



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.81 OF 2019

HANNINGTONE KESI BAYA.....PLAINTIFF/APPLICANT

VERSUS

KAZUNGU KARISA MULANDA.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 2nd October 2019, Hannington Kesi Baya (the Plaintiff) prays for:-

- i) An order declaring himself the rightful owner of LR No. Gede/Mijomboni/359;***
- ii) An order compelling the Defendant to execute transfer instruments for LR No. Gede/Mijomboni/359 to himself and***
- iii) A permanent injunction restraining the Defendants, his agents and/or employees from encroaching into the said LR No. Gede/Mijomboni/359***

2. The application which is supported by an affidavit sworn by the Plaintiff himself is premised on the grounds:-

- a) That the Plaintiff bought the parcel of land from the Defendant in 1974; and has since been residing thereon with his family;***
- b) That the Defendant has not executed a decree issued in 1978 requiring him to sign the transfer to the Plaintiff's name;***
- c) That the Defendant has now filed another case using a different name claiming he leased the property to the Plaintiff;***

3. But in a Replying Affidavit sworn and filed herein on 25th November 2019, the Defendant-Kazungu Karisa Mulanda avers that sometime in 1976, he entered into an agreement with the Plaintiff for the lease of some 80 cashew nut trees planted on the said Plot No. Gede/Mijomboni/359 at Kshs 20 per tree.

4. The Defendant aver that the lease agreement authorized the Plaintiff to harvest the cashew nuts from the trees but was to cease upon a refund of the sum of Kshs 1600/-. He accuses the Plaintiff of chasing away his mother who was then staying on the suit property as the Defendant was away working in

Mombasa.

5. The Defendant asserts that ever since, the Plaintiff has been evasive and has avoided any contact with the Defendant to enable the Defendant refund the money. When the Defendant came to learn that the Plaintiff had moved into the suit property, the Defendant instituted ***Malindi CMCC No. 117 of 2019; Kazungu Karisa Mulanda –vs- Hantony Baya Mwaro***. He denies selling the property to the Defendant.

6. I have considered the application and the response thereto. The Plaintiff has urged this Court to declare that he is the rightful owner of the suit property. He also craves an order compelling the Defendant to execute the transfer instruments for the parcel of land as well as a permanent injunction restraining the Defendant from encroaching onto the land.

7. Those Prayers arise from the Plaintiff's contention that he bought the suit property from the Defendant in 1974 and that he has since been residing thereon. The Plaintiff further avers that he had filed a civil case against the Defendant sometime in 1978 when the Defendant tried to interfere with his possession of land.

8. It is his case that the Defendant has to-date not complied with the Decree issued in that case which ended in 1979 requiring him to execute the transfer documents. He accuses the Plaintiff of turning around recently to sue him in ***Malindi CMCC No. 117 of 2019*** claiming he leased the suit property to him.

9. On his part, the Defendant does not deny filing the suit before the Magistrates Court. It is his case that he only leased the land to the Plaintiff sometime in 1976 to enable the Plaintiff to harvest some 80 cashew nuts trees thereon at the sum of Kshs 1600/-. He however denies any knowledge of the suit allegedly filed by the Plaintiff against himself in 1978 and/or any decree emanating therefrom.

10. Other than the assertion by the Plaintiff that he filed the suit in 1978 and that the Defendant had failed to comply with the decree requiring him to execute the transfer documents, the Plaintiff did not place anything before this Court to demonstrate that he had indeed filed the suit and/or that a decree was issued therein requiring the Defendant to execute the transfer documents.

11. In the absence of any such proof by the Plaintiff, this Court is unable to grant the first two prayers sought in this application which are couched in the nature of final orders.

12. In respect of the prayer for injunction, it was evident to me that the Plaintiff has over the years established his home with several permanent and semi-permanent houses on the suit property. Contrary to the Defendant's contention that the Plaintiff only recently put up the houses, the photographs annexed to the Plaintiff's affidavit depict structures that have been on the land for some time.

13. I am accordingly satisfied that pending a full inquiry into the circumstances regarding how the Plaintiff entered the land and built the houses, there is need to protect the property from any interference posed by the Defendant.

14. In the premises, I hereby grant the Plaintiff's application in terms of Prayer No. 3 thereof.

15. The Costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE