



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 73 OF 2015
MWANAISHA MASUDI NTUMU.....PLAINTIFF
-VERSUS-
KASSIM PIUS
ASHA ALI KUUZA
KWALE LAND REGISTRAR.....DEFENDANTS

RULING

1. There are two applications for determination. The first one dated 16th April 2015 was filed by the plaintiff which application is brought under section 3 A of Civil Procedure Act and Order 40 of the Rules. It sought for an order;

“That pending the hearing and determination of the entire suit, the status quo be maintained by an order injuncting the 1st defendant either by himself or his agents from constructing a house on a portion of land which he claims to be Kwale/Diani/2342 while it is Kwale/Diani/2911”.

2. The second application is dated 6th July 2015 brought by the 1ST defendant. It is premised under Order 40 rule 7, Order 51 rule 1 of the Civil Procedure Rules and section 1 A, 1 B and 3 A of the Civil Procedure Act. It is seeking that the injunctive orders given on 23rd April 2015 be discharged.

3. The applications were argued by way of filing written submissions. As rightly submitted by the plaintiff that if his application succeeds then the 1st defendant’s application will automatically be dispensed with. Therefore I will consider the plaintiff’s application first.

4. The plaintiff’s application shall hereinafter be referred to as the application. The applicant deposed that the original land allotted to her father was Kwale/Diani/442 measuring 1.7 ha. The applicant deposes selling two portions which resulted into subdivision to the current title Kwale/Diani/2911. The applicant accuses the survey office of complicating the dispute. She goes further to state that out of nowhere the 1st defendant commenced constructing a house on her land.

5. The applicant deposed that the 1st defendant’s title No 2342 is a subdivision of plot No 1337 belonging to Asha Ali Kuuza which is far from the applicant’s plot and is separated by another plot. The plot separating the two was not identified. The applicant deposes further on the process of acquisition of plot No 462 which is not a part of the matter in dispute. The applicant avers that all efforts to have the survey

exercise done has been thwarted by the Land Registrar Kwale and she urged the Court to exercise its mandate to investigate from the Land Registrar why the surveyors have been unable to identify land title No Kwale/Diani/466 (again not the subject in dispute)

6. The applicant annexed to her affidavit her title deed showing the land measures 1.03 ha, letter of offer dated 7.2.1978 addressed to Masudi Jumaa, correspondences regarding processing of title of the suit plot; certificate of official search, a map and correspondence from the Lands Office regarding boundary identification between plot Nos 2910, 2911 and 468. The applicant did not however annex the result of the survey exercise if any was carried out.

7. The application is opposed by the 1st Defendant vide his replying affidavit. He deposed that he acquired his plot through purchase. He deposes that the plots mentioned by the applicant are physically very far from his plot hence their location cannot in any way create a confusion. He denied encroaching on the applicant's land and expressed his willingness to participate in any survey exercise as long as it is purposeful, independent and straight forward.

8. From the pleadings and documents annexed thereto, it is clear that the plaintiff is laying claim to plot No Kwale/Diani/2911 while the 1st Defendant's plot is Kwale/Diani/2342. The matter in issue is whether the 1st defendant's plot is distinct of the applicant's plot or it is part of it. According to the 1st defendant's title annexed, his plot measures 0.3 ha. The applicant deposes that 2342 comprises part of his plot. The survey report mentioned by both parties refer to identification of boundaries between plots Nos 468 and 2911. As I said earlier, the owner of plot No 468 has not been joined in this suit.

9. According to this survey report annexed by the 1st defendant, it made a finding that there was no encroachment on the two plots under survey (Nos 468 and 2911) but the Surveyor noted that the applicant was claiming ground positions of other plots 2342 included. The plaintiff's own documents and pleadings at this stage does not support her claim that the 1st defendant is building on her plot.

10. Further to paragraph 9 above, the applicant has admitted that the 1st defendant was sold land by the 2nd defendant. The applicant pleaded that between her land and that of the 2nd defendant, there is distinct plot separating them. The applicant did not annex any report even from a private Surveyor if he had no faith in the government Surveyor. Since the applicant failed to explain whether the 1st defendant skipped this plot separating the two parcels in dispute, I am unable to find that the applicant has laid a prima facie case with a probability of success.

11. Lastly both parties are holding certificate of titles for separate parcels of land. If the prayers sought are granted, the Court is tantamount to questioning the authenticity of the title of 1st defendant which matter has not been raised by the applicant. Each title holder is entitled to enjoy rights and privileges assigned by law by virtue of registration.

12. In conclusion, I am not convinced that the applicant has met any of the principles for granting injunctions. Her application fails and is hereby dismissed with costs to the 1st defendant. The consequence of the dismissal is that the 1st defendant's application dated 6.7.2016 is successful. Each party to bear his costs.

Ruling dated and delivered this 8th day of September 2016

A. OMOLLO

JUDGE