



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 126 of 2012

JOSEPH MLANDI.....PLAINTIFF

VERSUS

JOSEPHAT KARISA

DERRICK RINGI.....DEFENDANTS

RULING

1. The Application before me is dated 31st July 2012 filed by the Plaintiff. The said Motion seeks for the following reliefs:
 - 1) That the defendants by themselves, their agents or otherwise howsoever, be restrained by temporary injunction from trespassing upon and or in any manner whatsoever interfering with the Plaintiffs use, possession and quiet enjoyment of that portion of plot 14 measuring approximately 100 * 30 feet situate at Mtomondoni/Mikanjuni, Kilifi District pending the hearing of the suit.
 - 2) That the costs of this application be borne by the defendant.
2. The Application is based on the grounds that the Plaintiff is the beneficial owner of portion of Plot No. 14 situate at Mtomondoni/Mikanjuni in Kilifi County; that the 2nd Defendant has without any colour of right or lawful excuse entered and or trespassed upon the said portion of land, fenced it and has started construction.
3. The Application is further supported by the Affidavit of the Applicant who has deponed that on or about 20th November 1994, the Plaintiff entered into an agreement of sale for Plot No. 14 Measuring approximately 3 ½ acres with one Gumbo Chibungu.
4. After the purchase of the said portion of land a dispute arose in 1999 between the said Gumbo Chibungu, the seller and one Tedeu Petro who was claiming the trees on the suit land. At the same time, Gumbo Chibungu had also sold another portion of land which was adjacent to the suit property to one Baya who later sold it to the 1st Defendant.
5. The Plaintiff has further deponed that after the death of Mr. Baya, the 1st Defendant moved and claimed that Mr. Baya had also sold to him the suit land in addition to the one had before his death. The 1st Defendant proceeded to sale the suit property to the 2nd Defendant.
6. The Plaintiff has further deponed that he started constructing on the suit land on 2nd July

2012 which led to the 1st Defendant reporting his actions to the District Officer who summoned the Plaintiff to his office.

7. After hearing the Plaintiff and the 1st Defendant, the Plaintiff has deponed that the District Officer arbitrarily ordered that the Plaintiff stops the construction that he had started and ordered the Plaintiff to hand to the 2nd Defendant the suit property. Consequently, the 2nd Defendant moved to the suit property and fenced it off.

8. The Plaintiff has deponed that in the meantime, the 2nd Defendant has started construction and he is cutting trees which are on the suit property.

9. The 2nd Respondent filed his Replying Affidavit on 8th November 2012 in which he deponed that he is the proprietor of Plot number 14 measuring approximately 100 feet by 40 feet (the suit property) which he purchased from the 1st Defendant for kshs. 400,000.

10. The 2nd Respondent has further deponed that he was not aware of any dispute between the 1st Defendant and the Plaintiff as at the time he was purchasing the suit property; that he had commenced construction on the disputed land and that the construction materials are now going to waste.

11. The 2nd Respondent has further relied on the decisions of the District Officer and the area Chief which, according to him, have been in favour of the 1st Defendant.

12. The 2nd Respondent has further deponed that the Plaintiff has not annexed on his affidavit the Title to plot number 14 which he claims to be his; that the Applicant has not informed the court if there was any sub-division of the suit property to earmark the 3 ½ acres that was purportedly sold to him by Mr. Gumbao Chibungu and the Survey map to show that the house being constructed by the 2nd Defendant falls within the 3 ½ acres allegedly sold to the Plaintiff by Mr. Gumbao Chibungu.

13. Finally, the 2nd Respondent has deponed that the Plaintiff has failed to disclose that there exists Mombasa Civil Suit No. 170 of 2006 and 109 of 2006 (OS) which are pending before the High Court, Mombasa, which involve parcel land Plot no. 14 within Mtwapa Mikanjuni.

14. The 1st Respondent did not file any response. The Plaintiff filed his submissions on 17th January 2013 through the firm of Apollo Muinde & Associates while the 2nd Defendant filed his submissions on 27th November 2012 through the firm of Okenga & Company advocates. The said Submissions reinstate the facts of the Plaintiff and the 2nd Defendants cases.

