



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 124 OF 2013

1. TITUS MWANIKI

2. JOSPHAT WAINAINA NENE

3. MONICA NJERI MUCHIRI.....PLAINTIFFS/APPLICANTS

=VERSUS=

ESTHER MUKAMI KIGURU.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. What is before me is the Plaintiffs' Application dated 17th July 2013 seeking for the following orders:

(a) That this Honourable Court do remove and order the Registrar of Lands, Mpeketoni in Lamu County to remove the caution lodged by the Defendant on the 16th December 2004 from all the parcel of land known as Title Number LAMU/LAKE KENYATTA1/4 which is subdivided into twenty five (25) portions but has not been given new title numbers.

(b) THAT the costs of this Application be borne by the Defendant.

2. The Application is grounded on the fact that the Plaintiffs are the bona fide purchasers and hence are entitled to deal with their portions of land; that the Defendant has no basis in law to lodge the caution or at all.

The Applicant's case:

3. According to the 2nd Plaintiff's Supporting Affidavit, she, together with the other Plaintiffs purchased land parcel number Lamu/Lake Kenyatta 1/4 measuring 10 acres from the then owner, Grace Wangari Mathenge; that the seller had also sold to twenty four other individuals different portions of land leaving 2 acres for herself.

4. It is the 2nd Plaintiff's deposition that the vendor obtained consent from the Land Control Board a consent to sub-divide the twenty five portions on 6th April 2005.

5. According to the Plaintiffs, the Defendant purchased ¼ acre out of the vendor's remaining portion of 2 acres before the sale fell through. The Defendant then sued the vendor in Lamu CMCC No. 40 of 2005 seeking legal redress. The Defendant lodged a caution in the year 2006 on the whole parcel of land and stopping all the dealings.

Defendant's/Respondent's case

6. The Respondent filed her Replying Affidavit on 16th August 2013 and deponed that the Applicants bought the suit property knowing that the same had been cautioned; that the civil suit in Lamu has been finalised and that the vendor has been unable to settle the decretal sum in Lamu CMCC No. 40 of 2005.

7. It is the Defendant's contention that if the caution is removed then she shall suffer loss because the vendor is not willing to pay her debt and that she has been wrongly sued.

8. The parties filed their written submissions which I have considered.

Analysis and findings

9. The Plaintiffs in this matter are claiming to be amongst the people who purchased some of the portions of land after Lamu/Kenyatta 1/4 was subdivided into twenty five portions by the registered owner.

10. The Defendant is also claiming to have bought a portion of land from the registered proprietor who is not a party to this suit. However, the Defendant and the vendor fell out and the Defendant registered a caution over the whole piece of land.

11. It would appear that the caution by the Respondent was in respect to the entire piece of land although a copy of the caution was not annexed on the Affidavits.

12. The Plaintiffs have annexed the consent that was given by the Board for the sub-division of the entire land into twenty five portions. That consent does not list the people who were to purchase the portions from the vendor. It is also not clear whether by the time the consent by the Board was being given, the caution had been registered or not.

13. The Respondent in this matter sued the vendor in SRMCC NO. 40 of 2005, Lamu for a refund of Kshs.87,500 for monies paid for the purchase of a portion of Lamu/Kenyatta 1/4 in which Judgment was entered in favour of the Defendant herein. The vendor has challenged the proceedings in the lower court in Malindi High Court Judicial Review Number 8 of 2013.

14. From the evidence before me, the sub-division of Lamu/Lake Kenyatta 1/4 has not been registered albeit approval having been given by the Board. The Plaintiffs' interest in the suit property, prima facie, has not crystallised. The order being sought by the Plaintiffs in my view should have been sought by the registered proprietor of Lamu/Lake Kenyatta 1/4. The circumstances in this case are different from the circumstances in **Malindi HCCC No. 45 of 2013** which the Applicants' advocate has relied on because in that case, the Plaintiff was the registered owner of the land.

15. In view of the fact that the Defendant filed a caution on the basis that she had an interest in one of the portion of Lamu/Lake Kenyatta 1/4 and considering that the orders being sought by the Applicants will dispose of the entire suit, I am of the view that the Plaintiffs have not established a prima facie case with chances of success as against the Defendant. The interest of the Defendant in the suit property as a purchaser should be protected in the interim until either the District Land Registrar removes the caution pursuant to the laid down procedures or until this suit is heard and determined.

16. In view of the fact that the Plaintiffs are in possession of their respective portions of land, they will not suffer any irreparable loss that cannot be compensated by way of damages.

17. For the reasons. I have given above, I dismiss the Plaintiffs' Application dated 17th July 2013 with

costs.

Dated and delivered in Malindi this **19th** Day of **March**, 2014

O. A. Angote

Judge