



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**Land Case No. 94 Of 2013**

**1. Jackson Friday Mwafuga Mwaumba**  
**2. Constance Mboli Mwakio.....Plaintiffs**

**=Versus=**

**1. Abdulrahman Abdalla Kheri**  
**2. Omar Abdalla Kheri**  
**3. Hamisi Mkono.....Defendants**

**R U L I N G**

1. The Application before me by the Plaintiffs is dated 31<sup>st</sup> May, 2013. In the Application, the Plaintiffs/Applicants are seeking for the following orders:
  - a. ***THAT this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, their servants, workmen, agents, officers, heirs, personal representatives or otherwise howsoever from dealing with by purporting to accessing, remaining onto, getting ingress into or trespassing into the Plaintiffs land namely Title NO.KILIFI/MTWAPA/504 measuring approximately Naught Decimal Two Naught (0.20) hectares or from erecting or causing to be erected any structures thereon whether temporary or permanent in nature or from in any way interfering with the Plaintiffs' peaceful possession, developments, constructions and enjoyment of the said suit land pending the hearing and determination of the suit.***
  - b. ***That the Kilifi County Officer Commanding Stations and the O.C.S Mtwapa Police Station/Post do maintain the peace at the suit property when the Plaintiffs shall be carrying out enjoyment of proprietary rights by fencing and causing constructions thereon.***
2. The Application is predicated on the grounds that the Plaintiffs are the title holders of land known as Kilifi/Mtwapa/504 measuring approximately 0.20 hectares; that the Defendants have threatened the Plaintiff with physical harm including destroying any development intended to be lawfully put up by the Plaintiffs and that the plaintiffs' proprietary rights should be protected by a court order.
3. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that him, together with the 2<sup>nd</sup> Plaintiff are the lawful owners of Kilifi/Mtwapa/504 having purchased it for valuable consideration from the then registered owner Jaswant Kaur Sohal and Mohinder Sign Sohal.

4. The 1<sup>st</sup> Plaintiff further deponed that during his visits to the suit land, the Defendants who are neighbours have threatened him with harm; that he is entitled to all proprietary rights subject to the overriding interests and that injunctive orders should issue against the Defendants to protect and preserve the right to private property as enshrined in the Constitution.
5. The 1<sup>st</sup> Respondent filed his Replying Affidavit on 24<sup>th</sup> June, 2013 on his own behalf and on behalf of the 3<sup>rd</sup> Defendant/Respondent.
6. The 1<sup>st</sup> Respondent deponed that he is one of the sons and beneficiaries of the Estate of the late Abdalla Kheri; that there is a court order in Mombasa Succession Cause NO. 157 of 1990 appointing the Public Trustee as the Administrator of the Estate of the late Abdalla Kheri.
7. According to the 1<sup>st</sup> Respondent, a restriction was placed and registered in Kilifi land office on 27<sup>th</sup> June, 1997 on all the properties belonging to the deceased; that, that order has never been lifted and that the Public Trustee has never effected the transfer of Kilifi/Mtwapa/504.
8. The 1<sup>st</sup> Respondent finally deponed that there is a pending suit being Mombasa HCCC No. 164 of 1999 concerning the suit property which has not been determined and that the Applicants are not bona fide purchasers for value.
9. Mr. Mogaka, counsel for the Plaintiffs and Ms Okumu, counsel for the Defendants appeared before me on 24<sup>th</sup> June, 2013 and made oral submissions.
10. Mr. Mogaka, counsel for the Plaintiffs/Applicants submitted that the Plaintiffs are the registered owners of the suit property.
11. According to counsel, the copy of the green card annexed on the Respondents' Affidavit re-affirms that the Plaintiffs are the registered owners of the suit property.
12. The Applicants' counsel submitted that entry number 5 on the green card shows that there was a restriction against the suit property which was later on raised as indicated at entry number 6.
13. Counsel submitted that the Plaintiffs are not parties in HCCC No.164 of 1999 neither is the person who sold the suit property to the Plaintiffs; that the alleged restriction in favour of the Assistant Administrator General dated 27<sup>th</sup> June 1997 was never registered against the title and that the Plaintiffs are purchasers for value without notice and they are entitled to the injunctive orders.
14. Counsel finally submitted that the first owner of the land was the Settlement Fund Trustee and the land never belonged to the Estate of the late Abdalla Kheri.
15. Ms Okumu, counsel for the Defendants/Respondents submitted that the suit property belongs to the Estate of the late Abdalla Kheri and that is why there was a restriction that was registered; that the Restriction was issued in respect to succession cause number 157 of 1990 and that upon perusal of succession cause number 157 of 1990, she did not come across the order lifting the Restriction as shown in entry number 6 of the green card.
16. Counsel further submitted that any dealing in the suit property after 26<sup>th</sup> February 1992 was illegal and that the Plaintiffs should not interfere with the Estate of the deceased pursuant to the provisions of section 45 of the Succession Act.
17. Counsel finally submitted that the Succession Cause has not been finalised and that the Public Trustee has never transferred the suit property to the Plaintiff or at all.
18. The Plaintiffs have annexed on their Supporting Affidavit a Title Deed showing that they were registered as the proprietors of Kilifi/Mtwapa/504 on 19<sup>th</sup> May, 2011.
19. The Plaintiffs have also annexed an Agreement of Sale dated 7<sup>th</sup> March 2011 between themselves and Jaswant Kaur Sohal and Mohinder Sign Sohal for the sale of the suit property at a consideration of Kshs.5,800,000/-.
20. The Respondents claim on the other hand is that Kilifi/Mtwapa/504 (the suit property) is one of the properties belonging to the Estate of the late Abdalla Kheri which is being administered by the Public Trustee, and that the Public Trustee has never disposed of the suit property. The Public Trustee was appointed by the court to administer the Estate of Abdalla Kheri in Mombasa Succession Cause NO. 157 of 1990. The Respondents are relying on the provisions of section 45 of the Law of Succession Act, Cap 106 to defeat the Plaintiffs claim over the suit property.
21. Section 45 of the Law of Succession provides that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.
22. The Respondents have annexed on their Replying Affidavit a copy of the Plaint in Mombasa HCCC NO.164 of 1999. The Respondents have also annexed the Grant of Letters of