15. The Applicant has annexed on his Supporting Affidavit the agreement between himself and one Mr. Gumbo Chibungu. The Applicant admits in his affidavit that the said Gumbo Chibungu had a dispute over the suit land with one Tedeu Petro but that dispute was resolved and the parcel of land was declared to belong to Gumbo Chibungu.

16. From the depositions of the parties, it would appear that Mr. Gumbo Chibungu, who is not a party to these proceedings sold the portion of his land to the Plaintiff and sold another portion abutting the Plaintiff's portion to Mr. Baya who is now deceased. According to the Plaintiff, Mr. Baya, who was supposed to be his neighbour sold his portion together with part of the Plaintiff's portion to the 1st Defendant who subsequently sold it to the 2nd Defendant.

17. The Plaintiff has annexed on his affidavit an agreement which was entered into between himself and one Gumbao Chibungu on 31st May 1991. The said agreement does not describe the land that Gumbo Chibungu sold to the Plaintiff and the same is not helpful at all to the court. The agreement however states that Gumbo Chibungu sold to the Plaintiff 3 ½ acres for Kshs.20,500.

18. The 2nd Respondent's documents are not helpful either. According to the Agreement of sale annexed on the 2nd Respondent's affidavit, the 1st Defendant sold to the 2nd Defendant a plot for Kshs. 400,000. The agreement does not define the land that was being sold or even the acreage.
19. What is not in dispute though is that one Gumbo Chibungu sold to the Plaintiff 3 ½ acres. The issue as to the extent of the land that was sold to the Plaintiff and whether that is the same land that the 2nd Defendant bought from the 1st Defendant can only be determined at a full hearing.
20. The Plaintiff's deposition that there was a land transaction between on Baya Chai Baya and the 1st Defendant is vindicated by the list of documents that have been filed by the 1st Defendant. But again, the agreement between Baya Chai Baya and the 1st Defendant does not specify the land that the two of them were transacting in.
21. The failure by the 1st Defendant to file a Replying Affidavit so as to inform the court extend of the land that he bought from the late Mr. Baya, and to inform the court the extend of the land that he sold to the 2nd Defendant can only be in favor of the Plaintiff.
22. The whole purpose of an injunction is that matters ought to be preserved in *status quo* until the question to be investigated in the suit can be finally disposed of.
23. Here, the question is whether the Plaintiff owns land which the 1st Defendant has sold to the 2nd Defendant. *Prima facie*, and in the absence of a response from the 1st Defendant, I find and hold that the Plaintiff has established that he bought land whose extend he cannot establish in these proceedings but whose *status quo* must be maintained. The 2nd Defendant has admitted that he has been informed that the suit property has had a dispute for a long time. In those circumstances, it would be prejudicial to the Plaintiff if the 1st Defendant is allowed to continue putting in use the suit property before the issue of ownership is determined by this court.
22. I therefore find and hold that the Plaintiff has established a *prima facie* case with probability of success. The 2nd Defendant's assertion that the suit property herein is the subject of a High Court Civil Case No. 109 of 2006 (O.S) has no relevance to the Plaintiff's claim. I have looked at the originating summons filed in Mombasa. The said suit concerns parties who are claiming Plot No. 14/section IV/M.N. Mtwapa measuring 91 acres which they argue that they have acquired by adverse possession.
23. The Plaintiff is claiming 100 * 40 feet being part of the 3 ½ acres that he claims he bought. Neither the Plaintiff nor the Defendant are parties to the Originating Summons, and the said suit has nothing to do with the Plaintiffs' current claim.
24. The Wanton destruction of trees by the Defendant and the construction on the suit property by the 2nd Defendant will cause the Plaintiff irreparable loss which will not be compensated by damages should the injunction not be granted.
25. For the reasons given above, I allow the Plaintiff's application dated 31st July 2012 in terms of prayers 3 and 4.

Dated and delivered at Malindi this 25th day of April, 2013

O. A. Angote
Judge