



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 6 OF 2017

JOHN MUTHOKA MUTUA AND OTHERS.....PLAINTIFF

=VERSUS=

JOYCE W. KOMBE.....1ST DEFENDANT

HARRISON KATANA KATOI.....2ND DEFENDANT

CHIMWENGA KATANA.....3RD DEFENDANT

MTAWALI CHARO KATANA.....4TH DEFENDANT

AND

THE ATTORNEY GENERAL.....INTENDED DEFENDANT/APPLICANT

RULING

1. On 12th January 2017, the Plaintiff John Muthoka Mutua filed this suit against the four Defendants accusing them of illegally trespassing and/or encroaching upon his parcel of land known as Kilifi/Kadzonzo/Madzimbani/115 situated at Mariakani in Kilifi County. He has accordingly asked this Court to issue a mandatory injunction to compel the defendants to vacate the suit property and order for demolition of the houses illegally constructed thereon by the defendants.

2. Upon the defendants being served with Summons to Enter Appearance and an application seeking for the grant of a temporary injunction herein, the Honourable the Attorney General filed the application presently before me dated 3rd February 2017 under a certificate seeking orders as follows:-

(i) That this application be certified urgent and heard ex-parte in the first instance.

(ii) That pending the hearing and determination of this application, this Honourable Court allows the Attorney General to participate at the hearing as a party to the suit on 6/2/2017 and be enjoined as a Defendant in this matter.

(iii) That the Plaintiff's suit is misplaced as against the Defendants as the suit property referenced is not the one under construction for the Chief's Office which lies on Kilifi/Kadzonzo/Madzimbani/119 and not Kilifi/Kadzonzo/Madzimbani/115 and as such the same be struck out.

(iv) That the Plaintiff's suit and claim against Joyce Konde and Harrison Katana Katoi named as the 1st and 2nd Defendants be struck out with costs and they be removed from the proceedings.

(v) That the Plaintiff's suit be struck out with costs for non-compliance with the rules and the law; and

(vi) That the costs of this application be borne by the Plaintiff.

3. The Application is supported by an Affidavit sworn by the 1st Defendant on 3rd February 2017 and a further one sworn on 10th March 2017. The application is premised on the Grounds inter alia:-

(a) That the construction complained about is being carried on in parcel Number Kilifi/Kadzonzo/Madzimbani/119 and not 115 as alleged by the Plaintiff;

(b) That the 1st and 2nd Defendants are the Area Chief and Assistant Chief and therefore public officers appointed under the National Government Coordination Act, 2013;

(c) That the Plaintiff's application and/or suit should be struck out for non-compliance with the rules and the law since the orders of injunction cannot be issued against the Defendants and the Attorney General.

(d) That the project complained of is the construction of the Chief's Office and the 1st and 2nd Defendants are involved therein in their official capacities as the Chief and Assistant Chief Mariakani respectively; and

(e) That the 1st and 2nd Defendants are protected from personal liability for acts done in the course of duty or in their official capacity by virtue of Section 22 of the National Government Coordination Act, 2013.

4. The Plaintiff is opposed to the Attorney General's application. In a Replying Affidavit sworn on 17th February 2017, the Plaintiff avers that the provisions of Section 22 of the National Government Coordination Act 2013 do not apply in these proceedings hence the application by the Attorney General is misplaced and ought to be dismissed with costs.

5. The Plaintiff re-affirms that the Defendants are constructing illegal structures on his Plot No. 115 and not 119 as alleged. It is further his case that the Attorney General should not be granted audience as:-

(i) The Defendants have been sued in their personal capacity and the Government Proceedings Act and the National Government Coordination Act do not apply;

(ii) No evidence has been shown that the Government owns Plot No 115;

(iii) The Defendants have ignored and disobeyed valid orders of injunction granted by the Court and are proceeding with construction; and

(iv) All the Defendant were served with the temporary orders issued by the Court on 18th January 2017 yet the Defendants continue to disobeying the same.

6. The Plaintiff affirms that he has no claim whatsoever over Plot No. 119 and his only claim is over Plot No. 115 upon which he states the Defendants have trespassed.

7. I have considered the application and the Affidavit in Reply. I have also considered the submissions placed before me by the Parties.

8. The Office of the Attorney General is established under Article 156 of the Constitution with inter alia

the following functions:-

(1).....

