



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.3 OF 2015

AZZURI LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

PINK PROPERTIES LIMITED.....DEFENDANT/RESPONDENTS

R U L I N G

1. What is before me is the Application by the Plaintiff dated 23rd June, 2015 in which it is seeking for the following orders:-

(a) THAT this Honourable court be pleased to strike out the Defendant's Defence and counterclaim dated 12th January 2015.

(b) That the Honourable Court be further pleased to enter Judgment for the Plaintiff against the Defendant as prayed in the Plaint.

(c) That the costs of this Application be provided for.

2. The Application is premised on the grounds that the Defence and Counter-claim is vexatious and aimed at prejudicing, embarrassing and delaying the fair trial of the suit; that it is clear from the surveyor's report that plot number Chembe/Kibabamshe/272 has encroached on Chembe/Kibabamshe/365 and that the Defence has not challenged the surveyor's report.

3. The Defendant has opposed the Application by filing Grounds of Opposition and a Replying Affidavit.

4. It is the Defendant's case that the Application has ignored the basic principles of natural justice and that the Defence raises triable issues.

5. I have considered the written submissions by both the Plaintiff's and the Defendant's advocate.

6. The Plaintiff has annexed on its Affidavit the Registered Index Map (RIM) in respect of the plots within that area together with the sub-division plan of plot number 356. The Plaintiff has also annexed the District Surveyor's report.

7. The report of the District Surveyor shows the Defendant's wall has encroached into the Plaintiff's plot covering an area of 0.224 Ha (approximately ½ an acre).

8. The District Surveyor's report has not been challenged by way of cross examination. The fact that the surveyor has stated that the Defendant's parcel of land has encroached on a public road and the Plaintiff's parcel of land is not conclusive until that evidence is tested at trial.

9. In deed, the Defendant has filed an Application dated 21st August, 2015 requesting that a joint survey in respect to the two parcels of land be carried out to ascertain whether indeed the two plots overlap each other. That, in my view, is a request that this court should consider before concluding whether indeed the Defendant's Defence is a sham or not, after the surveyors evidence have been tested.

10. For those reasons, I find and hold that the Plaintiff's Application dated 23rd June 2015 is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **26th** day of **February**, 2016.

O. A. Angote

Judge