



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 59 OF 2013

ANITA WAMBOI JULIUS.....PLAINTIFF

=VERSUS=

1. STEPHEN MWAURA TAHACHIE

2. ISAAC MKALIMANI MWANGU

3. LILIAN WANJIRU MARIBII.....DEFENDANTS

R U L I N G

1. The Application before me is dated 8th April 2013 seeking for the following reliefs.
 - a. **THAT this Honourable Court do issue, a temporary injunction to restrain the Defendants/Respondents by themselves, their agents, servants, representatives or any other person claiming under them from trespassing, intruding, occupying, clearing, cultivating, planting, erecting temporary or permanent structures on the Plaintiff's parcel of Land or adversely dealing with the land in any manner pending the hearing, determination and final disposal of the suit property.**
 - b. **THAT the Officer Commanding Station (O.C.S) Mpeketoni Police Station do assist in effecting this order.**
 - c. **THAT the costs of this application be provided for.**
2. The Application is premised on the grounds that the Plaintiff/Applicant is the genuine registered owner of all the parcel of land known as plot number 613 situated in Hogwe village in Mpeketoni within Lamu country. The said plot is approximately 100 feet by 200 feet.
3. According to the Applicant's affidavit, the 1st Defendant subdivided her plot into four pieces thus creating plot numbers 18, 19, 20 and 21 and sold them to the 2nd and 3rd Defendants without her knowledge, that the 3rd Defendant has now intruded into her land and has put up temporary residential structures and that the 2nd Defendant and his agents destroyed the house that she was building on the suit property.
4. The Applicant deponed that she has been unable to secure the attendance of the surveyor before the Officer Commanding Station, Mpeketoni, because he is working jointly with the Defendants and that she is unable to enjoy her property peacefully without any interference.
5. The Applicant finally deponed that even if it is true that the 2nd Defendant bought plot number 21, the same was done two years after she had purchased plot number 18 and 19 which the 1st Defendant sub-divided into four pieces thus creating plot numbers 21 and 20, in addition to plot

- numbers 18 and 19; that the house constructed by the 3rd Defendant is an illegality and that the two survey maps were prepared on the 1st Defendant's instructions because of the 1st Defendant's greed for money.
6. The Respondents, who were not represented, filed their joint Defence, list of documents and Replying Affidavit on 29th April, 2013. The 2nd Defendant swore the Replying Affidavit on his own behalf and on behalf of the 1st and 3rd Defendants.
 7. The 2nd Defendant deponed that he bought plot number 21 from the 1st Defendant on 7th April, 2009 and he has since been cultivating and planting maize on the plot. The 3rd Defendant, on the other hand, bought her plot around the same time and she has constructed a semi-permanent structure on it.
 8. The parties appeared before me on 13th May, 2013 and made oral submissions.
 9. Mr. Omwancha, counsel for the Applicant submitted that by way of an agreement dated 10th January 2007, the Applicant bought plot numbers 18 and 19 measuring 50 X 100 feet each for Kshs.96,000.
 10. According to counsel, the 1st Defendant re-subdivided plot numbers 18 and 19. Plot number 18 was split into two and so was plot number 19 thus creating plot numbers 18, 19, 20 and 21. Plot number 21 was sold to the 2nd Defendant and plot number 20 was sold to the 3rd Defendant.
 11. The Applicant's counsel further submitted that the 2nd Defendant is the area chief and has on numerous occasions used his office to mobilize people to demolish the Plaintiff's construction; that his client intends to develop her land and that she should be protected under Article 40 of the Constitution.
 12. Counsel finally submitted that the 2nd Defendant is cultivating the suit property and wasting it; that the 3rd Defendant has constructed a house on plot number 20 and that the Defendants do not say how the new plots were created.
 13. The 2nd Defendant submitted that he has been the area chief for 16 years; that plot number 613 belongs to the 1st Defendant who sub-divided it in the year 2000 to create plots measuring 50 x 100 feet.
 14. The 2nd Defendant further submitted the first survey plan for the subdivision of plot number 613 was prepared in 2001 by which time the Plaintiff had not bought the suit property. However, it was discovered that the survey plan did not provide for a road and on the advice of the surveyor, a second plan was prepared in 2003.
 15. The 2nd Defendant finally submitted that the Plaintiff has two plots measuring 50 X 100 feet each and that the Defendants' plots abuts the Plaintiff's two plots.
 16. It is not in dispute that the 1st Defendant is the registered owner of parcel of land number Lamu/Lake Kenyatta 1/638 measuring 4.3 Ha. It is also not in dispute that the said land was subdivided by the 1st Defendant.
 17. By way of an agreement dated 10th January 2007, the 1st Defendant sold to the Plaintiff plot numbers 18 and 19 each measuring 50 feet by 100 feet for a total sum of Kshs.96,000.
 18. Two survey plans were drawn on scale showing the subdivision of Lamu/Lake Kenyatta 638. The first plan, which is unsigned and prepared by P.G Waweru is dated 22nd March 2001. It shows the creation of plot numbers 19, 18 and 17 amongst others each measuring 0.045 Ha, which, according to the parties is equivalent to 50 feet by 100 feet.
 19. The second map, also drawn on scale and prepared by the same surveyor, P.G Waweru, and dated 22nd March, 2003 shows the existences of plot numbers 16, 17, 18, 19, 20 and 21 each measuring 0.045 Ha, which is equivalent to 50 feet by 100 feet.
 20. It is the Plaintiff's case that the plots he bought are the one registered in the first map. The Plaintiff's Advocate submitted that though the measurements of plot number 18 and 19 in both maps are the same, that is 50 feet by 100 feet, the shape of the two parcels of land and the neighbouring parcels of land are different from what she bought.
 21. The question that arises is this, which plots did the plaintiff buy? Is it the plots shown in the survey plan of 2001 or the ones in the survey plan of 2003. Both survey plans indicate the existence of plot numbers 18 and 19 with the same measurements save for the shape of the land. The 2nd and 3rd Defendant bought plot numbers 21 and 20 respectively pursuant to the survey plan

