



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 20 of 2013

EVER PROPERTIES MALINDI LTD.....PLAINTIFF

VERSUS

ATHUMAN SHEE MOTETORA
SAMUEL MJOMBA MATAMBO
MATHIAS KAHINDI KENGA
NDOLO KAHINDI NYIRI
GRANTON MZEE MWANGEKA

ABDALLA MWARORA HASSAN.....DEFENDANTS

RULING

1. The Application before the court is the one dated 12th February 2013 and filed on 18th February, 2013 seeking for the following reliefs.

- a) THAT a temporary injunction be issued restraining the defendants whether by themselves, agents and/or servants from trespassing onto, making use of, staying in or in any manner whatsoever or howsoever from interfering with or dealing with the property L.R. No. 20696 pending the hearing and determination of this application and/or of suit herein.
- b) THAT the defendants be restrained by an order of this Honourable Court from interfering with the plaintiff's use and enjoyment of the property L.R. No. 20696 pending the hearing of the suit herein.
- c) THAT the defendants do forthwith vacate or be evicted from property known as L.R.No.20696 and in the alternative the court be pleased to grant possession of the property L.R. No. 20690 to the plaintiff against the defendants summarily.
- d) THAT the Officer Commanding Station at Gongoni Police Station do enforce the orders herein
- e) THAT this Honourable Court be pleased to order there to be formal proof on mesne profits payable to the plaintiff by the defendants.
- f) THAT the costs of this application be provided for.

2. The Application is supported by seven grounds and the affidavit of Amit Rasiklal Shah, the Plaintiff's director.

3. The main depositions of the Plaintiff's director is that the Plaintiff is the registered proprietor of land reference number **20696** which is situated North of Malindi in Kilifi County (the suit property); that the

Plaintiff read the advertisement in the newspaper in month of May, 2011 for the sale of the suit property by public auction and upon been satisfied with the condition of the property, the Plaintiff bought it at a public auction.

4. The Plaintiff has annexed on its affidavit the Certificate of Sale and the Transfer between itself and Victoria Commercial Bank Limited which shows it purchased the suit property for Kshs. **23,800,000**.

5. The Plaintiff's director has further deponed that after the Transfer of the property to it by **Victoria Commercial Bank Limited** as chargees, the Plaintiff was registered as the proprietor of the suit property on 24th July 2012.

6. However, towards the end of the year 2012, the Plaintiff was shocked to find that there were persons who had invaded and occupied the suit property. The said persons chased the Plaintiff's director and his surveyor when they went on the ground to ascertain the beacons. Consequently, the Plaintiff's director has deponed that the Plaintiff is unable to enjoy the suit property as the registered proprietor.

7. The Application was filed under a certificate of urgency on 18th February, 2013 and the same came up for *inter parte* hearing on 19th March 2013.

8. Though the Defendants were served with the Application and the hearing notice for 19th March, 2013, I directed that they should be served again with a hearing notice for 18th April 2013. Again, the Defendants did not turn up in court. There is no Replying Affidavit by the Defendants on record. Consequently, the Application proceeded for hearing *ex-parte*.

9. Mr. Wainaina, learned counsel for the Applicant made oral submissions. Counsel reiterated the contents of the Applicant's Supporting Affidavit. According to counsel, section 23 of the Registered Titles Act, Cap 281 (repealed) confers absolute ownership of land to the registered proprietor. Counsel relied on the cases of **Captain Patrick Kenyagia & Another -Vs- Damaris Wangechi & 2 Others, Civil Appeal No. 150 of 1993** and **Thugi River Estates Ltd. & Another -Vs- National Bank & 2 Others; NAIROBI H.C.C.C. No. 633 of 2004** to buttress his argument.

10. I have considered the Plaintiff's Application, the Supporting Affidavit and the submissions by the Applicant's counsel. The Application is not opposed and as a result, the averments by the Plaintiff are taken as admitted by the Defendants.

11. In the circumstances, and considering that the Plaintiff is the registered proprietor of the suit property and in view of the fact that the Defendants invaded the suit property in 2012 without any lawful cause, I find and hold that the Plaintiff has established a *prima facie* case with chances of success. I also find and hold that unless the injunctive orders are granted as prayed, the Applicant will suffer irreparable damage considering that he cannot now use the property.

12. For the reasons I have given above, I allow the Plaintiff's Application dated 12th February 2013 in the following terms:

a)A temporary injunction be and is hereby issued restraining the defendants whether by themselves, agents and/or servants from trespassing onto, making use of, staying in or in any manner whatsoever or howsoever from interfering with or dealing with the property L.R. No. 20696 pending the hearing and determination of this suit.

b)The defendants be and are hereby restrained by an order of this Honourable Court from interfering with the plaintiff's use and enjoyment of the property L.R. No. 20696 pending the

hearing of the suit herein.

c)The defendants do forthwith vacate or be evicted from property known as L.R.No.20696 pending the hearing of the suit.

d) The Officer Commanding Station at Gongoni Police Station do enforce the orders herein.

Dated and Delivered at Malindi on 23rd day of **May**, 2013.

O. A. Angote
Judge