



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.237 OF 2014

SPRING PROPERTY MANAGEMENT LIMITED.....PLAINTIFF

VERSUS

1. LUKE BRUNO MWATSUMA

2. THE ESTATE OF GRACE NAZI MAWATSUMA (DECEASED)

3. PETER WOODS

4. LAND REGISTRAR-KILIFI (sued through the Hon. Attorney General).....DEFENDANTS

AND

AIN DIAB INVESTMENT LTD.....INTERESTED PARTY

R U L I N G

Introduction:

1. The Plaintiff's Application dated 28th October 2014 is seeking for the following orders:

(a) That an order of interim injunction for fourteen (14) days do issue restraining the 1st, 2nd and 3rd Defendants from encroaching, trespassing, developing, alienating, selling, transferring Title No. Kilifi/Mtondia/332, Kilifi/Mtondia/378 and Kilifi/Mtondia/374 either by themselves or through their servants, agents or whomsoever claiming in any manner whatsoever pending the hearing of the Application interpartes or until further orders of the Court.

(b) That PMCC No. 623 of 2010 Kilifi Luke Bruno Mwatusa-Vs Alexia Ndoki Ceppi be stayed pending the hearing and determination of this suit.

(c) That a mandatory injunction do issue to compel the 1st, 2nd and 3rd Defendants to restore to the Plaintiff the 8-10 meters boundary wall alienated by them until further orders of this Honourable Court.

(d) That such other further orders as the Honourable court shall deem fit to grant so as to maintain and enforce the Rule of Law.

(e) That costs be born by the Defendants in any event.

The Plaintiff's/Applicant's case:

2. According to the Plaintiff's director, the Plaintiff purchased a parcel of land known as Kilifi/Mtondia/332 from Alexia Ndoki Ceppi; that when the Plaintiff commenced developing the land, it found out that the 1st, 2nd and 3rd Defendants had encroached onto a portion of the suit property and that the Plaintiff was served with a decree in PMCC No.623 of 2010 which relates to Kilifi/Mtondia/378 which the 1st Defendant claimed that Alexia Ndoki Ceppi had encroached on.
3. The Plaintiff's director deponed that he obtained letters showing that Alexia bought plot number 332 measuring 5.7 acres and not 6 acres; that it was agreed between Alexia and the 1st Defendant that the 1st Defendant would take 1.9 acres and 3.8 acres; that the Plaintiff was not aware of the boundary dispute between the two and that the dispute was settled by the District Land Surveyor.

The Defendants'/Respondents' case:

4. The 1st Defendant deponed that the issue of the boundary in respect of Kilifi/Mtondia/378 and 332 was heard and determined in Kilifi PMCC No. 623 of 2010; that his surveyor determined the boundary lines between plot 331 and 332 which showed the encroachment on his parcel of land and that the previous owners of plot number 332, Alexia Ndoki Ceppi sold the land to the Plaintiff knowing very well that the magistrate had made a determination on the issue.
5. The 1st Defendant has denied that he entered into an agreement in which he agreed to take 1.9 acres and Alexia to take 3.8 acres and that the then Land Registrar favoured Alexia on the issue of the boundary inspection.
6. In his affidavit, the Land Registrar has deponed that the records pertaining to the survey and preparation of boundaries in respect to plot 111 which was subdivided to create plot number 289 and then 311 and 322 cannot be traced in the land office.
7. On the other hand, the Interested Party's director deponed that the issue of encroachment and boundary dispute was adjudicated by the Honourable Court in Kilifi PMCCC No. 623 of 2010; that according to the survey report of Mr. Mwanyungu, plot 332 had encroached into plot number 331 and that at no time did the 1st defendant agree to donate a portion of his plot.

Submissions:

8. The advocates filed their respective submissions reiterating their client's depositions and evidence. I have considered the said submissions and authorities.

Analysis and findings:

9. According to the Plaintiff's director's Affidavit, the Plaintiff is the registered proprietor of Kilifi/Mtondia/332 while the 1st Defendant who is his neighbour is the owner of Kilifi/Mtondia/378. The 2nd and 3rd Defendants are the owners of plot number 374.
10. The Plaintiff's director has averred that after the Plaintiff purchased Kilifi/Mtondia 332 from Alexia Ndoki, he discovered that people had encroached upon the said land, moved the boundary and reconstructed a new wall.
11. According to the Plaintiff's director, he was not aware of orders in PMCC No. 623 of 2010 as at the time the Plaintiff purchased the suit property and that PMCC No. 623 of 2010 was confined to Kilifi/Mtondia 378; that those orders were illegal because the court had no jurisdiction to grant them and that by the time he purchased the property, it was 8-10 meters bigger.
12. The only issue in this matter for determination is the location of the boundary of Kilifi/Mtondia 332 and the other neighbouring plots.
13. The Plaintiff is seeking for an injunction order not only in respect to his plot being 332 but also in respect to the plots registered in favour of the Defendants being plot 378 and 374.
14. That order cannot issue considering that the Defendants are the registered proprietors of plot numbers 378 and 374. How can the court injunct the Defendants from using the two plots just

- because of the existence of a dispute over a boundary? That, in my view, would be unjust and the prayer has no basis in law.
15. In any event, there appears to have been a dispute in Kilifi PMCC No. 623 of 2010 between the Plaintiff's predecessor in title and the 1st Defendant.
 16. The Plaintiff's predecessor in title was enjoined in the suit from interfering with the 1st Defendant's parcel of land number 378. This court cannot in the circumstances issue an order contradicting the said order.
 17. If the Plaintiff's predecessor in title was dissatisfied with the order of the lower court, then he should have moved the same court to set aside the said orders or filed an appeal. He did not do any of the two.
 18. The Plaintiff's contention that the orders by the lower court in PMCC No. 623 of 2010 is a nullity for want of jurisdiction has no basis in law. It is trite law that an order of the court remains valid until it is set aside, discharged or varied either by the court itself or by an appellate court.
 19. The Plaintiff's other contention is that the Decree in the lower court was in respect of plot number 378. However, the Plaintiff has not annexed the Judgment of the court to enable this court to ascertain the context in which that order was made. In any event, the prayers in the present application shows that the issues raised are in respect of plot number 378 also.
 20. Having declined to issue an order of prohibitory injunction on the grounds enumerated above, this court cannot issue an order of mandatory injunction for the demolition of the existing wall at this stage.
 21. The order staying PMCC No. 623 of 2010 can also not issue considering that there is no appeal before me in respect of that suit.
 22. The issue of whether the 4th Defendant should be compelled to produce all the original and certified copies of the survey plans and other documents in respect of Kilifi/Mtondia/332, 374 and 378 can only be dealt with at pre-trial and not by way of an Application.
 23. For those reasons, I dismiss the Plaintiff's Application dated 28th October 2014 with costs.

Dated and delivered in Malindi this 11th day of September 2015.

O. A. Angote

Judge