



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**CIVIL CASE NO. 52 OF 2010**

**YAWA CHOME**

**SHUME.....PLAINTIFF**

**=VERSUS=**

**1. PHILOMEN MAKUPE YAWA.....1<sup>ST</sup>  
DEFENDANT**

**2. HUSSEIN ABDALLA SAID.....2<sup>ND</sup>  
DEFENDANT**

**3. THE DISTRICT LAND REGISTRAR KILIFI (thr' the Attorney General.....3<sup>RD</sup>  
DEFENDANT**

**R U L I N G**

**Introduction**

1. The Application before me is dated 18<sup>th</sup> May, 2010 and it seeks for the following orders:
  - a. **THAT the Defendants by themselves, their servants, agents be restrained from trespassing, farming and/or disposing and/or transferring and/or in any other manner dealing with plot number Kilifi/Ngerenyi/1075 pending the hearing and determination of the suit.**
  - b. **THAT the costs of this Application be in the cause.**

**The Plaintiff's case**

2. The Plaintiff/Applicant is the father to the 1<sup>st</sup> Defendant. According to the Plaintiff's deposition, he is married to four wives and the said wives have 23 issues inclusive of the 1<sup>st</sup> Defendant.
3. The Plaintiff has deponed that he acquired as an allottee of the government of Kenya through the Settlement Fund Trustees parcel of land number Kilifi/Ngerenyi/727 which measured 4.9 Hacters; that the plot is an agricultural parcel of land; that that is the land where his family has been tilling and that between 1967 and 2002, he paid all the monies due in respect to the property.
4. The Plaintiff has further deponed that after going through all the stages of acquisition of a title deed, the title deed was released in the year 2002; that the 1<sup>st</sup> Defendant informed him that the title deed which had been issued was in respect to the entire parcel of land but when he visited the chief to assist him in the sub-division of the land which he believed was 4.9 Hacters (approximately 12 acres), he was informed for the first time that the property was not 4.9 Hacters but 2.45 Hacters. The Plaintiff was informed that the 1<sup>st</sup> Defendant was claiming ownership of the

other half of the original plot without his consent.

5. The Plaintiff finally deponed that the 1<sup>st</sup> Defendant, after sub-dividing the original land sold the plot to the 2<sup>nd</sup> Defendant and that the registration of the suit property in the the 1<sup>st</sup> or 2<sup>nd</sup> Defendants' names was illegal and fraudulent.

### **Defendants' case**

6. The 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit and a Supplementary Affidavit on 12<sup>th</sup> July 2010 and 16<sup>th</sup> July 2013 respectively.
7. According to the 1<sup>st</sup> Defendant, the Plaintiff, who is his father is aged over 80 years and that it is the Plaintiff who was allotted the original parcel of land, to wit Kilifi/Ngerenyi/727; that he (the 1<sup>st</sup> Defendant) purchased the suit property from his uncle when he wanted to dispose of the property for Kshs.300,000 with the blessings of the Plaintiff and the entire family and that he is the one who guided the Plaintiff through the process for discharging the property and obtaining the title for the original plot.
8. It was the 1<sup>st</sup> Defendant's deposition that the original plot was sub-divided equally with the full knowledge and consent of the entire family; that the Plaintiff signed the necessary consents and that the families of the Plaintiff's four (4) wives have all been allocated their equal share in Kilifi/Mtwapa/1074 and built their houses.
9. The 1<sup>st</sup> Defendant finally deponed that the share of the land that was registered in his name originally belonged to the Plaintiff's brother whom he paid Kshs.300,000/-.
10. The 2<sup>nd</sup> Defendant filed an affidavit on 9<sup>th</sup> July 2010 and deponed that he purchased the portion of land known as Kilifi/Ngerenyi/1075 from the 1<sup>st</sup> Defendant as a bona fide purchaser without notice; that the title was issued in his favour and that the Plaintiff's application has no basis in law.
11. The parties filed written submissions in respect the Application which I have considered.

