



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 23 OF 2013

KAHINDI KAMBI MBITA.....PLAINTIFF

=VERSUS=

POLA CHARO KANIKI.....DEFENDANT

RULING

1. The two Applications before me are dated 21st February, 2013 and 19th March, 2013 by the Plaintiff and the Defendant respectively.
2. Both Applications are seeking for injunctive orders. The Plaintiff on the one hand is seeking to restrain the Defendant from interfering in any manner with the parcel of land known as Kilifi/Mtondia/63 pending the hearing of the suit, while the Defendant on the other hand is seeking to restrain the Plaintiff from interfering with the same land.
3. According to the Supporting Affidavit of the Plaintiff sworn on 20th February 2013, the Plaintiff is the administrator of the Estate of Kithemba Mwaduna who was the beneficial owner of Kilifi/Mtondia/63 which was later sub-divided by the Defendant into plots number 1894 and 1893. Portion number 1894 was sold by the Defendant after she registered the property in her name.
4. The Plaintiff has deponed that the late Kithembe Mwaduna had two wives, Kadzo Fondo, being the first wife and Kadii Thethe being the second wife.
5. According to the Plaintiff, the Defendant is the only child of Kadii Thethe, the second wife of the late Kithembe Mwaduna. The first wife had many children.
6. It is the Plaintiff's deposition that the Defendant, the daughter of the late Kithembe Mwaduna with the second wife sold one acre of the suit property, being part of the Estate of the deceased and was paid Kshs.3,000,000; that all the beneficiaries of the Estate of Kithembe Mwaduna have equal rights and equal share in the Estate and finally that the Defendant is not staying on the suit property and therefore the injunctive orders being sought against her will not be prejudicial to her.
7. The Respondent filed her Replying Affidavit on 6th March, 2013 in which she deponed that she is the daughter of Kithembe Mwaduna, the deceased, who had two wives.
8. The Respondent admitted that the suit property was owned by the late Kithembe Mwaduna who lived on it with his family and children before he met his death in 1970; that the family of the first wife Kadzo Fondo, moved away from the suit property. She with her mother remained on the property. Later on, one Moses Mike Mukolwe attempted to grab the suit property during the demarcation and adjudication of Kilifi Mtondia area.
9. According to the Defendant, her, together with her mother, took the dispute to the Bahari Land Disputes Tribunal where the Tribunal decided that the suit land belonged to her father, the late Kithembe Mwaduna. After the decision of the Tribunal, the suit property was registered in her

- name. She sub-divided the land into two portions being parcel of land number Kilifi/Mtondia/1893 and 1894. The Defendant admits that she sold plot number 1984.
10. The Respondent has finally deponed that she used a lot of resources to defend Malindi HCCC NO. 54 of 2007 and that the Plaintiff and other beneficiaries of the estate of the late Kithembe Mwaduna did not contribute towards the defence of the suit though they were aware of the same; that after the suit was decided she obtained a discharge of charge and paid the requisite stamp duty and that even though the other beneficiaries are also entitled to the suit property their share cannot be equal to hers.
 11. The Respondent deponed that it is true she intends to dispose of the suit land and that she should be allowed to decide at will the amount she should distribute to the other beneficiaries.
 12. The Respondent has admitted in her affidavit that the suit property formed part of the Estate of the late Kithembe Mwaduna and that she has disposed of part of the Estate of the deceased being parcel of land number Kilifi/Mtondia/1894. She has admitted that she intends to dispose of the remaining portion being Kilifi/Mtondia/1893, the suit property.
 13. It may be true that Kilifi/Mtondia/1893 was registered in the name of the Defendant on 4th September 2012. However, having admitted that the land initially belonged to her late father, the question as to how the land was registered in her name and whether she is holding the land in question in trust for the rest of the family can only be determined at the full trial. If the court finds that the suit property formed part of the Estate of the late Kithembe Mwaduna, then the Plaintiff and the other beneficiaries of the Estate of the deceased will be entitled to a share of the suit property.
 14. It is a trite law that the assets of a deceased person cannot be intermeddled with until one gets the letters of administration and the said letters of administration are confirmed. It is during the confirmation of the Grant of the Letters of Administration that the Defendant may raise the issue of the proportion that she thinks she is entitled to. In any event, she has already disposed of part of the Estate, albeit without the legal authority to do so. I therefore do not understand why she is keen to dispose of the remaining portion of the Estate to the detriment of the other beneficiaries of the Estate of the late Kithembe Mwaduna.
 15. For the above reasons, I find and hold that the Plaintiff has established a prima facie with chances of success. The Plaintiff and the other beneficiaries of the late Kithembe Mwaduna are likely to suffer irreparable loss in the event that the Defendant sells the suit property. The suit property seems to be the only remaining asset of the late Kithembe Mwaduna.
 16. Having found that the Plaintiff has established a prima facie case with chances of success, I will not consider the Defendant's Application dated 19th March 2013 which is also seeking for injunctive orders as against the Plaintiff. The Application is based on the same grounds that the Defendant has relied on in opposition to the Plaintiff's claim.
 17. In any event, the Defendant has not filed a counter-claim as against the Plaintiff. In that respect, this court cannot entertain an Application for injunction. There is no suit as against the Plaintiff claiming for a permanent injunction.
 18. In the circumstances and for the reasons given above, I allow the Plaintiff's Application dated 20th February 2013 with costs and dismiss the Defendant's Application dated 19th March 2013 with costs.

Dated and delivered in Malindi this 11th day of July, 2013.

O. A. Angote

Judge