



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.50 OF 2015

KAZUNGU CHANGAWA KADZEHA.....PLAINTIFF

=VERSUS=

MUTHENGO

1. KAHINDI

MUTHENGO

2. CHARO

3. SAMUEL KARISA MUTHENGO.....DEFENDANTS

RULING

1. The Application before me is the one dated 30th March, 2015 in which the Plaintiff is seeking for the following orders:

(a) That the honorable court be pleased to order that the Defendants/Respondents herein their agents, servants, and/or such persons claiming under them be restrained from demolishing, evicting, leasing, selling, alienating, transferring, dealings or interfering with the Applicant's occupation on the land more particularly known as Plot No. 36 Shauri Moyo Scheme Magarini Land and Settlement within Kilifi County pending the hearing of this Application.

(b) THAT the Honourable court be pleased to order that the Defendants/Respondents herein their agents, servants, and/or such persons claiming under them be restrained from demolishing, evicting, leasing, selling, alienating, transferring, dealings or interfering with the Applicant's occupation on the land more particularly known as Plot NO. 36 Shauri Moyo Scheme Magarini Land and Settlement within Kilifi County pending the hearing of this suit.

2. The Application is premised on the grounds that the Applicant bought plot number 36, Shauri Moyo Scheme (the suit property) from the Respondents' mother in the year 2004; that at the time of the purchase, the Respondents did not have a title deed until in the year 2005 and that since obtaining the title deed, the Respondents have failed to transfer the said land to the Applicant but instead sold the same land to someone else.

3. The Applicant has deponed that he has been living on the suit property until 13th February, 2015 when he received a demand letter from the Defendants claiming that he was only living on the suit

- land after being invited by their late father.
4. In response, the 1st Defendant deponed that it is not true that the Plaintiff bought the suit property from their mother because the suit property belonged to their father; that their father died in the year 1997 and no letters of administration regarding his estate had been taken out and that they have never received the alleged Kshs.30,000 from the Plaintiff.
 5. In his submissions, the Plaintiff's advocate submitted that although the suit property belonged to Mthengo Madondola who died in 1997, the same was sold to the Plaintiff by the Respondents' mother in the year 2000.
 6. According to counsel, the balance of convenience tilts in favour of the Plaintiff considering that he has been in occupation of the suit property for the past thirteen (13) years since he bought it.
 7. The Defendant's advocate on the other hand submitted that the Plaintiff has not annexed any sale agreement to show that he actually purchased the suit property; that the Plaintiff is trying to enforce non-existent rights and that the Plaintiff has not established a prima facie case with chances of success.
 8. The Defendant's counsel submitted that in the absence of letters of administration in favour of the deceased's estate, the wife of the deceased did not have authority to sell or deal with the suit property.
 9. The Plaintiff has annexed on his Affidavit a handwritten acknowledgement in which the 1st Defendant acknowledge receipt of Kshs.8,000 being the last installment of the purchase price of Kshs.30,000.
 10. In the said undated acknowledgement, the 1st Defendant stated that he received the payment in the presence of his brother, Samuel Karisa Mtego, the 3rd Defendant.
 11. The 1st Defendant had previously received Kshs.14,800, according to annexure KCK-2B, on 9th April 2000 and Kshs.7,200 on 28th April 2000.
 12. Although it is true that the title deed for parcel of land number Malindi/Shauri Moyo/36 was issued in favour of the Defendants on 4th May, 2007, the Defendants have not informed the court which parcel of land they were selling to the Plaintiff in the year 2000.
 13. Although it is true that the 1st Defendant or his mother did not have the legal authority to sell land belonging to their late father, the interests of justice demand that the Defendants should explain which land they sold to the Plaintiff vide the acknowledgement slips annexed on his Affidavit.
 14. If indeed the 1st Defendant sold to the Plaintiff the suit property or a portion thereof, I will not hesitate at the end of trial to direct that the 1st Defendant's share of the land after the distribution of the Estate of the deceased be ceded to the Plaintiff.
 15. I say so because where a party purports to sell land belonging to the deceased, justice demands that he should cede his portion of land after the confirmation of the grant. That is the only way parties can be discouraged from selling portions of the Estate of the deceased person before a Certificate of Confirmation of Grant is issued hoping that they will go scot free.
 16. Considering that the Defendants have admitted that it is the Plaintiff who is in possession of the suit property, or a portion thereof, and considering that the Plaintiff has established a prima facie case as against the 1st Defendant who acknowledged receipt of the purchase price, I shall, which I hereby do, allow the Plaintiff's Application dated 30th March 2015 as prayed.

Dated and delivered in Malindi this 19th day of **February**, 2016.

O. A. Angote

Judge