### **Analysis**

12. The Plaintiff's case, as I understand it, is that he was allocated parcel of land number Kilifi/Ngerenyi/727 and paid the requisite fees between the year 1967 and 2002. Indeed, the 1<sup>st</sup> Defendant, who is the Plaintiff's son, admitted in his Replying Affidavit that it is the Plaintiff who was allocated the original parcel of land number Kilifi/Ngerenyi/727.
13. The Plaintiff annexed on his Supporting Affidavit a letter dated 30<sup>th</sup> October 1996 by the District Land Adjudication and Settlement Officer addressed to the Director of Lands Adjudication and Settlement. In the letter, the Director was being requested to prepare legal documents in the name of the Plaintiff in respect to Plot number Kilifi/Ngerenyi/727.
14. The Plaintiff also annexed on his affidavit a copy of the official receipts showing that he paid Kshs.1,025 to the Settlement Fund Trustees before the land was discharged and transferred to him. The Plaintiff annexed other receipts showing the payments he made to the Settlement Fund Trustees before the property was discharged.
15. The Payment to the Settlement Fund Trustees by the Plaintiff clearly shows that parcel of land number Kilifi/Ngerenyi 727 was land within a settlement scheme and not Trust land.
16. If that is the position, then it follows that the identification of the Plaintiff as the "settler" by the officials from the settlement office in respect to the parcel of land can only be in respect to the Plaintiff and not the Plaintiff and his brothers. The ascertainment of claims by squatters in a settlement scheme is different from the ascertainment of rights of individuals over Trust land.
17. It is therefore strange that the Plaintiff having paid the requisite fees to the Settlement Fund Trustees, and the title having been issued in his name, the said parcel of land was subdivided into two portions without the consent of the Plaintiff.
18. It is even more strange that the title in respect to parcel of land number Kilifi/Ngerenyi /727 was issued in the name of the Plaintiff and on the same day, the land was sub-divided into parcel numbers 1074 and 1075 in the names of the Plaintiff and the 1<sup>st</sup> Defendant respectively.
19. The 1<sup>st</sup> Defendant's case is that the Plaintiff held the title for the original land in trust for his brother and that he bought the said half from the Plaintiff's brother, who is his uncle. The 1<sup>st</sup>

- Defendant annexed a sale agreement on his Supplementary Affidavit dated 7<sup>th</sup> February 2001.
20. The 1<sup>st</sup> Defendant has not shown by way of evidence how his uncle's interests in the land arose considering that the land in question was not Trust land and the said uncle did not make any payments to the Settlement Fund Trustees. The 1<sup>st</sup> Defendant has also not explained how his uncle sold the suit property on 7<sup>th</sup> February 2002 and yet the title for the original parcel of land was issued to the Plaintiff on 12<sup>th</sup> January 2001 and the titles for the sub-division issued on the same day, with the suit property being registered in his name. At what particular point did his uncle become the registered owner of one of the subdivisions to enable him sell the land to the 1<sup>st</sup> Defendant? There is even no evidence that the consent of the Land Control Board was obtained before the said sub-division was effected on the same day the original title was issued in the name of the Plaintiff.
21. In the circumstances, and for the reasons I have given, I find that the Plaintiff has, prima facie, established that he is the owner of the suit property and the purported sub-division of the original parcel of land was either done by mistake or it was fraudulently done by the 1<sup>st</sup> Defendant. The Plaintiff has shown that he has a prima facie case with chances of success.
22. Considering that the 1<sup>st</sup> Defendant has admitted having sold the suit property to the 2<sup>nd</sup> Defendant, the Plaintiff is likely to suffer irreparable damage that will not be compensated by costs if the Defendants are allowed to deal with the property further. The suit property is likely to get out of reach of the Plaintiff unless the injunctive order is issued by this court.
23. For the reasons I have given above, I allow the Plaintiff's Application dated 18<sup>th</sup> May 2010 as prayed.

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

**O. A. Angote**

**Judge**