



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CIVIL SIUT 67 OF 2008

SOFIA KASSIM SHARIEF ALIAS SOFIA KASIMU.....PLAINTIFF

VERSUS

KITSAO NGUMBAO NZAI.....1ST DEFENDANT

FRANSCESCO MANCA.....2ND DEFENDANT

RULING

The application filed by way of Chamber Summons dated 4th September 2008 under order XXXIX Rule 1, 2 and 9 CPR and section 3A CPA seeks for temporary orders of which to issue against the Defendants/Respondents either by themselves, their servants and/or agents, from encroaching upon, entering on, trespassing upon, disposing of, alienating or in any other manner, dealing with the Plaintiff/Applicant's Plot No.396 Jimba pending hearing and determination of this suit.

The grounds are that;-

- (1) The applicant is the legal owner of Plot No.396 Jimba.
- (2) The Defendants/Respondents have without any colour of right, encroached upon the said plot and or servants are busy clearing the grounds for purposes of intended construction to the detriment of the Plaintiff/Applicant.

In the supporting affidavit sworn by the applicant, she states that sometime in the year 2000, she applied for a plot to the settlement Fund Trustees and was offered Plot No. 396 measuring approximately 0.8 Hectares at Jimba Squatter Settlement Scheme in Malindi District by a letter of offer dated 21/7/00 and marked SKS 1.

One Rehema Guyo Barisa was offered plot No.1024 measuring 0.8 Hectares at the same settlement

scheme, which plot was amalgamated with the applicant's plot to give a total area of 1.6 Hectares under plot 396 as shown by the annexed letter SKS 2 dated 17th July 2000.

On 9th day 2000, the District Land Adjudication and Settlement Officer Malindi wrote a letter to the Director Land Adjudication and Settlement, Nairobi, attaching an acceptance from the applicant (the same is marked SKS 3). On 9th November 2000, the applicant made a final purchase price for the said plot as supported by annexures 4a and 4b.

On 24th August 2008, applicant's husband one Ali Didi went to inspect the subject plot and found the ground being cleared in preparation for construction by the 2nd Defendant/Respondent who claimed to have bought it from the 1st Defendant/Respondent.

Incidentally 1st Defendant/Respondent was allocated Plot No.394 Jimba Squatter Settlement Scheme and not Plot 396) Mombasa - annexed is a copy of a list of names of allottees of the said scheme, their plot numbers and acreage. She avers that 1st Defendant therefore has no legal right to alienate, sale, work on or in any way deal with the subject property.

Applicant has annexed photographs marked SKS – 6 showing worker's hired to clear the same. The application is opposed and the Respondent states in his replying affidavit that Plot No.396 Jimba has been in his possession and occupation on half basis with the Plaintiff/Applicant for as long as he can remember and that this position is well known to the administration as confirmed by a letter from the area chief marked KNN1.

It is his contention that applicant secretly secured a letter of offer to be issued in her own names in respect of that plot. On 1st July 2003, the Department of Land Adjudication and Settlement wrote to the District Land Adjudication and Settlement Officer, requesting for the ground status report vide letter marked KNN2.

On 8th July 2008, the said officer responded vide letter annexed saying plot No.396 was developed on half-half basis by the applicant and respondent. The officer also confirmed that there was a dispute over the plot and a restriction order was entered – the letter is marked KNN3. It is his contention that as regards the list of allottees, he has no interest in plot 394 and that his name was listed by mistake.

He maintains he was clearing bush only on his half of Plot 396 which he has used and occupied for as long as he can remember. The correspondence from the Lands Adjudication and Settlement Department confirm that Applicant was offered Plot No.396 Jimba and in another letter plot no.1024 which had been allocated to **REHEMA BARISA** was married with 396 to form common ownership and retain the NUMBER 396. So that applicant upon accepting that offer became the owner of that No.396. The list of allottees shows that Respondent was given Plot 394. Was it for Respondent to specify and determine which plot to be allocated to him?

However Respondent got the area assistant chief to intervene on basis that he too had occupied and used Plot No.396 and a physical check on the ground by the Malindi Lands Adjudication and Settlement Officer confirmed that Plot 396 measured 1.5 acres and was being used by Plaintiff/Applicant and 1st Defendant/Respondent on half-half basis and that since there was a dispute, then a restriction had been entered until the dispute is settled.

So if there is already a restriction, then on what basis is the 1st Defendant clearing the land in preparation to dispose of it – as in his own reply affidavit he states that Kiposa had found a buyer and he (1st Defendant) had already received Kshs.100,000/-. The applicant has demonstrated that she has a good claim on the parcel on the strength of correspondence sent to her by the Lands Adjudication and Settlement Officers Malindi – she has further shown that 1st Defendant has taken steps to alienate and dispose of that parcel despite the restriction order entered.

Indeed 1st Respondent has himself confirmed of intention to sell off the land - having even received some money – obviously if his actions are not stopped, he will dispose off the land before the dispute is sorted out. The Applicant has established a prima facie case with probability of success.

The current value of the land is not given, so it is not possible for me to determine whether damages would be adequate compensation, but just going by the very nature of the matter, the even escalating prices of land in this country and the scarcity of land, my view is that damages would not be adequate compensation.

It is certainly convenient to preserve that parcel of land rather than attempt to recover it once it is disposed off to third parties for development. Therefore the balance of convenience tilts in favour of the applicant. This court subsequently grants the prayers sought for injunction to issue upon the 1st and 2nd Respondents, their servants and/or agents from encroaching, entering, trespassing, disposing, alienating, or in any other manner dealing with the Plot No.396 Jimba until the suit is heard and determined.

(b) Costs of this application shall be borne by Respondent.

Delivered and dated this 25th day of February 2009 at Malindi

H A OMONDI

JUDGE