



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 77 OF 2015

SANSONE BANIN

T/A THE MAJI BEACH BOUTIQUE HOTEL.....PLAINTIFF

-versus-

THE NATIONAL LAND COMMISSION..... 1ST DEFENDANT

**MINISTRY OF LANDS HOUSING AND URBAN DEVELOPMENT.....2ND
DEFENDANT**

DIRECTOR OF SURVEY, MINISTRY OF

LANDS HOUSING AND URBAN DEVELOPMENT..... 3RD DEFENDANT

COUNTY GOVERNMENT OF KWALE..... 4TH DEFENDANT

THE ATTORNEY GENERAL..... 5TH DEFENDANT

R U L I N G

Introduction

1. The Plaintiff filed this suit on 24th March 2015 claiming that he is the proprietor of Maji Beach Hotel situate on the Diani Beach in Ukunda and on property known as L.R. No. 28170 (Original No. 16761 & 28169/4) registered in Land Titles Registry at Mombasa as C.R 62142.
2. The Plaintiff averred that adjacent to his said property is L.R No. 17948 registered as C.R 24986 in the name of Zeta Limited as well as L.R No. 16760 registered as C.R 24705 owned by Weaver Bird Limited. That the said properties are now comprised in L.R Nos 16760 (formerly 12830/1), 16761 (formerly 12830/2) and 17948 pursuant to a consolidation and subdivision exercise.
3. That prior to the subdivision, in between L.R. Nos. 17948 and 12830 was a 12.19 meter access path to the beach which was owned by the Government. That upon consolidation of the parcels and their subsequent subdivision, the access path was re-aligned and moved to a position 36 meters Northwards in between L.R Nos. 16760, part of 12830/3 and 16761 one side and 17948 on the other.
4. That on 7th January 2015, the National Land Commission, the 1st Defendant wrote to the Director of Surveys, the 3rd Defendant alleging that the parcels of land owned by the Plaintiff had wrongfully contributed to the blocking of access to L.R No. 12830/1 and directed that the said access be opened. That opening the access path as directed by the 1st Defendant would involve

- demolition of the Plaintiff's hotel and residential home. The Plaintiff therefore sought a declaration that there is no access path leading to the beach traversing the Plaintiff's property and an injunction to restrain the Defendants from interfering with the Plaintiff's property.
5. On 1st July 2015 SPIRE PROPERTIES (KENYA) LIMITED (hereinafter "Spire Properties") filed an application dated 19th June 2015 to be enjoined in this suit on the basis, *inter alia*, that it is the owner of L.R. No. 12830/3 which is served by the access road in issue in this case. The application was certified as urgent by this court on 1st July 2015 and subsequently fixed for inter partes hearing on 15th September 2015.
 6. Meanwhile on 2nd September 2015, the Plaintiff filed a letter dated 6th August 2015 seeking to mark this case as settled with no orders as to costs and on terms outlined on the said letter. When the parties appeared before this court on 15th September 2015 for hearing of the application dated 19th June 2015 by Spire Properties, its learned counsel Mr. S. Onyango urged that the same be allowed because no response thereto was filed despite the Respondents having been duly filed.
 7. At that point, Mr. Ondego, learned counsel for the Plaintiff stated that there was no suit pending before court since the parties had recorded consent vides the letter dated 6th August 2015 marking the case as settled. Consequently, the court lacks the jurisdiction to grant the reliefs sought by Spire Properties. Mr. Ondego relied on the case of **ANWAR MAHENDRA PANDYA V BUSINESS FORMS AND SYSTEMS LIMITED & 3 OTHERS [2013] eKLR** where Havelock J. (as he then was, now retired) held as follows:

"...I have no doubt that the Agreement between the parties as aforesaid did compromise this suit. I see no reason why the Agreement should not be enforced particularly with regard to its provisions in relation to the withdrawal of this suit before Court. However, if any of the parties hereto need to seek a remedy as regards a breach of the Agreement then they must seek such remedy by a fresh cause of action in relation thereto.

As a result, I see little point in the legal representatives of the estate of the 2nd Defendant being enjoined hereto and consequently, I dismiss the Notice of Motion of the Plaintiff dated 10th May 2013 in its entirety..."

8. Ms. Namahya appearing for the Hon. Attorney General told court that although she had signed the consent letter, she did so without knowing that Spire Properties had filed its application to be enjoined in this suit. She stated that she had signed the consent on the strength of an e-mail communication she had received from the 1st Defendant indicating that the dispute had been settled. Counsel was categorical that had she seen the application by Spire Properties before, she would not have signed the consent. Ms. Namahya submitted that since the consent had not been adopted as an order of the court, the same should be put on hold to enable the application by Spire Properties be addressed since the same was filed prior to the signing of the consent.
9. To begin with, the consent letter has not been adopted as an order of this court. When the parties appeared before the court, the Plaintiffs advocates did not address the court to confirm if the order could be adopted before the proceedings on the interested parties application could go on. The 1st Defendant has not entered appearance in this case. The A.G filed appearance for the 2nd to 4th Defendants although the 4th Defendant is the County Government of Kwale.
10. Is there a suit before this court to which the interested party can join? Ms Namahya, the state counsel submitted that she signed the consent without the knowledge of the pending application. She urged the court to with-hold adopting the consent until that application is dispensed with. The 1st and 4th Defendants have not filed any appearance. The non-appearance of these defendants was confirmed by Mr Ondego advocate for the Plaintiff. The civil procedure rules require parties to respond to summons by filing memo of appearance. Once the appearance is filed then this court would assume all parties are aware of the dispute before court and would then have powers to enter into consents such as this. Given the A.G has told court that she would rather the adoption of the consent be held in abeyance until the pending application is finalized and further the 1st defendant not having entered appearance, this court cannot adopt the consent letter dated 6th august 2015 as an order. The answer to the question as to whether there is a suit before court is thus positive. There suit is not yet settled and the interested party's application is not overtaken.

11. Now on the merits of the pending application, the Plaintiffs admitted being served. According to the affidavit of service filed and on record, the Plaintiff and the 4th Defendant were served on 3rd July 2015. The 2nd 3rd and 5th Defendants were served on 6th July 2015. The Plaintiff's advocate submitted that when the application was served, they had settled matter in dispute between him and the defendants. However the consent letter is dated 6th August 2015 which is one month after they were served with this application. All the parties served had enough time to file a response to the application.
12. There is no document in record before court opposing the Interested Party's application. When it came up for hearing on 15th Sept 2015, none of the Respondent's advocates submitted on its merits other than the Plaintiff stating the court lacks jurisdiction. The Interested Party is requesting to be allowed to join the suit. Since none of the parties have expressed any prejudice they are likely to suffer if Spire Properties joins the suit and since there is no documents the said application, I see no reason why I should not allow it. The application dated 19th June 2015 is allowed with no order on costs.

RULING DATED & DELIVERED IN MOMBASA THIS 16TH DAY OF DECEMBER 2015

A OMOLLO

JUDGE