(2).....

(3).....

(4) *The Attorney General:-*

a) Is the Principal Legal Adviser to the Government.

b) Shall represent the National Government in Court or in any other legal proceedings to which the National Government is a party, other than Criminal Proceedings; and

c) Shall perform any other functions conferred on the Office by an Act of Parliament or by the President”.

9. Pursuant to its functions as provided under Article 156(4) (c) of the Constitution, Parliament enacted the Office of the Attorney General Act, 2012. Section 5(1) of the said Act provides the functions of that office as follows:-

(a)....

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(h)....

(i) Representing the National Government in all Civil and Constitutional matters in accordance with the Government Proceedings Act;

(j) Representing the Government in matters before Foreign Courts and tribunals; and

(k) Performing any functions as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney General.

10. Black’s Law Dictionary 8th Edition defines the term “Government” to mean

“1) The structure of principles and rules determining how a state

Or organisation is regulated.

(2) The Sovereign Power in a Nation or State.

(3) An Organisation through which a body of people exercises political

authority, the machinery by which sovereign power is expressed.

11. Article 1(3) (b) of the Constitution provides that Sovereign Power under the Constitution is delegated to among others, the national executive and the executive structures in the County Governments. The National Government and Coordination Act, 2013 is in my view one of the machineries through which the National Government expresses sovereign power. Section 15 thereof provides as follows:-

“15(1) In accordance with the National Government functions under the Constitution, this Act or any other written law, the Public Service Commission shall, in consultation with the Cabinet Secretary, recruit and appoint National Government Administrative Officers to coordinate National Government functions and to perform such other functions as may be assigned to them under this Act or any other written law.

(2) Pursuant to sub section (1), the Public Service Commission shall appoint:-

(a) A County Government in respect of every County.

(b) A Deputy County Commissioner in respect of every Sub-County.

(c) An Assistant County Commissioner in respect of every ward.

(d) A Chief in respect of every location.

(e) An Assistant Chief in respect of every Sub-Location; and

(f) Any other National Government Administrative Officer.

12. In regard to liability for their actions in the course of their duties, Section 22 of the National Government and Coordination Act, 2013 provides as follows:-

“22. Protection from Personal Liability.

Nothing done by a Public Officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand”

13. In the application before me, it is the Plaintiff/Respondent’s case that both the Government Proceedings Act and the National Government Coordination Act 2013 only apply in instances where Government officials are sued in relation to acts arising out of their conduct of official functions associated with their respective offices.

14. In support of his case the Plaintiff has presented before this Court a Survey report which indicates that the area of land in dispute, is part of all that parcel of land known as Kilifi/Kadzonzo/Madzimbani/115 and not 119 which the Defendants claim to be theirs.

15. It is however noteworthy that the Defendants have similarly annexed in their further Replying Affidavit a Report by the District Surveyor, Kilifi which shows that the area in which the construction is going on is on Plot No. 119 and not 115 as alleged by the Plaintiff.

16. Arising from the foregoing, and in the absence of a report by an independent surveyor, it is difficult to know on the basis of the material presented before this Court, which party is stating the correct position.

17. What is however clear is the fact that the 1st and 2nd Defendants believe that the disputed portion of land is on Plot No 119. According to them, that plot of land has been set aside by the Government for the construction of a Chief's office. They have attached minutes in their Replying Affidavit showing that a meeting was held on 25/10/2016 which formed a Committee to spearhead the building of the office. The 2nd Defendant is a member of the Committee.

18. Whatever the case, nothing has been placed before me to show the personal interest of the 1st and 2nd Defendant in the disputed parcel of land to warrant their being sued in their personal capacity. It is clear to me that in participating in the construction, they were merely discharging their duties in good faith and in furtherance of the objectives of the National Government in the honest belief that the land in dispute is the right parcel that belongs to the Government.

19. Arising from the foregoing, the 1st and 2nd Defendants have been wrongly suited herein as even if it were to be found that the boundaries of the two plots encroach upon one another, the correct party to be sued would be the Attorney General on behalf of the Government and not the two individuals.

20. Accordingly, I allow the application dated 3rd February 2017 in terms of Prayer No. 4 thereof. The result is that the Plaintiff's suit is struck out in so far as it relates to the 1st and 2nd Defendants.

21. The Plaintiff shall also bear the costs of this application.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE