



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
HCCC NO. 66 OF 2012

1. KAHINDI KARISA MUDZOMBA

2. KAZUNGU KARISA MUDZOMBA.....PLAINTIFFS

=VERSUS=

1. KADZO CHARO

2. NYEVU CHARO

3. BAHATI CHARO

4. SHAURI CHARO

5. ATHUMA BARUA NYAMBU.....DEFENDANTS

RULING

1. What is before me is the Plaintiff's Notice of Motion dated 20th December 2012 seeking for the following orders:
 - a. *THAT, this Application be certified as urgent and service be dispensed with in the 1st instance.*
 - b. *THAT, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants, their agents, servants and employees from trespassing, entering, clearing, digging hole, building, leasing, renting and or in any manner dealing with the suit land plot no. KLL 583 pending the interpartes hearing of this application.*
2. The Application is supported by the Affidavit of Kahindi Karisa Mudzomba who has deponed that on 10th May 2003, him, together with the 2nd Plaintiff bought a parcel of land at Kalolo area within Kilifi County from Dama Kenga Kulumba. The Plaintiffs paid Kshs.100,000/- for the said parcel of land.
3. After purchasing the suit property, the Applicants have deponed that they paid the requisite fees to Kalolo Kibaoni Baya Magozi upgrading project and obtained a certificate of clearance.
4. On 20th November 2012, the 1st to 4th Defendants who are the daughter of Dama Kenga

- unlawfully and illegally sold the suit property to the 5th Defendant while aware that the same land had been sold to the Plaintiffs.
5. The Plaintiff finally deponed that the 1st to 4th Defendants, being children of the deceased did not have any capacity to resale the suit property because the land was not part of the Estate of the deceased and that the 5th Defendant has trespassed on the suit land and removed the Plaintiff's fence.
 6. The Respondents filed their Grounds of Opposition and Replying Affidavit on 4th January 2013 and 17th January 2013 respectively.
 7. The 1st, 2nd, and 3rd Respondents deponed that they are children of the late Dama Kenga Kulumba who owned a plot within Kilifi Township known as KKB 583.
 8. The Respondents further stated in the Affidavit that the family members of the late Dama Kenga Kulumba were not aware that the Plaintiff had purchased the land from their mother. According to the Respondents, their mother was in a coma as at the time the alleged sale occurred.
 9. It was further deponed that the village elder never signed the purported agreement; that the Respondents' mother always signed using a thumb print which was not the case herein; that Garama Dari was the village elder and could not have been the co-owner of the suit property and that the husband or children of the deceased were not called to witness the sale of the land to the Plaintiffs.
 10. The Respondents finally deponed that the receipts which have been annexed on the Plaintiffs affidavits do not show which plot was sold; that Kalolo Kibaoni upgrading project does not have any approvals from the Ministry of Lands with the authority to collect money and that the suit property belongs to the 5th Defendant who bought it from the family members.
 11. The Defendants through their advocate filed written submissions on 8th April 2013 while the Plaintiffs Advocate submitted orally. The submissions were a reinstatement of the depositions in the affidavit which I have summarised above.
 12. The Plaintiffs have annexed on their supporting affidavit an Agreement dated 10th May 2003. The said Agreement shows the vendor as Dama Kenga Kulumba/Garama Deri and it is signed by Dama kenga and the two Plaintiffs.
 13. The Sale Agreement dated 10th May 2003 further shows that the late Dama Kenga Kulumba signed it by way of writing her first name and also imposed her finger print. The Agreement was witnessed by five people, including the sub-chief of the area.
 14. I will not consider, for purpose of this Application, the probative value of the receipts from Kalolo Kibaoni Bayamagonzi upgrading project because their standing in the allocation of land was not established by the Plaintiff. It is not clear to me on whose authority the said group collects money from citizens and the purpose of the money they collect. It would appear that this is one of the many groups in the country menacingly collecting money from people for the benefit of a few individuals. Such uncontrolled activities of collecting money should be investigated by the relevant agencies and appropriate recommendations made.
 15. I will now revert to the Agreement of sale dated 10th May 2003 between the Plaintiff and the Respondents' mother.
 16. A contract of sale of an estate in land, just like any other contract, must comply with the basic requirements for a contract not under seal.
 17. However, unlike contract for the sale of other chattels, contract for sale of land must be in

writing. Section 3 (3) of the Contract Act, cap 23 states that a Memorandum of a Disposition in land must be in writing, and must be signed by all parties thereto and the signature of each party signing must be attested by a witness.

18. The Act does not state the person who must witness the signing of the Agreement.
19. As I have stated above, the Agreement of sale dated 10th May 2003 was in writing and was signed by the Respondent mother by way of affixing a thumb print and her name. It was also signed by the two plaintiffs and the signatures were witnessed by five people.
20. Although the Agreement does not show the portion of land that was being sold, the Respondents have not stated that their late mother had other parcels of land other than the suit property. Therefore the only conclusion I can arrive at is that the Sale Agreement of 10th May 2003 was in respect to the suit property.
21. The 1st to 4th Respondents have annexed on the Replying Affidavit a sale agreement between themselves and the 5th Respondent dated 20th December 2012. It would appear that the Sale Agreement was reduced into writing after the Plaintiffs issued a demand letter dated 3rd December 2012.
22. The said Sale Agreement refer to the four Respondents as the Administrators of the Estate of the late Dama Kenga Kulumba. However, the 1st to 4th Respondents have not annexed the letters of administration for the Estate of their late mother.
23. In the absence of the letter of administration for the Estate of Dama Kenga Kulumbu, it would follow that the 1st to 4th Respondents did not have the legal capacity to sale plot number 583. Section 45 of the Law of Succession Act prohibits any person from inter-meddling in the Estate of the deceased.
24. I have also noted that all the receipts being relied on by the Respondents in respect to the purported sale were issued by the Town Council of Kilifi after this suit had been filed. The receipts, in my view were obtained with the sole purpose of defeating the Plaintiff's claim.
25. In the circumstances, I find that the Plaintiffs have established a prima facie case with chances of success. I also find that unless the injunctive orders are issued as prayed, the Plaintiffs will suffer irreparable damage which cannot be compensated by way of damages. In any event, the Plaintiffs took possession of the land and fenced it way before the 1st to 4th Respondents purported to sale the land to the 5th Respondent. The balance of convenience therefore tilts in favour of the Plaintiffs.
26. For the reasons I have given above, I allow the Plaintiff's Application dated 20th December 2012 as prayed.

Dated and Delivered in Malindi this **11th** day of **July 2013**.

O. A. ANGOTE

JUDGE