



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

**AT MALINDI**

**CIVIL CASE NO. 169 OF 2011**

**CAROLINE MUMBUA MALINDA.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**1. JAMES KAI MWANGUDZA**

**2. THOYA SHOMO**

**3. LUCY NDAGO**

**4. STEPHEN DECHE WASHE**

**5. CHARO KAMTU BAYA**

**6. RODGERS RAMA CHANGAWA**

**7. KAHINDI KARISA**

**KATANA.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

1. The Plaintiff moved this court by way of a Plaint dated 28<sup>th</sup> October, 2011 claiming for vacant possession of the suit property. The Plaintiff also prays for a mandatory order of injunction compelling the Defendants to give vacant possession of parcel of land number Kilifi/Kijipwa/1338 to 1356.
2. In the meantime, the Plaintiff filed an Application seeking for injunctive orders. The Application was heard by Lady Justice Meoli and she delivered her Ruling on 26<sup>th</sup> March, 2012. The judge dismissed the Application.
3. The Plaintiff/Applicant has now filed an Application dated 16<sup>th</sup> April, 2013 seeking for the following orders:
  - a. **THAT this Honourable Court be pleased to make an order that the Government Surveyor – Kilifi, do a re-survey at the applicant's cost of the suit land for purposes of establishing boundaries and the report thereof be filed in this court within twenty one (21) days from the date of service of the order;**
  - b. **THAT costs of this application be provided for.**
4. The Plaintiff/Applicant is relying on two main grounds, firstly that the Plaintiff is the registered

- owner of the suit land and secondly that the Defendants are trespassers to the suit land without any colour of right or lawful excuse.
5. The Plaintiff/Applicant has deponed that to enable the court to deal with the real issue in controversy, it is necessary that a re-survey is done in order to establish the actual boundaries and the extent of the Defendants' encroachment on his land.
  6. The Respondents did not file a Replying Affidavit, Grounds of Opposition or Notice of Preliminary Objection as required under the provisions of Order 51 Rule 14 (1) of the Civil Procedure Rules, 2010.
  7. Mr. Obaga, counsel for the Applicant and Mr. Ole Kina counsel for the Respondents made oral submissions. Mr. Ole Kina submitted only on matters of law. I have considered the submissions by the two learned counsels.
  8. The Plaintiff has pleaded in his Complaint that he is the registered owner of Kilifi/Kijipwa/361 measuring approximately 1.90 Hectares. The said parcel of land was later sub-divided to create 19 parcels of land.
  9. The Plaintiff has further pleaded in his Complaint that on diverse dates from May 2009, the Defendants unlawfully entered the suit land.
  10. From the above averments, the Plaintiff was aware of the extent of her land. She could not have sued the Defendants before establishing that they were indeed trespassers on her parcel of land which must have been surveyed before the title document was issued to her.
  11. It is an abuse of the court process for the Plaintiff to now seek for the orders of this court directed to the Government Surveyor to re-survey what she considers her land. No basis has been laid by the Plaintiff for such an order.
  12. It is not for this court to assist the Plaintiff in collecting evidence to prove her case. What the Plaintiff is seeking in her present application is what she should have established before filing the present suit.
  13. For the above reasons, I dismiss the Plaintiff's Application dated 16<sup>th</sup> April 2013 with costs.

Dated and Delivered in Malindi this 25<sup>th</sup> day of July, 2013

**O. A. Angote**

**Judge**