- of the year 2003.
- 22.The Sale Agreement which the Plaintiff is relying on does not state whether the 1st Defendant sold to the Plaintiff the two plots as per the survey plan of the year 2001 or the one for the year 2003.
 - 23.The Sale Agreement was entered into in the year 2007, way after the surveyor had prepared the second survey plan. The Sale Agreement should therefore have abided by the contents of the second survey plan and not the first one which had been superseded by the second one. If the Plaintiff had checked with the surveyor who had prepared both plans, she would have been informed of the existence of the second survey plan.
 - 24.I cannot fault the 2nd and 3rd Defendants for having purchased plot numbers 21 and 20 respectively at this stage of the hearing. According to the documents before me, they did so by relying on the second survey plan which the Plaintiff should have been aware of before she purchased the suit property.
 - 25.It is not enough for the Plaintiff to state that she was not aware of the plan that was prepared in 2003 when she indeed purchased the property in 2007. In any event, the Plaintiff, prima facie, has not lost any land other than the change in the shape of the said land, which change can only be explained by the surveyor who undertook the two surveys. It is therefore not true, prima facie, that his plots were re-subdivided and sold to the 2nd and 3rd Defendants.
 - 26.In the circumstances, and based on the material before me, I find and hold that the Plaintiff has not established a prima facie case with chances of success.
 - 27.The Plaintiff has also not shown the irreparable damage that she is likely to suffer considering that she has not lost any land in terms of the acreage to the Defendants or at all.
 - 28.The 3rd Defendant has already constructed a house on plot number 21. The injunctive order as prayed for by the Plaintiff will in effect evict her yet she purchased the suit property from the 1st Defendant on the basis of a survey plan prepared in 2003. It will be unjust for this court to evict the 2nd and 3rd Defendants from their plots in the circumstances of this case at an interlocutory stage.
 - 29.For the reasons given above, I dismiss the Plaintiff's Application dated 8th April, 2013 with costs.

Dated and Delivered in Malindi this 27th day of June, 2013.

O.A. Angote

Judge