why they should be ordered at this preliminary stage to carry out a survey. The Court can however make an order if the parties agree. I hasten to add that the case of **Joseph Ndugu – v – Ruth Anyango (2016) eKLR** cited by the Plaintiff is distinguishable as it related to a matter that had been heard and concluded, and there was no order for survey requested for hence not relevant in the present case. From the plaint, it is clear that the Plaintiff herein is seeking an order for a survey to be conducted. In my view that can be done either by consent or during trial.

7. I am not satisfied on the material before me that the Plaintiff has established a *prima facie* case against the Defendants with a probability of success. The Plaintiff has also failed to show what irreparable damage he would suffer if the orders are not granted. As for the balance of convenience, I take the view that the same tilts in favour of the Respondents who have demonstrated that they are in occupation of their own parcel of land and have been in occupation for several years.

8. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 7<sup>th</sup> September 2016 lacks merit and the same is hereby dismissed with costs to the Respondents.

**Ruling delivered, dated and signed at Mombasa this 20<sup>th</sup> day of September 2017**

C. YANO

JUDGE