



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 6 OF 2016

CHEBUSWA LIMITEDAPPLICANT

VERSUS

MONICAH AKULO OUMA1ST RESPONDENT

PAOLO TARSIA INCURIA2ND RESPONDENT

RULING

1. What is before me is the Plaintiff's Application dated 12th January, 2016 in which the Plaintiff is seeking for the following orders:

a. That a temporary injunction be issued restraining the Respondents by themselves or through their servants or agents from interfering with the Applicant's access to its property plot 1356 through the Access Plot known as 10885 pending the hearing and determination of this suit.

b. That a temporary mandatory injunction be issued directing the Respondents by themselves or through their servants or agents to remove the stones and barricade placed by the Respondents on the Applicant's gate and or access to its property on Plot 1356 pending the hearing and determination of this suit.

c. That the costs of this Application be borne by the Respondents.

2. The Application is supported by the Affidavit of the Applicant who has deponed that he is the registered proprietor of Plot No. 1356; that when sub-division was done in the year 1957, the scheme was approved subject to a surrender of a plot to be used as a public utility plot (*the access plot*) and that for the past thirty (30) years, he has had access to his property through the "*access plot*."

3. According to the Applicant, in July, 2015, he received a letter from the Respondents' advocates alleging that the "*access plot*" was owned by the Respondents and that when he tried to use the "*access plot*" to access his land, he was stopped by people who had been hired by the Respondents.

4. In response, the 2nd Respondent deponed that on 1st July, 2015, the 1st Respondent purchased plot number 10885 Malindi from Mart Properties Limited; that the 1st Respondent carried out a search prior to purchasing the said land that the 1st Respondent is in possession of a valid title for the said land.

5. The 2nd Respondent finally deponed that the Applicant has access to his plot and that the Application should be dismissed.

6. In her submissions, the Applicant's advocate submitted that the court should order that access through Plot No. 10885 remains undisturbed pending the hearing and determination of the suit; that the order should be granted in view of the long period the right of way has been enjoyed by the Applicant and that the Applicant has established a right which should be protected pending the hearing of the suit.

7. The Respondents' counsel submitted that the 1st Respondent purchased plot number 10885 on 1st July, 2015; that the said land is private land and that her title is indefeasible.

8. The Applicant's case, as I understand it, is that before the 1st Respondent's Plot No. 10885 Malindi was surveyed, the same was a public access road.

9. According to the Applicant's deposition, the said public utility was surrendered by the original owner of the land when the sub-division scheme of the area was done in the year 1957.

10. It is the Applicant's case that since he purchased his land being portion number 1356 Malindi on 27th September, 1988, he has always used the surrendered public utility plot to access his plot. He was therefore surprised when in July, 2015, he was informed that the land actually belongs to the 1st Respondent, and that he could not use it to access his plot.

11. The Applicant annexed on his Affidavit a conveyance to show that he purchased portion number 1356 Malindi on 27th September, 1988. The Applicant also exhibited the sub-division scheme dated 27th December, 1957 which shows the existence of portion number 1356, which has what appears to be an access road to the ocean and between his plot and Plot No. 1357.

12. The Respondents have produced in evidence the survey plan that was done on 11th April, 2002 and which gave rise to portion number 10885 that the 1st Respondent purchased in the year 2015.

13. Considering that the Plaintiff's claim is that what is now known as portion number 10885 was a public utility, which he has always used to access his plot, it will be upon the 1st Respondent to disabuse that allegation at the hearing.

14. I say so because if indeed portion number 10885 was surrendered for public utility in the year 1957, the burden of proving that the said land was lawfully allocated Mart Properties Limited on 14th May, 2002 will be on the Respondents.

15. In the meantime, and considering that the Plaintiff has been using the said land since 1988 to access his land, he should continue using the said land for that purpose until the hearing and determination of the suit.

16. For those reasons, I allow the Notice of Motion dated 12th January, 2016 as prayed.

DATED AND SIGNED AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 15TH DAY OF NOVEMBER, 2017.

J.O. OLOLA

JUDGE