



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 20 OF 2012

ROBERT MUHAMBI KATANA & OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

MOMBASA TEACHERS CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LTD.....DEFENDANTS/RESPONDENTS

RULING

1. The notice of motion dated 10th February 2015 is made under Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules. In it, the interested party has moved the Court for orders :-

i. This honourable Court be pleased to direct and order that a surveyor be appointed to survey plot number 3634/Mainland North/Section II and file his report in Court.

ii. The Court be pleased to make any other or such further orders as it may deem fit to grant.

iii. Cost be provided for.

2. The motion is premised on the grounds on the face of it and on the affidavit of Jane Gakii Marete (herein after referred to as the applicant). One of the grounds is that the issue in dispute is for the Court to determine the dimensions and boundaries of the said plot thus it is imperative that a surveyor be appointed. The applicant deposed that this suit was ordered consolidated with ELC No 20 of 2012. They have a consent in that file for a surveyor to be appointed to survey the suit property and file his report which survey exercise has not been executed. She deposed further that the contentious issues in dispute cannot be substantially addressed without the survey report. The applicant urged the Court to grant the orders.

3. The application is opposed by all the 16 defendants. In their 9 paragraph grounds of opposition, they stated the application is misconceived, malicious and scandalous. The defendants aver they are in actual occupation of the suit property and the orders sought are impractical. Further the applicant lacks locus to make this application. Lastly if the orders are granted, they said orders will prejudice the defendants. The plaintiff did not oppose the application.

4. The parties argued the motion by filing of written submissions. The applicants' submissions summarises their pleadings filed therefore I need not repeat the same. The defendants/respondents submitted that the consent order referred to by the applicant was entered into without instructions.

Further that it is misleading for the plaintiff to say that boundaries and dimensions of the suit property are in dispute while what is in dispute is **ownership**. The defendants also aver that the applicant did not carry out due diligence before purchasing this property. In conclusion, the defendants submit there is no boundary dispute to be determined and the present application is meant to waste the Court's time.

5. In the plaint before the Court, the plaintiff has asked the Court for the following orders :-

1. A declaration that the defendants are trespassers on the suit suit property.
2. A permanent order of injunction restraining the defendants from occupying, cultivating or remaining on plot No 3634/MN/II or interfering with the plaintiff's possession of the plot.
3. An order of eviction of the defendants.
4. An order directing the Coast Provincial Commissioner to supervise and provide security during the eviction.
5. Costs of the suit and interest.

In the originating summons No 20 of 2012 consolidated with this suit, the defendants herein who are the plaintiff in suit No 20/2012 asked the Court to declare them as owners of the suit property by virtue of adverse possession.

6. From the pleadings on record, the issue of dimensions or boundaries of plot No.3634 is not in dispute. What is in dispute is whether an order for eviction should be granted or a declaration that the defendants have acquired the plot by way of adverse possession. The applicant has not filed any pleadings to bring forth her claim as against the defendants. The pleadings on record put by the plaintiff and the defendant can be determined without the in put of a surveyor.

The defendants will not be prejudiced if the orders sought are granted but this Court's duty is not to grant orders in vain. I find no basis for allowing the motion dated 10.2.2015. I am in agreement with the defendants' submission that the same is misconceived and an abuse of the Court process. Wherefore I proceed to dismiss it with costs to the defendants.

Ruling dated and Delivered at Mombasa this 29th day of September, 2015

A. OMOLLO

JUDGE