



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 332 OF 2015**

**PAUL CAROLUS OFWONA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MARGARET MUTHONI.....DEFENDANT**

**RULING**

1. The Plaintiff/Applicant moved the Court vide his application dated 11<sup>th</sup> December 2015 brought under the provisions of order 40 rule 1 & 2 of the Rules and Section 1A, B & 3A of the Civil Procedure Act. In it, the applicant sought the following ;

**a) Spent**

**b) Spent**

**c) The Honourable Court do issue an order of injunction restraining the Defendant/Respondent by herself, her agents, assignees, employees and/or servants from surveying, sub-dividing, registering any sub-divisions, selling and/or demolishing any structure thereon or in any manner prejudicial to the plaintiff/applicants proprietary rights dealing with Plot No. Mombasa Ziwa La Ngombe Settlement Scheme/1760 pending the hearing of this application interparties.**

**d) Costs of this application be provided for.**

2. In the grounds, the applicant states that he is the registered owner of suit plot Mombasa Ziwa La Ngombe Settlement Scheme/1760. The applicant claims the defendant is attempting to exercise proprietary rights by placing new beacons on a portion of the plot. Lastly that the defendant is threatening to demolish a steel structure erected on the suit plot.

3. The application is further supported by an affidavit deposed to by the applicant. The applicant deposes that the plot is developed with 11 roomed Swahili houses from which he receives rental income. That in April 2007, he allowed Oscar Sagwa to put up a steel structure in front of this house for carrying out welding workshop at a monthly rent of Kshs 3500= per month. He deposed that in October 2015, the defendant who owns a neighbouring plot claimed this portion.

4. It is the plaintiff's contention that this portion has been part of his plot from the time the plot was purchased. The applicant deposed further that since the beacons have been forcefully placed, the defendant will forcefully dispossess of this portion which will then cause him immense loss. He also

feared being sued by the tenant for breach of contract. He urged the Court to grant the orders.

5. The application is vehemently opposed by the defendant vide her replying affidavit deposed on 22<sup>nd</sup> February 2016. The defendant deposed that she purchased the plot No 1759 although she caused the same to be jointly registered in the names of her son & daughter. She deposed that she has been in occupation of this plot for over 10 years carrying on business. She deposed that the boundaries of the two plots are clear from the survey map.

6. The defendant deposed they co-existed peacefully with the applicant until when the applicant allowed the tenant Oscar Sagwa to construct the steel and welding shop in January 2015. It is her contention that this workshop encroached on to her plot and therefore she made complaints to the provincial administration as per copies of the letters annexed show. The defendant deposes that the District Land Adjudication & Settlement Officer visited the place and identified the beacons placed by the Surveyor and in his letter dated 29<sup>th</sup> December 2015 the Adjudication officer advised the plaintiff to remove the structures and restrict development within his boundaries.

7. The defendant avers that it is on the basis of this letter that she served the plaintiff with notice to remove the offending structure. It is her contention that the beacons were placed after a thorough and open survey process and not forcefully as deposed to by the applicant. The defendant deposes that the present application is vexatious and an abuse of the Court process and should be dismissed.

8. Both advocates filed rival submissions. The submissions summarised the facts as contained in the pleadings. They have both submitted on the principles of **Giella vs Cassman Brown**. I will therefore not repeat the summaries herein as the same has been set forth in the earlier paragraphs. Having analysed the pleadings and documents annexed in support and against the application and having considered the submissions, it is clear the two plots Mombasa Ziwa La Ngombe Scheme/1759 & 1760 neighbour each other. The plots are differently owned and the only issue in dispute is a portion occupied by Mr Oscar Sagwa who put up a welding workshop.

9. The applicant pleaded that in April 2007, Hudson Sande requested him to lease the undeveloped portion to his son Oscar Sagwa to put up a welding workshop. The applicant agreed and the said Oscar put up the structure since the year 2007. The defendant on his part says the dispute arose when the structure was put up in January 2015. In the applicant's document annexed as 'PCO 4' which is the lease agreement, it was dated 7<sup>th</sup> October 2014 between Oscar Mugobwa Sagwa & the Applicant. It does not support the averment that the structures were put up in 2007.

10. Secondly Annexure PCO4 is a letter written by the applicant dated 2<sup>nd</sup> August 2007 certifying that Hudson Sande is allowed to carry on business on plot No 1652/II/M. N in Bombululu. This letter was not related to say that plot No 1652/II/M. N in Bombululu is the same as MSA ZIWA LA NGOMBE/1760. On the face of it, the two plots are distinct and therefore this letter does not add any value to the allegation that the workshop has been in place since 2007.

11. The defendant contends that when this structure was being put up in January 2015, she was unhappy and made reports/complaints to the provincial administration. All the correspondences annexed by the defendant are dated 2015. In the document annexed as MM-5 to the replying and signed by A. Mukenyang for District Land Adjudication & Settlement Officer – Mombasa, it states that the ground survey was done in the presence of the two plot owners and village elders. The beacons separating the two plots were placed and the land owners shown their plots. There was a finding that a garage erected by the applicant's tenant had encroached on to plot 1759.

12. Without going in the authenticity or veracity of the documents relied on by the parties at this stage, I am satisfied that the defendant's documents are in tandem with the facts deposed to in the replying affidavit while the applicant's document particularly annexure PCO 4 contradicts his deposition. I am therefore not satisfied that the plaintiff has met the first principle on laying of a prima facie case with a probability of succeeding.

13. Secondly on the irreparable loss, the defendant took up the issue of the structures and registered her complaints with the relevant authorities as soon as the structures were put. The applicant has also annexed a lease showing he is receiving monthly rent of Kshs 3500. The loss if any is therefore quantifiable and should he win, the damages payable will be assessed. This case therefore fails the second test too.

14. Lastly on balance of convenience, the portion is being claimed by both parties. It is my opinion and I so hold that the balance of convenience would be to let the portion remain unused/unoccupied until the suit is determined. It will be unfair in the circumstances to have one party benefit. The occupant/tenant in the disputed portion should therefore look for alternative business premises until this matter is resolved. I would add that sixty days would be sufficient for him to move out. In the result, I find the motion dated 11<sup>th</sup> December 2015 to be without merit and I hereby dismiss it with costs to the defendant.

**Dated and delivered at Mombasa this 9<sup>th</sup> day of November 2016.**

**A. OMOLLO**

**JUDGE**