



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 64 of 2012

KITSAO KAZUNGU KALUME.....PLAINTIFF

VERSUS

DAMA THOYA KALONGO.....DEFENDANT

RULING

1. What is before the court is the Plaintiff's Application dated 20th December 2012 seeking for the following orders:

(a) That this application be certified as urgent.

(b) That a temporary injunction be issued restraining the Defendant by herself, her servants, agents, family members and any other person deriving interests from her from trespassing and entering onto the Plaintiff's two (2) acres in that original Plot number Ngomeni Settlement Scheme 1866 measuring 1.88 Ha and from cultivating and or dealing with the Plaintiff's portion in any manner howsoever pending the hearing of this application.

(c) That the costs be in the cause.

2. The Application is premised on the grounds that the Plaintiff is the legal owner of 2 acres, the subject parcel of land; that the Defendant while knowing that the Plaintiff is the legal owner of the suit property blatantly registered the suit property in her name and lastly that there is a danger that the Defendant is likely to transfer the suit property to a third party.

3. The Application is supported by the Affidavit of the Plaintiff whose main depositions are that he purchased the suit property from the Defendant; that the Sale Agreement between himself and the Defendant was burnt when his house caught fire and that as at the time of the purchase of the suit property, the suit property had not been registered.

4. The Applicant has further deposed that he agreed with the Defendant that out of the 4.5 acres, two (2) acres were to belong to him while the remainder of the land was the Defendant's.

5. The Applicant has deposed that despite the agreement between himself and the Defendant, the Defendant registered the whole parcel of land in her name on or about 27th July 2007. The suit property was registered as Ngomeni Squatter Settlement Scheme/1866.

6. It is the Applicant's further deposition that the Defendant is in the process of looking for a willing buyer to sale that piece of land being Plot number Ngomeni squatter settlement scheme/1866 and

that he is bound to suffer gravely and irreparably if the Defendant is not restrained from continuing with the said illegal acts.

7. The Respondent did not file a response to the Application despite being served with the Application and hearing notices for 14th February 2013 and 18th April 2013. Consequently, the Plaintiff's Application is unopposed.

8. I have considered the Plaintiff's Application, the Supporting Affidavit and the Applicant's advocate's oral submissions.

9. I have noticed that the Application is seeking for interim orders of injunction pending the hearing of the application and not the suit.

10. When this matter came up for hearing *ex-parte*, I issued an injunction on 24th December 2012. The said interim order was to last for a period of 14 days. Consequently the pending issue for determination is whether this court should grant to the Applicant an interim injunction pending the hearing of the suit. I shall therefore proceed to determine the current application on that basis.

11. It is trite law that for an injunction to be issued by this court, the Applicant must know that he has a *prima facie* case with chances of success; that unless the injunctive order is issued, the Applicant is likely to suffer irreparable damage that cannot be compensated by way of damages; and if the court is in doubt, then it should decide the case on a balance of convenience.

12. The Defendant has not denied that she sold to the Plaintiff approximately 2 acres out of the 4 acres that she holds. The applicant has deponed that the said Sale Agreement was burned in his house, a fact which has also not been rebutted by the Defendant.

13. The Plaintiff has annexed the copy of the Title for the whole piece of land which is registered in the Defendant's name. The applicant has also annexed a copy of a letter from the area chief who has confirmed that the Plaintiff bought the suit property from the Defendant in 1992.

14. In the circumstances, I find and hold that the Applicant has established a *prima facie* case with chances of success and if the injunctive orders are not granted, he is likely to suffer irreparable damage which cannot be compensated by way of damages.

15. For the reasons given above, I allow the Plaintiff's Application dated 20th December, 2012 in the following terms:

a) A temporary injunction is hereby issued restraining the Defendant by herself, her servants, agents, family members and any other person deriving interest from her from trespassing onto the Plaintiff's two acres in that original plot number Ngomeni Settlement Scheme/1866 and from cultivating and or dealing with Plaintiff's portion in any manner howsoever pending the hearing of the suit.

b) The costs of the Application to be in the cause.

Dated and delivered at Malindi this 26th day of April, 2013.

O. A. Angote
Judge