



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.231 OF 2014

ALI SHARIF MAULANA (*the lawful attorney of*

PAOLA GLORIA).....PLAINTIFF

=VERSUS=

SCAVO PIETRO.....DEFENDANT

IN ELC NO. 236 OF 2014

PIETRO SCAVO.....PLAINTIFF

=VERSUS=

GLORIA PAOLA.....DEFENDANT

R U L I N G

Introduction:

1. The Application before me is the one dated 11th December 2014 filed by the Plaintiff. In the Application, the Plaintiff is seeking for injunctive orders restraining the Defendant from trespassing on his share of portion number 622, Watamu and from breaking the wall fence.

2. Related to the current Application is an Application dated 16th December 2014 filed in Malindi ELC Civil Case NO. 236 of 2014. In that Application, the Defendant herein is seeking to have the wall erected illegally dividing the house on property known as subdivision number 622, Watamu demolished.

The Plaintiff's case:

3. The Plaintiff's Attorney, has deponed that the Plaintiff together with the Defendant, are the registered owners of land known as portion number 622 Watamu in equal portions and that each one of them has an equal portion.

4. It is the Plaintiff's case that on 15th November 2014, the Defendant trespassed and entered into the Plaintiff's portion and damaged the wall fence on the east side of the plot and interfered with the construction of the staff house.

5. According to the Plaintiff, the parties agreed verbally that the property was to be divided into two and a wall was constructed to separate the Defendant's premises from the Plaintiff's; that the wall was built in the presence of the Plaintiff's girlfriend and that the kitchen and sitting room have been equally subdivided and that each party has his half share.

The Defendant's case:

6. The Defendant deponed that when he came to Kenya in September 2014, he found the Plaintiff had proceeded to illegally demarcate the residential house standing on the suit property into two by building a wall right across the kitchen, sitting room and veranda rendering the house inhabitable.

7. It is the Defendant's case that the suit property is commonly owned and that the Plaintiff had no right to try and demarcate the property without his consent.

Submissions:

8. The Plaintiff's advocate submitted that the marriage of convenience between the parties herein has broken down; that the Plaintiff has used his own resources to renovate the makuti roof and that they bought the house and they are using it jointly.

9. Counsel submitted that the appropriate order to be made in this case is for status quo to be maintained pending the hearing of the main suit.

10. The Defendant's counsel submitted that the donee of a Power of Attorney can only do things in the name of the donor and not on his own behalf; that the Attorney filed the suit in his own name and that because of the error the suit and should be struck out.

11. Counsel submitted that the Plaintiff's Attorney ought to have sought the approval of the court to represent the Plaintiff.

12. The Defendant's counsel submitted that according to the provisions of the Land Act, the suit property was owned by the Defendant and the Plaintiff as tenants in common. Counsel submitted that although tenant in common may own distinct shares, the same cannot be demarcated and the tenants enjoy the property as a whole. Counsel rely on he decision of **Mudigo wa Kuwanga Vs Ngumbao Kazungu & Another (2014) e KLR**.

13. Counsel submitted that a tenant in common cannot deal with the property in any way adverse to the interests of the other tenant without his consent.

Analysis and findings:

14. In this suit, the Plaintiff is seeking for an order restraining the Defendant from trespassing and entering on his share of portion number 622 Watamu and from breaking the wall fence that he has put up separating the said plot into two equal shares.

15. On the other hand, the Defendant herein has sued the Plaintiff in Malindi ELC No. 236 of 2014 in which he is seeking for an order to demolish the wall running through the house on parcel of land number 622 Watamu and to restrain the Plaintiff herein from interfering with his quiet possession of the house and the entire suit property.

16. It is not in dispute that portion number 622 Watamu was acquired by the Plaintiff and the Defendant on 30th December 2014. The Certificate of Title produced in this court does not show the shareholding of the two parties in the suit property.

17. The parties have agreed in their pleadings that they each own half a share of the suit

property.

18. On the suit property is a house which was supposed to be owned and occupied by both the Plaintiff and the Defendant. It would appear that initially, the Plaintiff and the Defendant agreed to have independent bedrooms and share the kitchen and the sitting room during their stay in the house. However, their friendship did not hold.

19. According to the affidavit of the Attorney of the Plaintiff (Paolo Gloria), the two partners verbally agreed that a wall be built separating the house into two and that the Plaintiff went into great expense to prepare the sub-division scheme and to construct the wall dividing the house and the suit property into two.

20. The Plaintiff's Attorney in this matter deponed that the kitchen and the sitting room have been equally subdivided and each party can have his half share and that the division is in line with the subdivision plan lodged at the Municipal Council offices.

21. I have perused the "proposed sub-division on plot 622 Watamu" annexed on the Plaintiff's affidavit. The said sub-division scheme shows the subdivision of the plot into two areas each measuring 0.053 hectares. The said plan does not show the exact location of the house and how that house was to be sub-divided. Indeed, the plan does not show that a house exists on the plot.

22. Although the County Government of Kilifi circulated the said sub-division scheme to the District Lands Officer and, the District Planning Officer, there is no evidence to show that the County Government of Kilifi approved the construction of a wall right through the middle of a house on the suit property.

