



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 215 OF 2018

ABDULHALIM ABDALLA

SALIM HAJI MANSUR

ABDALLA ABDULHALIM.....PLAINTIFFS

Versus

KENNEDY KANUNGU

MOSES KANUNGU (Administrators of the Estate of

KANUNGU MWAGANDI CHIVUTE (Deceased)

COUNTY LAND REGISTRAR

THE ATTORNEY GENERAL

COUNTY SURVEYOR KILIFI.....DEFENDANTS

RULING

1. By their application dated and filed herein on 3rd December 2018, the three Plaintiffs pray for an order of injunction restraining the Defendants from interfering with, trespassing, entering upon, remaining and/or dealing with all that parcel of land known as Kilifi/Mtwapa/1364 and 1365 pending the hearing and determination of this suit.

2. In addition, the Plaintiffs pray for an order directing the County Surveyor Kilifi to visit the site for identification or verification of boundaries and the actual measurement on the ground between the said parcels of land and the 1st and 2nd Defendants' parcels of land known as Kilifi/Mtwapa/896 and 1363.

3. The Application which is supported by an affidavit sworn by the 2nd Plaintiff Salim Haji Mansur is premised on the grounds:-

i. That the Plaintiffs are the owners of Plot No. Kilifi/Mtwapa/1364 measuring 0.9 Ha and Kilifi/Mtwapa/1365 measuring 0.8 Ha.

ii. That the 1st and 2nd Defendants have forcefully gained entry to the suit properties and are uprooting the beacons and putting up new ones at night.

iii. That unless the Defendants are restrained, they will continue with the trespass and completely damage and change the face thereof.

4. By a Notice of Preliminary Objection dated and filed herein on 14th December 2018, Kennedy Kanungu and Moses Kanungu (the 1st and 2nd Defendants respectively) sued herein as the Administrators of the Estate of Kanungu Mwangandi Chivute (deceased) raise an objection to the application on the grounds:-

1. That the application is an abuse of the Court process and grossly contravenes the Provisions of the Law of Succession Act as the named persons are not the administrators of the estate of Kanungu Mwangandi Chivute since all the documents are said to be in the names of the deceased and not the defendants in order to defend the suit.

2. That the application is bad in law because the persons named as the 1st and 2nd Defendants are not privy to any transaction that might have arisen between the Plaintiffs and the deceased person therefore their Constitutional rights shall be violated if orders are granted since they cannot get a proper defence at this stage which contravenes Article 50 (2) (c) of the Constitution.

3. That this application seeks to defeat the very cardinal principles of justice incriminating a family not involved in the dispute hence amounting to a miscarriage of justice.

4. That the application is incurable (sic) and bad in law and ought to be dismissed with costs.

5. That it is a fact that there is (a) title deed now and this Honourable Court does not have the jurisdiction to entertain this matter because the defendants relatives have the title and the possession of the parcel (of land).

6. That there exists no known agreement between the late Kanungu Mwangandi Chivute and the Plaintiffs herein on the said piece of land.

7. That it is a fact that whoever sold the land to the Plaintiffs did that with the knowledge that the said land was short of acreage and as such the Plaintiffs need to approach the said vendor for compensation and not from the estate of Kanungu Mwangandi Chivute.

8. That the 1st and 2nd Defendants ought not to be added as parties to the said suit since they are not party to the said agreement and or transfer transactions that might have taken place between the Plaintiff and the Vendor one Omar Hussein Abdalla.

5. The County Land Registrar, the Honourable the Attorney General and the County Surveyor (the 3rd, 4th and 5th Defendants respectively) are equally opposed to the application. By Grounds of Opposition filed herein on their behalf by the Honourable the Attorney General, the Defendants state:-

1. That the application and the entire suit offends the mandatory provisions of Section 18 of the Land Registration Act on determination of boundary disputes and this Honourable Court lacks jurisdiction to entertain the same.

2. That the application seeks orders of injunction against the Government grant of which is expressly prohibited under Section 16 of the Government Proceedings Act.

3. That the Orders sought are final in nature which cannot be granted at interlocutory stage unless there is demonstrated great hardship on the part of the applicant which is not the case herein.

4. That the prayers sought are neither available nor merited.

5. That the application is otherwise an abuse of the process of this Honourable Court.

6. I have considered the application and the respective responses thereto by the Defendants. I have equally perused and considered the written submissions as filed herein by the Learned Counsels for the parties.

7. As was held in *Mukhisa Biscuit Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 696:-*

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. It is trite laws that a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued, may dispose of the suit. In that respect, I have carefully considered the 8 grounds raised in the Notice of Preliminary Objection as filed herein by the 1st and 2nd Defendants. The issues raised are matters of fact and incapable of disposing of this suit. The said Notice of Preliminary Objection is thus misconceived and I have no hesitation in dismissing the same.

9. In the Supporting Affidavit to the Plaintiff's application, the Plaintiffs accuse the 1st and 2nd Defendants of forcefully uprooting beacons and replacing them with new ones during the night. They aver that they bought the suit property from one Omar Hussein Abdalla in the year 2008 but have had a boundary dispute with the Defendants from around the year 2015.

10. That dispute led them to make a request through the area Chief Mtwapa for the County Survey Office to visit the ground, identify the boundaries and verify the actual measurements of their two parcels of land and the Defendants Parcel No. Kilifi/Mtwapa/896. The parties appointed two surveyors in this regard. A report from one of the Surveyors dated 22nd January 2016 revealed some discrepancies on the sizes of the Plaintiff's parcel but one Surveyor is yet to forward his report.

11. Taking all these issues raised in both the Plaint filed on the same day and the application before me, I am in agreement with the position taken by the 3rd, 4th and 5th Defendants that this matter concerns a boundary dispute between the Plaintiffs and their 1st and 2nd Defendant neighbours.

12. That fact is indeed admitted by the Plaintiffs in the Further Affidavit of Salim Haji Mansur filed herein on 26th February 2019 in which he states at paragraph 33 thereof as follows:-

“33. That I am advised by my Advocates on record and which advise I verily believe to be true that the delay in settlement of the boundary dispute herein is inordinate. The Complaint was moved from the office of the Chief on 09/02/2016, the survey was conducted in the presence of the parties on 8/02/2016 and the results were to be released as per the notice on 25/10/17 but to no avail to date. We have continued to be denied the right to occupation and enjoyment of our property and there is merit for the Honourable Court to intervene and issue the Orders sought.”

13. While I understand the frustrations that the delay in resolving the dispute is causing to the parties, this Court’s hands are however tied by the Law. Section 18 of the Land Registration Act requires such disputes to be determined by the very office which the Plaintiffs herein accuse of delay. In that regard, Section 18 (2) of the said Act provides as follows:-

“18(2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section.”

14. In the circumstances and in light of the admission that the Registrar is yet to fix the boundaries in accordance with Section 18(3) of the Land Registration Act, this Court lacks jurisdiction to entertain this matter as set out under Section 18(2) above.

15. The Plaintiff’s application and the suit upon which it is anchored are therefore clearly premature. Both are accordingly struck out.

16. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE