



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.44 OF 2015

ALWI MOHAMED ALWI.....PLAINTIFF

=VERSUS=

SWALEH OMAR AWADH.....DEFENDANT

RULING

Introduction

1. The Plaintiff has filed an Application dated 19th March 2015 in which he is seeking for the following orders:

(a) That the Honourable Court does issue a temporary injunction restraining the Defendant/Respondent by himself, his employees and/or agents from further carrying out with construction and/or erection of structures, interfering and or destroying, obstructing and or restricting in whatever manner whatsoever with the Plaintiff's portion of parcel Number PORTION NUMBER 4314 within Malindi Sub County of Kilifi County and undertaking any further construction and wanton destruction thereon and in any other manner whatsoever interfering with the said parcels of land pending the hearing and final determination of this suit.

(b) THAT, the OCPD Malindi Division be ordered to effect this orders.

(c) THAT, costs of this application be provided for.

The Applicant's case:

2. The Plaintiff's Application is supported by his affidavit in which he has deponed that he purchased parcel of land known as portion number 4314 which is a sub-division of portion number 505R from the heirs of the Estate of Fadhil Omar Fadhil on 21st September 2007.
3. It is the Plaintiff's deposition that the Defendant purchased a building on the adjacent portions of the suit property being portion 4314; that he demolished the house on the suit property and put up another building and that since they shared the same land with the Defendant, it became necessary that the said portion be subdivided.
4. It is the Plaintiff's case that he obtained the necessary approvals for the sub-division of the land.
5. According to the Plaintiff, on 16th March 2015, the Defendant proceeded to erect a structure on his portion of land and was served with an "enforcement notice by the County Government of Kilifi"

for erecting structures without the requisite approvals.

The Defendant's/Respondent's case:

6. In his Replying Affidavit, the Defendant stated that he is the lessee of the entire portion number 4313; that he started occupying the leased land in the year 1980 after purchasing a house on the land by then known as portion number 505 on 11th November 1980 and that the subdivision of the said land was done on 25th October 1988.
7. According to the Defendant, after the subdivision, portion number 4314 was assigned to him vide Deed Plan number 134623 and that as at 21st September 2007, there was no other building within portion number 4314 other than the one owned by him which he acquired on 28th October 1980.
8. According to the Defendant, he is carrying out extension to his house within the portion of land leased to him and that the County Government approved the construction of the extension and withdrew the alleged enforcement notice.
9. It is the Defendant's case that he has never shared the suit property with the Plaintiff; that he is a lessee and not a trespasser and that the Plaintiff's Application lacks merit.
10. The Plaintiff's and the Defendant's advocates filed brief written submissions in which they reiterated their clients' cases. I have considered the said submissions.

Analysis and findings:

11. The Plaintiff's case is that he purchased a building standing on portion number 4314 which he has since demolished with the intention of putting up another one.
12. According to the Plaintiff, he shares plot number 4314 with the Defendant and consequently, the said portion was subdivided into two with the approval of the Council. His complaint is that the Defendant commenced construction of a structure on portion number 4314 without approval.
13. On the other hand, the Defendant's case is that he does not share the suit property with the Plaintiff; that he purchased the suit property in 1980 and that he intends to extend the house that is currently on the suit property.
14. The evidence before me shows that the Plaintiff purchased a house without land situated on portion number 505/R for Kshs.250,000 vide an agreement dated 21st September 2007.
15. The Agreement of 21st September 2007 does not specifically refer to portion number 4314 which I am told is a subdivision of plot number 505/R.
16. According to the Plaintiff, what he purchased was a house without land which he has since demolished and intends to build another one.
17. In the letter dated 10th December 2007, the owner of plot number 4314 informed the Town Clerk that he had authorised the Plaintiff to construct a house on the said plot.
18. In another letter dated 9th April 2012, the owner of the plot, Seif Mohamed Said informed the Town Clerk that indeed the Defendant also has a house on a portion of his land.
19. The letters by Seif Mohamed Said annexed on the Plaintiff's Affidavit shows that what the Plaintiff purchased in 2007 was an old house which was built in 1960. The owner of the land had no objection with the Plaintiff demolishing the said house and building another one on portion number 4314.
20. Seif Mohamed Said, the purported owner of the suit property also confirmed that the Defendant owns a house which is standing on the same suit property. The Defendant has annexed receipts showing that he has been paying Mr. Mohamed Said Nassor ground rent for plot number 505.
21. The Defendant also annexed an agreement dated 11th November 1980 showing that Swaleh Omar Baghrab purchased a house standing on plot number 505 Malindi for Kshs.100,000.
22. A proposed subdivision plan for portion number 4314 has been annexed on the Plaintiff's Affidavit.
23. On the other hand, the Defendant has annexed on his Affidavit a plan of the "extension of the existing house on plot number 4314." It would appear from the plan that once the proposed extension of the house is done, it would cover a substantial area of portion number 4314.
24. None of the parties has annexed on his Affidavit the title document showing the registered proprietor of portion number 4314. However, both parties are agreeable that what they purchased

- are houses without land.
25. Having purchased a house without land standing on plot number 4314 which is still intact, I do not understand how the Defendant can build an extension of the said house to cover almost the entire plot without the consent of the proprietor of the land.
 26. I say so because the Defendant does not own the land in question and his interest is only limited to the house he bought in 1980.
 27. It is also not clear to this court how the Plaintiff can legally commence construction of a new building altogether when he only purchased a house on the suit property which he has either since demolished or collapsed on its own. How will the Plaintiff ascertain the amount of space he will occupy while undertaking the construction on the suit property?
 28. The scenario that is now playing before the court shows the difficulties that arise when proprietors of land do not want to part with their land but at the same time want to allow purchasers to build houses on the land and pay them ground rent.
 29. In my view, it is time, with the promulgation of the Constitution, the Land Act and the Land Registration Act which repealed the Land Titles Act, that the concept of a house without land, which has been recognized in the coastal area for decades should be buried and forgotten.
 30. Indeed, the operative land statutes do not recognize this concept of a house without land any longer. The concept of a house without land, although recognised under the repealed Land Titles Act, defies the existing definition of “land” and “lease” in our laws.
 31. I therefore do not understand, even with these changes in our laws, why the County Government of Kilifi will still approve the construction of a building by a person who does not have a beneficial or legal interest in a piece of land on which he proposes to put up a house.
 32. My concern with such approvals in this: what will happen in the event the owner of the land demands his land back after a person has invested in constructing a building on the same land. The answer can only be one, the person will lose his investment because land has been defined by the Constitution to include the surface of the earth and the subsurface rock. With the repeal of the Land Titles Act, any other definition of “land” will be unconstitutional.
 33. My observations above are just but cautionary to the people intending to put up buildings on land that do not belong to them considering the changes in our land laws. However, for the purposes of this Application, I am satisfied that, prima facie, the Defendant cannot lay a claim on the whole land considering that he only purchased an existing house and not the land. He cannot therefore put up any other structures on the land without the written consent of the registered proprietor. Consequently, he should be restrained from putting up the proposed extension pending the hearing of the suit.
 34. For those reasons, I allow the Application dated 19th March 2015 as prayed.

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

O. A. Angote

Judge