- Administration Intestate that was issued to the Public Trustee on 11<sup>th</sup> October 1996 in Mombasa HCCC No.157 of 1990.
23. According to the Plaintiff in HCCC No.164 of 1999, the Public Trustee sued Mustafa Abdalla Kheri on the ground the said Mustafa Abdalla Kheri was the Administrator of the Estate of Abdalla Kheri until 24<sup>th</sup> April 1995 when the court revoked the Grant of Letters of Administration and appointed the Public Trustee instead.
  24. It was alleged in the said Plaintiff that the said Mustafa Abdalla disposed of some of the assets of the Estate of the deceased before the confirmation of the grant as required by the law. One of the properties which he is alleged to have sold is the suit property herein.
  25. The Plaintiff itemised the deceased properties, including Kilifi/Mtwapa/504 measuring 0.70 Ha. According to the Plaintiff, Mustafa Abdalla Kheri without the authority of the court sold Kilifi/Mtwapa/504 to one Joseph Kahu Stephen on 10<sup>th</sup> December 1991. This sale, according to the Public Trustee, was done prior to the confirmation of the Grant of Letters of Administration to Mustafa Abdalla and was therefore null and void.
  26. The Public Trustee sought for a declaratory order that the sale and transfer of Kilifi/Mtwapa/504 be declared illegal, null and void.
  27. I was not informed of the position of that suit.
  28. The Respondents also annexed a copy of the register (the green card) in respect to plot number 448 and 504.
  29. According to the copy of the register (the green card), Kilifi/Mtwapa/448 was opened on 1<sup>st</sup> March 1991 on which date the Settlement Fund Trustee was registered as the proprietor of parcel of land number 448 measuring 5.5 Ha.
  30. In September 1991, parcel number 448 was transferred to Mustafa Abdalla Heri. The register does not indicate the circumstances under which the land was transferred from the Settlement Fund Trustees to the said Mustafa Abdalla Heri.
  31. The green card does not also show that the property was being transferred to the said Mustafa Abdalla Heri as the Administrator of the Estate of the late Abdalla Kheri, which could have been the case.
  32. On 26<sup>th</sup> November 1991, the title deed in respect to parcel number 448 was closed upon sub-division. New numbers arose from these sub-divisions, to wit, parcel numbers 497, 498, 499, 500, 501, 502, 503 and 504.
  33. The register for Kilifi/Mtwapa/504 was opened on 26<sup>th</sup> November 1991 and Mustafa Abdalla Heri was registered as the proprietor on the same day. Mustafa Abdalla Heri then transferred the suit property to Omar Abdalla Kheri (his brother) on 10<sup>th</sup> December 1991. Again, the register does not show whether the transfer was by way of transmission or it was for valuable consideration.
  34. On 10<sup>th</sup> December 1991, Omar Abdalla Kheri transferred the suit property to Joseph Kehu Stephen for Kshs.30,000/-.
  35. A Restriction was registered on 26<sup>th</sup> February 1992 against the suit property “until civil suit number P& A 157 of 1990 is finalised.” On 30<sup>th</sup> May 1994, a raising order dated 28<sup>th</sup> February 1994 was registered thus lifting the Restriction.
  36. What is interesting about these two entries, that is the “**Restriction**” and the “**Raising**” orders is that the Registrar did not endorse them.
  37. The Respondents' advocate submitted that she perused succession cause number 157 of 1990 and did not find the order “Raising” the Restriction. However, counsel did not inform the court the position of that suit considering that the Restriction of 26<sup>th</sup> February 1992 was to await the finalization of Succession Cause number 157 of 1990.
  38. In the absence of any explanation by the Respondents on the position of Mombasa Succession Cause number 157 of 1990, and the fact that the court appointed a Public Trustee to manage the Estate of Abdalla Kheri on 11<sup>th</sup> October 1996, it can only be assumed that the said suit was finalised. Whether the raising order dated 25<sup>th</sup> February 1994 was issued by the court or not is an issue that can only be determined at trial. Indeed, the Respondents counsel should have annexed the copies of the proceedings in H.C.C.C No. 157 of 1990 to show that such an order was never made at all.
  39. However, the documents annexed by the Respondents themselves indicated that there was such an

- order and consequently, the suit property was transferred to Jaswant Kaur Sohal and Mohinder Sign Sohal on 8<sup>th</sup> July 1997 who subsequently transferred it to the Plaintiffs.
40. The Plaintiffs cannot at this stage be faulted for purchasing the suit property in view of the entries in the register.
41. Furthermore, the copies of the registers for parcel number 448 and 504 do not show that the suit property belonged to the late Abdalla Kheri.
42. It may be true that the suit property was transferred to Mustafa Abdalla Heri as the Administrator of the Estate of Abdalla Kheri. However, that is not apparent on the face of the register or the certificate of confirmation.
43. In the circumstances I cannot, at this stage make a finding that the suit property formed part of the Estate of the late Abdalla Kheri. No material has been placed before me to prove that fact.
44. It is also not clear what the Public Trustee has been doing in terms of administering the Estate of Abdalla since 1996 when he was appointed by the Court, and why he did not sue Jaswant Kaur Sohal and Mohinder Sign Sohal when he filed his suit in 1999. By the time the suit was being filed in 1999, the suit property had already passed to the Jaswant Kaur Sohal and Mohinder Sign Sohal.
45. For the reasons I have given above, I find and hold that the Plaintiffs have established a prima facie case with chances of success and unless the Respondents are restrained, the Plaintiffs are likely to suffer irreparable damage that will not be compensated by way of damages because they cannot take possession of the suit property.
46. I will therefore allow the Plaintiff's Application dated 31<sup>st</sup> May 2013 in terms of prayer number 4 and 5.

Dated and Delivered in Malindi this 31<sup>st</sup> day of **July**, 2013

**O. A. Angote**

**Judge**