



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 56 OF 2013

1. RODGERS KABILA MTSONGA

2. SHADRACK NYINGE MTSONGA.....PLAINTIFFS/APPLICANTS

=VERSUS=

1. JAPHET MWANGEMI

2. PATRICK MWAROME MWANGEMI.....DEFENDANTS/RESPONDENTS

R U L I N G

1. What is before me is the Plaintiff's Application dated 4th April 2013 seeking for the following orders;
 - a. **THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants either by themselves, their agents, assigns, employees, servants and/or any one claiming under them from alienating, selling, disposing off, constructing or in any manner interfering with the Plaintiffs'/Applicant's land situated at Kidutani Chonyi measuring about 6 acres or carrying on and building construction, cultivating, improvements and/or development activities on the purported land pending the inter partes hearing of this Application and further pending the hearing and determination of the suit herein.**
 - b. **THAT the costs of this Application be provided for.**
2. The Application is supported by the affidavit of the 1st Plaintiff who has deponed that him, together with the 2nd Plaintiff are the co-administrators of the Estate of Michael Mutsonga Lewa who died on 27th October 2000. Prior to his death, he had lived in exclusive possession of the plot located at Kidutani Chonyi measuring about 6 acres.
3. It is the Applicants' deposition that in 1998, before the demise of their father, Michael Mutsonga Lewa, there was a land dispute between their father and Japhet Mwangemi, the 1st Defendant being Kilifi SRM Land Dispute Case Number 6 of 1998.
4. The Applicant has further deponed that upon determination of the land dispute case, the land was awarded to their late father and Japhet Mwangemi was ordered to vacate the land with all the people claiming under him, including the 2nd Defendant who is the 1st Defendant's grandson; that the Defendants vacated the suit property in compliance with the order of the court and that the Defendants have once again trespassed on the suit property and have chased away the Plaintiffs' relatives.

5. The Defendants filed their Notice of Preliminary Objection and Replying Affidavit on 26th April 2013 and 29th April 2013 respectively.
6. The 1st Defendant deponed that the original owner of the disputed land is the late Mwajuo Jumbale who is his father.
7. His late father, Mwajuo Jumbale, had two sons, himself and Japhet Mwangemi (deceased). The said Japhet Mwangemi, it was deponed, took charge of the disputed land on his own behalf and on behalf of the beneficiaries of the late Mwajuo Jumbale and that his brother's Estate has never been administered and in the circumstances he is not the administrator and cannot be sued in respect of the deceased's estate.
8. According to the 1st Defendant, the award in the Land Dispute Tribunal case no. 177 of 1986 in respect to the disputed parcel of land was in favour of the late Chishega Mwajuo Jumbale; that the said Mwajuo Jumbale (deceased) had sold the suit property to the great grandfather of Rodgers Kabila (1st Plaintiff) and that when Rodgers Kabila's great grand father died, Rodger's Kabila's grandfather, Lewa Chikanda, chased away Samson Chishenga Jumbale but reversed that decision when he was paid Kshs.280 by Samson Chishenga.
9. The 1st Defendant finally deponed that land case number 6 of 1998 was instituted in contravention of the orders of land case number 49 of 1986; that the estate of Chishenga Jumbale has never been administered; that he is over 90 years old and he has lived with his family on the suit property and that the Applicant should be ordered to deposit Kshs.100,000/= for the crop damage that shall be occasioned due to the prevailing injunction.
10. The advocates for the Plaintiffs and the Defendants agreed to dispose of the Application by way of written submissions which were filed on 12th June, 2013 and 25th June 2013 respectively.
11. The Plaintiffs' Advocate submitted that Japhet Mwangemi, the Respondent in Land Dispute Tribunal Case number 6 of 1998 has never preferred an appeal after the Tribunal found that the disputed land belonged to the Plaintiffs' father; that the Plaintiffs are strangers to Land Case Number 49 of 1986 between Lewa Chikanda and Mwangola Chidui and that the land in question does not belong to Samson Chishenga Jumbale neither does it belong to Mwazuo Jumbale as alleged by the Respondents.
12. The Defendants' Advocate submitted that the disputed land was leased to the lineage family of the Plaintiff for Kshs.280; that this amount was refunded and the land reversed to the original owners.
13. The Defendants' advocate further submitted that the Plaintiffs having brought this suit on behalf of the Estate of the late Michael Mtsonga Lewa, they ought to have obtained appropriate leave of the court to sue on behalf of the Estate of the deceased person; that the Defendants are beneficiaries of the Estate of Japhet Mwangemi Jumbale, the son of Samson Chishenga Jumbale and they are not the administrators of the said two persons.
14. The Defendants' Advocate finally deponed that there are four suits in respect to the suit property thus rendering this suit *res judicata* and that the suit is time burred.
15. The Plaintiff's Plaint seeks for a permanent injunction as against the Defendants and for a declaration that the suit property is the property of the late Michael Mutsonga Lewa in conformity with the findings of the panel of elders in land civil case number LDT 41/97 and the decree of Kilifi SRM Land Dispute Case NO. 6 of 1998.
16. The Applicants have annexed on the Supporting Affidavit a Limited Grant of Letters of Administration *ad colligenda bona*.
17. The limited grant is in respect of the Estate of Michael Mutsonga Lewa and it is limited for the purpose of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the Estate of the deceased. The Plaintiff therefore have the *locas standi* to bring this suit on behalf of the Estate of Michael Mutsonga Lewa.
18. The Plaintiffs have also annexed a copy of the award of the panel of elders in land case number LTD/41/97 of 17/6/1997 between Michael Mutsonga Lewa, the Plaintiffs' father and Japhet Mwangemi and sons. The Defendants have admitted in their pleadings that they are the beneficiaries of the Estate of Japhet Mwangemi Jumbale who was the son of the late Samson Chishenga Jumbale.
19. The Defendants' advocate has submitted that the Defendants are not the administrators of the late Japhet Mwangemi Jumbale and Samson Chishenga Jumbale and for that reason, they are non-suited.

20. I do not agree with the learned counsel's submissions on that issue. The Plaintiffs are entitled to sue any person whom they perceive to be intermeddling with the Estate of their late father, whether on their own behalf, or on behalf of other people. They need not wait until the Defendants obtain letters of administration as argued by counsel.
21. The Defendants cannot hide behind the fact that they have not obtained letters of administration in respect of their father's Estate while at the same time dealing with the property which, as alleged by the Plaintiffs belongs to the Plaintiffs' late father.
22. The award by the panel of elders in Land Civil Case NO. LTD/41/97 shows that the dispute between the Plaintiffs' father and the Defendants' father was heard on 17th June 1997 and both parties were present.
23. The panel of elders visited the site and inspected the disputed land.
24. The record by the panel of elders shows that although the Defendants' father was subsequently invited to testify, he declined to do so. The panel of elders consequently awarded the disputed parcel of land to the Plaintiff's father.
25. The award by the panel of elders was adopted by the Senior Resident Magistrate, Kilifi in RMCC No. 6 of 1998 on 6th October 1998.
26. The award by the panel of elders and the adoption of the said award by the Senior Resident Magistrate has never been appealed against.
27. The Defendants have referred this court to another dispute being land case number 177 of 1986 between Lewa Chikanda and Mwangolo Chidui.
28. After hearing the parties and their witnesses, the panel of elders in land case number 177 of 1986 unanimously agreed that the land in dispute belonged to "Chishanga Jumbale and it is only him who has the right to evict the Defendant." The said Chishanga Jumbale (Samson Chishanga Jumbale) is the Defendants' grandfather.
29. The Defendants have also annexed on their Replying Affidavit a Ruling by the Principal Magistrate in Civil Case Number L.A.4a of 1986 on which the Appellant challenged the decision of the panel of elders in case number 177 of 1986.
30. In the Ruling, the learned Principal Magistrate held as follows:

"The dispute has not been satisfactorily resolved as the said CHISHENGA JUMBALE was not a party to the dispute before the elders even though he was awarded the land. In the circumstances of this case and in the interest of justice, I have decided to refer this dispute back to the panel of elders to deal with the dispute that has now emerged between the plaintiff and CHISENGA JUMBALE who was awarded the said parcel of land. This dispute will be heard by a different District Officer."

31. It is obvious from the Ruling by the Magistrate that the decision of the panel of elders in case number 177 of 1986 awarding the Chisenga Jumbale, the Defendants' grandfather, the suit property was nullified by the court.
32. It is therefore not true, as submitted by the Defendants' Advocate, that the award of the panel of elders in land civil case number LTD/41/97 is in contravention of the award of the panel of elders in civil case number 177 of 1986. The award that still stands and, prima facie, recognized in law is the one in civil case number LTD/41/97 awarding the disputed parcel of land to Michael Mutsanga Lewa, the Plaintiffs' father.
33. Consequently, I find and hold that the Plaintiffs have established a prima facie case with chances of success. Indeed, the Plaintiffs are likely to suffer irreparable damages if the Defendants are allowed to intermeddle with the Estate of the Plaintiff's father, which act is unlawful.
34. For the reasons I have given above, I allow the Plaintiff's Application dated 4th April, 2013 as prayed.

Dated and Delivered in Malindi this 22nd day of **August**, 2013

O. A. Angote

Judge