



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 120 OF 2013

SAMUEL NGUGI CHEGE & OTHERS.....PLAINTIFFS

-VERSUS-

ALI SAID MOHAMED & ANOTHER.....DEFENDANTS

RULING

1. The plaintiffs/applicants moved this Court vide their notice of motion dated 22.10.15 and premised under the provisions of section 1 A, 1 B and 3 A of the Civil Procedure Act. In the motion, the applicants sought the following prayers ;

1. Spent

2. That the subdivisions done by the defendant from plot Nos MN/11/11465 to MN/11/11552 originally known as plot No 82/11/MN unilaterally be redone with the input and presence of the plaintiffs.

3. That the Mombasa lands District Officer be ordered to do valuation of each parcel of Land at its value when the particular plaintiff entered and built on their particular parcel of Land.

4. That the costs of this application be provided for.

2. The application is supported by the grounds listed on its face and the affidavit deposed by the applicants' representatives. The applicants aver that they had approval of the landlord before they erected their structures. They complain that the defendants unilaterally and without consultation commissioned a Surveyor to subdivide the main property originally plot No 82/11/MN. The result of the subdivision is that some of the applicants' plots have been cut into two while some houses have been eaten by access roads.

3. The applicants also complain that the valuation being carried out by the Mombasa District Lands Officer is on basis of the sub-division and it cannot ascertain the proper value of any parcel of land which has been wrongly subdivided. It is the applicants' view that it is wrong to make them buy the land at current market value yet they have been on the land for over 20 years. They contend that the value of this land appreciated because of the structures they built and installation of water and electricity. They prayed for the orders to be granted to help prevent them suffering irreparable loss.

4. The application is opposed by the defendants. In his replying affidavit, Ali Said Mohamed deposed that the applicants constructed illegal structures on their land without authority. That at the time of filing

the suit, the plaintiffs were aware of the subdivisions as they had been supplied with the relevant deed plans. He also deposed there is a consent on record allowing the valuation of the plots as per the subdivisions. The Respondents depose that subdivision of Land in Mombasa is a technical fundron undertaken by the relevant agencies of both County and National government and cannot be subjected to the whims and wishes of the plaintiffs. He urged the application to be disallowed as it has no basis in law.

5. Parties filed written submissions which I have read and considered. The Respondents have stated that the applicants were aware of the subdivisions even before they filed this suit. In the supporting affidavit, the applicants have not stated when the subdivisions they are unhappy with was undertaken. The applicants have not justified why they needed to be consulted before the survey exercise was undertaken when they admit they do not own the land.

6. Secondly if the exercise was done before the commencement of this suit then the applicants ought to make it a substantive prayer in their pleading in which it should ask the Court to declare the exercise illegal or unfair. By making the prayer via an interlocutory application to undo what is already done is tantamount to trial through the backdoor. Further the applicants did not disclose to Court how many plots affected them so that the Court would weigh the costs implication of re-doing the exercise.

7. In the plaint filed in Court, prayer (a) reads thus ;

“A permanent injunction against the defendants, their agents or agents or any person whatsoever acting under their instructions be restrained from evicting or howsoever interfering with the plaintiffs ‘quiet possession of all the properties known as plot No 11466/11/MN to plot No 11552/11/MN (hereinafter the suit property) or from dealing with the suit property in any manner contrary to the plaintiffs’ right”.

Looking at this prayer visa a – vi the orders sought in the present application. If the plaintiffs’ suit succeeds then the submissions undertaken by the defendants would be of no consequence. In effect the prayers contained in the motion is at variance with the main suit and therefore are unavailable to the applicants as they have no foundation to stand on.

8. The Respondent also stated that there is a consent order dated 10.3.2014 which allowed the valuation exercise to be undertaken. I have perused the record and found therein a consent letter dated 10.3.2014 which was adopted as an order of the Court and a Court Order issued on 25.6.2014. No (a) ordered the government valuer to carry out a valuation in respect to plot Nos 11465/11/MN – 11555/11/MN all inclusive. This order did not specify the valuation was to be done for what period of time.

9. As stated correctly by the Respondents, if the applicants wish to vary this consent for the valuation to cover the value of the plots before occupation by the plaintiffs then they need to follow the proper procedure for setting aside a consent order. Prayer No 3 of the motion as presented is resjudicata as the issue of valuation has been resolved by a consent.

10. In conclusion, I find the motion dated 22nd October 2015 as lacking merit, and abuse of the Court process. The same is dismissed with costs to the defendants.

Ruling dated and delivered at Mombasa this 7th day of September 2016

A. OMOLLO

JUDGE