



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 3 OF 2015

AZZURI LIMITED.....PLAINTIFF

=VERSUS=

PINK PROPERTIES LIMITED.....DEFENDANT

RULING

Introduction:

1. What is before me is the Plaintiff's Application filed on 9th January, 2015 and the Defendant's Application dated 12th January 2015
2. In its Application, the Plaintiff is praying for the following orders:
 - (a) That pending the hearing and determination of the suit herein, a temporary injunction does issue restraining the Defendant, by itself, its servants, agents, employees, successors in title and any other person or entity acting on the Defendant's behest from in any way proceeding with any construction activity and/or development on the Defendant's land parcel Chembe/Kibabamshe/272 particularly all such development that apparently violates the Plaintiff's land parcel Chembe/Kibabamshe/356 and/or the road of access between these adjoining properties.
 - (b) That costs be provided for.
3. On the other hand, the Defendant's Application is seeking for the following reliefs.
 - (a) That the injunctive orders granted by this Hon. Court on 9th January 2015 be discharged and/or set aside forthwith pending hearing and determination of this application.
 - (b) In the alternative the Plaintiff do furnish security of costs aggregating to Kshs.20,000,000/- being estimated value for the materials and the entire construction work thereon.
 - (c) That the Plaintiff do bear costs of this Application.

The Plaintiff's/Applicant's case:

4. According to the Plaintiff's director's deposition, the Plaintiff is the registered proprietor of Chembe/Kibabamshe/356; that the Defendant owns a plot that adjoins the Plaintiff's being Chembe/Kibabamshe/272 and that the two plots are separated by a road reserve.

5. It is the Plaintiff's deposition that the Defendant is developing on its property a development that extends beyond its boundaries thus blocking the road of access and that the said development has further encroached on the Plaintiff's parcel of land.

6. According to the deposition by the Plaintiff's director, he noticed the discrepancies on the issue of the boundaries and after holding meetings with the Defendant, it was decided that the two parties engage the District Surveyor to ascertain the boundaries.

7. It is the Plaintiff's case that the existing Registered Index Map shows the access road and road reserve and that the joint survey report shows the encroachment by the Defendant on a public road which has blocked the access road that the Plaintiff uses.

The Defendant's/Respondent's case

8. In his Affidavit, the Defendant's director has deposed that the Respondent's activities are purely confined on parcel of land reference number Chembe/Kibabamshe/272.

9. It is the Defendant's case that the survey report filed in this court is oppressive and selective; that where any uncertainty or dispute arises as to the position of any boundary, the land registrar ought to summon all parties and that the Plaintiff has never raised any objection since the year 2012 when the Defendant put up its wall.

10. The Defendant has also filed an Affidavit sworn by the Director of Textile Construction Co. Ltd.

11. According to the said Affidavit, Textile Construction Co. Ltd has been contracted by the Defendant to construct a twin villa with a common swimming pool on land known as Chembe/Kibabamshe/272; that the construction of the villa commenced on 1st April 2014 and that the said construction is at an advanced stage.

12. In the alternative, the Defendant's director has deposed that in the event the injunctive order is granted, the Plaintiff should deposit Kshs.20,000,000 for security of costs.

Submissions:

13. The Plaintiff's advocate submitted that he has failed to understand the continual development being done by the Defendant which has encumbered the Plaintiff's access to its property.

14. Counsel submitted that other than blocking the Plaintiff's access, the Defendant has denied the public the right to use the public road.

15. Counsel relied on the case of **Alkamen Vs Muchoki (1984) KLR 353** where it was held *that damages are not always an adequate remedy where there has been a breach of legal right; that encroachment on a public access road is not permissible and that both the public and the Plaintiff have a right that require protection.*

16. On the issue of whether the Plaintiff should be ordered to provide security for costs, counsel relied on the case of **Abdalla Vs Patel & Another (1962) EA 447** where it was held *that a litigant however poor, should be permitted to bring his proceedings without hindrance.*

17. The Defendant's counsel on the other hand submitted that the Plaintiff has no locus standi to bring this suit; that access roads are public utilities which are managed by relevant government departments and that if the Plaintiff's rights have been infringed, the Plaintiff should have moved the court by way of a Petition.

18. The Defendant's counsel submitted that his client followed the laid down procedure before it commenced the construction of the villas on its plot and that the construction of the said villas is in its final stages.

19. According to the Defendant's advocate, the Plaintiff failed to inform the court the existence of HCCC No. 127 of 2014 and 32 of 2015 which are in respect of parcel of land known as Chembe/Kibabamshe/356.

Analysis and findings;

20. It is not in dispute that the Defendant was registered as the proprietor of land known as Chembe/Kibabamshe/272 on 6th June 2011 while the Plaintiff was registered as the proprietor of Chembe/Kibabamshe/356 on 31st October 2014.

21. The Defendant contracted the firm of Texline construction Co. Ltd to put up a twin villa on its land which commenced on 1st April 2014.

22. The Defendant has annexed on the affidavit the contract entered into with the said construction company on 24th March 2014 and the approved development plans.

23. On the other hand, the Plaintiff has alleged that the Defendant has encroached on a public road hence blocking access on its land.

24. It is the Plaintiff's case that it has a multi-million cottage development project whose progression the Defendant's actions have inhibited.

25. The Plaintiff has annexed on its Affidavit the Registered Index Map (RIM) in respect of the plots within that area together with the sub-division plan of plot number 356. The Plaintiff has also annexed the District Surveyor's report.

26. The report of the District Surveyor shows the Defendant's wall has encroached into the Plaintiff's plot covering an area of 0.224 Ha (approximately ½ an acre).

27. Other than encroaching into plot number 356, the surveyor's report also shows that the developments by the Defendant have also extended into Chembe Kibabamshe/364 by 0.313Ha.

28. The same report further shows that the Defendant's perimeter wall has blocked a public access road on both sides.

29. The Defendant has not annexed on its Affidavit a report by a surveyor to dispute the findings of the District Surveyor.

30. The Registered Index Map has clearly designated public access road which has been blocked by the Defendant's developments. The Defendant has not given to this court any reason as to why it did not confine its developments, including the perimeter wall, within the confines of plot number 272.

31. Considering that the Defendant has not produced a report by a surveyor to justify why it has encroached on a public access road and on the Plaintiff's parcel of land, or to dispute the fact that it has indeed encroached on the road and the Plaintiff's land, I find and hold that the Plaintiff

has established a prima facie case with chances of success.

32. It does not matter that the Defendant has spent a substantial sum of money to put up the almost complete building. What matters is that the Plaintiff has established, prima facie, that the Defendant's actions have are likely to infringe on its proprietary rights both as the owner of parcel number 356 and as the user of the public access road that has been blocked by the Defendant.

33. I do not agree with the Defendant's deposition that the Plaintiff is guilty of laches. I say so because the Plaintiff only managed to have parcel of land known as Chembe/Kibabamshe/356 registered in its name on 31st October 2014 and filed this suit on 9th January 2015.

34. It is only after the Plaintiff obtained the tile deed to its land that it could have discovered about the encroachment. The Plaintiff therefore has moved the court timeously.

35. Having shown, prima facie, that its rights have been infringed, this court shall not make an order for security of costs as prayed for by the Defendant.

36. For those reasons, I allow the Application as prayed.

Dated and delivered in Malindi this **12th** day of **June**, 2015.

O. A. Angote

Judge