23. The Plaintiff and the Defendant are tenants in common. According to the provisions of Section 94 of the Land Act, any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and the Registrar shall effect the partitions of the land in accordance with the agreement of the tenants in common.

24. Section 94(3) of the Act provides that the Registrar may, after hearing the Applicant and any other tenants in common, make an order for partition.

25. It is therefore clear that the law requires that partitioning of land held in common can only happen after an Application in the prescribed form has been made and after the Registrar has heard all the tenants.

26. There is no evidence before me to show that the Plaintiff herein applied in the prescribed form to have the suit property partitioned as proposed in the subdivision scheme before he constructed a wall dividing the suit property and the house in two portions.

27. There is also no evidence that the Defendant consented to the said partition and that the Registrar gave him an opportunity to be heard on whether the said partition should be carried out or not.

28. The above provisions of the law are mandatory in nature. The partitioning of land held in common can only be done with the written consent of all tenants and after the tenants have been heard. This procedure must be followed because the share of each tenant, until physically divided, only exists in relation to the metaphysical obstruct ownership of the land and not in the physical land itself.

29. In the case of **Kuwanga Vs Ngumbao Kazungu & another, 2014, eKLR**, this court held as follows:

“As discussed by Sweet & Maxwell's (Supra), the undivided nature of the shares and inability to demarcate the land physically flows from the fact that unity of possession remains a necessary equipment of a tenancy in common thus entitling a tenant in common to possess every part of the land. The consequences of this doctrine of unity of possession entitles every tenant to possession of the whole of the land as tenant in common notwithstanding his shareholding.”

30. A co-owner of land cannot therefore unilaterally decide the portion of land that his partner should be allocated in the event they decide to divide the land held in common. That is why the law requires the Registrar to hear all the tenants before the partitioning can be registered.

31. Other than not complying with the law, the Plaintiff herein did not disclose to the County Government of Kilifi and the Kilifi Physical Planner that what was being divided was not only the land but the house that was standing on the land.

32. Had that fact been brought to the attention of the Physical Planner and the County Government, I highly doubt that they would have approved it without the consent of the Defendant.

33. What is intriguing and interesting about this case is that because of the differences the Plaintiff had with the Defendant and his girlfriend, he decided to put a wall through the house that is standing on the suit property purportedly subdividing the house and the land into two equal shares. The Plaintiff then went ahead to put up a staff house on what he considered to be his share.

34. How can one divide a completed house into two equal shares when the house was built as one unit? And does it mean that the house is right in the middle of the suit land for the purpose of each partner getting half the house and the land? Such an exercise, in my view, is an absurdity. A house constructed with several rooms as unit cannot be possibly sub-divided into two equal shares using a wall, of course unless all the tenants agree in writing to such a division.

35. Considering that the Plaintiff has not shown to me that he followed the law before he put up a wall purportedly to sub-divide the houses on the suit property into two, I find and hold that it is the Defendant who has shown that he has a prima facie case with chances of success in respect to his Application in **Malindi ELC No. 236 of 2014**.

36. Indeed, unless the wall which passes through the house is demolished, it will cause the Defendant herein irreparable injury that cannot be compensated in damages. The inconvenience of the wall constructed right in the middle of the house is obvious and is a special circumstance that warrants the issuance of an order of mandatory injunction.

37. In the case of **Mucuha Vs Ripples Limited (1990- 1994) EA 388**, the Court of Appeal held that the maintenance of status quo does not include the circumstances existing after an intruders' illegal acts, but which existed before hand. The Plaintiff herein has not justified why this court should allow the impugned wall to continue standing.

38. I shall not address at this stage whether this suit is bad in law on the ground that the same was filed by the Plaintiff's donee without the leave of the court. Such a decision can only be made after hearing the parties at trial.

39. For the foregoing reasons, I dismiss the Plaintiffs Application dated 11th December 2014 with costs in this matter and allow the Plaintiff's Application dated 16th December 2014 in ELC No. 236 of 2014 in the following terms.

(a) A mandatory injunction be and is here issued compelling the Defendant,

Gloria Paolo, to demolish the wall erected dividing the house on property known as subdivision number 622 (original No. 59/7) Watamu and to reconstruct the house so that it is in the same status as it was before the construction of the said wall within 45 days pending the hearing and determination of the suit.

(b) The Plaintiff in ELC No. 236 of 2014 be at liberty to demolish the said wall and reconstruct the house as ordered in (a) above after the expiry of 45 days and the costs of the demolition of the wall and reconstruction of the house to be paid by the Defendant in ELC No. 236 of 2014.

(c) The Defendant, Gloria Paola, in ELC Case NO. 236 of 2014 be and is hereby restrained by a temporary injunction from interfering with the Plaintiff's quiet possession of the entire property known as portion NO. 622 pending the hearing of the suit.

(d) The Defendant, Gloria Paola, in ELC Civil Case No 236 of 2014 to pay the costs of this Application.

Dated and delivered in Malindi this 26th day of June, 2015.

O. A. Angote

Judge