



**REPUBLIC OF KENYA**  
**N THE HIGH COURT OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**LAND CASE NO. 107 OF 2013**

**MAZRUI LAND BOARD OF TRUSTEES.....PLAINTIFF/APPLICANT**

**=VERSUS=**

- 1. SAMUEL CHARO KITSAO**
- 2. KAZUNGU PILAU MATAZA (CHULO)**
- 3. MWANGOLO SANGA MWANGOLO**
- 4. PETER MUYE MWAVIRA.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

**Introduction**

1. What is before me is the Plaintiff's Notice of Motion dated 21<sup>st</sup> June 2013. The Application is seeking for a temporary injunction to restrain the Defendants by themselves, relatives, assigns, agents, employees, proxies or otherwise from encroaching upon or continuing to waste or in any manner interfering with parcel of land known as plot number 4236 Kilifi pending the hearing and determination.
2. The Defendants have opposed the Application.

**The Plaintiff's/Applicant's case**

3. One of the members of the Plaintiff/Applicant deponed that the Applicant is the sole registered proprietor of the parcel of land number 4236 Kilifi (the suit property) and consequently, the Plaintiff is entitled to the use of the said property.
4. According to the Applicant, the Defendants/Respondents have moved on the suit premises and have started to clear the vegetation and digging deep trenches therein in a bid to mint building blocks for sale; that the Respondents have on several occasions ignored calls to have them stop committing the said waste and as a result the Respondents have denied the Plaintiff the right to own the suit property.

**The Respondents case**

5. The 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit on his own behalf and on behalf of the other Respondents on 12<sup>th</sup> June 2013.
6. According to the Respondents, they have owned the suit property for over 40 years and that in 1991, the plots they occupy which are numbers 31, 466, 761, 760, 759, 603, 259, 402 and 324 Takaungu, situated at Vuma/Maweni Takaungu within Kilifi county.
7. It is the Respondents' deposition that they have not wrongfully occupied the suit property and that they have occupied the suit property in their own right as the beneficial owners thereof; that the plots indicated in the Application are owned by third parties and not the Defendants and that the Plaintiff has not stopped them occupying and using the suit property for over 40 years. Consequently, it was deponed, the Plaintiffs claim is time barred by virtue of the provisions of the Limitation of Actions Act, Cap 21.

### **Plaintiff's Further Affidavit**

8. The Plaintiff filed a Further Affidavit on 8<sup>th</sup> August 2013 and deponed that the Plaintiff's claim is in respect to plot number 4236 Kilifi and that the Respondents have encroached on plot numbers 370, 372, 465, 761, 760, 750, 466, 465, 753, 602, 253, 258, 259, 252, 257, 324 and 389 and not on plot numbers 31, 758, 759, 603, 402 and 324 Takaungu as alleged by the Respondents.
9. The Applicant finally deponed that any claim based on adjudication by the Respondents was extinguished upon the issuance of title to the Applicant under the repealed Land Titles Act and that the trespass complained of commenced sometimes in April 2013.
10. The parties filed their respective submissions which I have considered.

### **Analysis and Findings**

11. The current application is based on the Plaintiff's Complaint dated 21<sup>st</sup> June 2013. For this court to determine if indeed the Plaintiff has a prima facie case with chances of success, the court has to look at the claim by the Plaintiff viz-a-viz the Defendants.
12. According to paragraph 4 of the Complaint, the Plaintiff has averred that the Defendants jointly and severally wrongfully entered and took possession of portions of the suit property being plot numbers 370, 373, 374, 465, 761, 760, 750, 466, 465, 758, 602, 254, 253, 258, 265, 259, 252, 324 and 389. This averment was repeated by the Plaintiff in paragraph 4 of the Supporting Affidavit.
13. I have perused the Plaintiff's annexures and specifically the Certificate of Postal Search. According to the search, the Plaintiff is the registered owner of plot number 4236-Kilifi measuring 2,716 acres. The court in Mombasa HCCC No. 185 of 1991 confirmed that position in a judgment delivered on 19<sup>th</sup> July 2012.
14. The Plaintiff has also annexed on its Supporting Affidavit a sketch plan with various plot numbers. The source of the said sketch plan has not been indicated neither does it show that the land being sub-divided is 4236-Kilifi.
15. It is therefore not possible for this court to ascertain at this stage if the plot numbers indicated in the Complaint and which the Defendants are alleged to have encroached upon are sub-divisions of plot number 4236-Kilifi and if it is so, that they are related to the plot numbers that the Defendants are claiming to have been created after the adjudication process.
16. In view of the uncertainty of which plots the Defendants are occupying, and considering that the prayers in the application are of a mandatory nature, I find that the Plaintiff has not established a prima facie case with chances to success.
17. The issue of whether the Defendants are actually occupying some portions of 4236-Kilifi can only be determined at the full hearing of this suit. The Plaintiff will also have to rebut the claim of adverse possession raised by the Defendants at the hearing of the main suit.
18. In the circumstances, and for the reasons I have given, I dismiss the Plaintiff's Application dated 21<sup>st</sup> June 2013 with costs.

Dated and Delivered in Malindi this 19<sup>th</sup> day of **December**, 2013

**O. A. Angote**

**Judge**