



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.190 OF 2014

PATRICK MBOKOMO MGHENDI.....PLAINTIFF

=VERSUS=

1. DAMA LEWA PEPO

2. KALAMA LEWA PEPO.....DEFENDANTS

R U L I N G

Introduction

1. This Ruling is in respect to the Application by the Plaintiff dated 16th October 2014. In the Application, the Plaintiff is seeking for the following orders:

(a) Pending the hearing and determination of this suit, an injunction do issue to restrain the Defendants by themselves, their servants, workmen, agents, heirs, personal representatives or otherwise howsoever from selling, leasing, charging, pledging, offering the title thereof as lien or any form of security, erecting any permanent structures thereon, giving possession of the property or any part thereof to any other person, or in any way whatsoever and howsoever interfering with the suit property known as KILIFI/MTWAPA/803.

(b) That the costs of this Application to be borne by the Defendants herein.

The Plaintiff's/Applicant's case:

2. The Plaintiff has deponed that he is the administrator of the estate of his late son Antony Chari Mzae; that the late Lewa pepo Masuku was the owner of the land known as KILIFI/MTWAPA/803 and that by an agreement of sale made between the late Lewa Pepo Masuku and his late son on 7th August 1989, his son purchased six (6) acres of the suit property and the process of sub-division and transfer commenced.

3. It is the Plaintiff's deposition that Lewa Pepo died on 22nd August 2003 before he transferred the suit property to his son and that the Defendants have refused to complete the transfer process.

4. It is the Plaintiff's case that his son took possession of the six acres upon signing the said agreement.

5. According to the Plaintiffs, the Defendants, sued the son of the late Antony Chari in Malindi HCCC No. 159 of 2002; that during the currency of this suit, the Defendants have forcibly evicted the family of

the late Anthony Chari Mzae from the six acre portion of the suit property and cut down all the trees.

The Defendant's/Respondent's case:

6. The 2nd Defendant deponed in his Affidavit that the purported agreement is dated 7th August 1989 while the alleged seller passed away on or about 22nd August, 2003; that the Applicant had enough time to have the transfer transferred to him and that the Plaintiff's claim is time barred.

7. According to the 2nd Defendant, his family is entitled to the whole land having inherited it from their late father.

Submissions:

8. The Plaintiff's advocate submitted that it is the Defendants who have breached the sale agreement by obtaining the letters of administration and transferring the entire land into their names; that the breach under Section 4(1)(a) of the Limitation of Actions Act occurred when the transfer was registered in favour of the Defendants and that the Defendant's father died in 2003 before he transferred the suit property to the late Anthony Chari Mzae.

9. The Defendants' advocate submitted that a suit to enforce specific performance of a contract falls under Section 4(1)(a) of the Limitation of Actions Act and that the cause of action in any contract involving land accrues immediately after the execution of the agreement.

10. According to counsel, the late Antony Chari Mzae should have filed a suit for specific performance or for refund of the monies paid within 6 years after the execution of the sale agreement and that in any event, the Plaintiff is not entitled to an order of specific performance.

Analysis and findings:

11. The Plaintiff's suit is premised on the agreement that was entered into by the late Lewa Pepo, the Defendant's father and Antony Chari Mzae, the Plaintiff's son on 7th August 1989.

12. It is the Plaintiff's case that after the signing of the sale agreement, the consent of the Land Control Board was obtained and the process of sub-dividing the land commenced. However, the Defendant's father died in the year 2003 before a title was issued to him for the purpose of transferring it to Anthony Chari Mzae. Anthony Chari Mzae also died in 2007 before he was registered as the proprietor of the six (6) acres, being a portion of Kilifi/Mtwapa/803.

13. The main prayer in the Plaint is an order of specific performance and in the alternative, a refund of the purchase price of the six (6) acres at the current market price.

14. Other than the agreement of 7th August, 1989, the Plaintiff has annexed on his affidavit a copy of the Consent of the Board allowing the sub-division of the suit property into two portions of six (6) acres each and the sale of 6 acres of the suit property to the Plaintiff's late son.

15. The Plaintiff has also annexed the Transfer document showing that the Settlement Fund Trustees transferred the suit property to the Defendant's late father in the 2007. The Title Deed for the entire land was then issued on 18th March 2014.

16. The Defendant's defence is premised on the fact that the suit is time barred because having signed the agreement in 1989, the Plaintiff should have filed the suit before the expiry of six years.

17. The question that shall be determined by the court at trial is when the cause of action in this matter arose.

18. I say so because although the order of specific performance is premised on the agreement of 7th April 1989, the court will have to determine whether the cause of issue is in respect to a contract per se, whose limitation period is 6 (six years), or whether the cause of action by the Plaintiff is for recovery of land whose limitation period is twelve years.

19. If at the trial the court holds that an order of specific performance of land matters is an action for recovery of land, then the court will have to determine when time started running for the purposes of section 7 of the Limitation of Action Act considering that the Title Deed in respect to the suit property was not issued until the year 2014.

20. Those are issues which can only be determined after the tendering of evidence in a full trial. Suffice to say that there is material before me to show that indeed the Plaintiff's son entered into an agreement for sale of land with the Defendant's father and took possession of the land he bought.

21. Indeed, the Land Control Board gave its consent to have the suit property sub-divided into two and a portion thereof was to be transferred to the Plaintiff's son.

22. Having perused and considered the above mentioned documents, I am convinced that the Plaintiff has a prima facie case with chances of success. The eviction of the family of Antony Chari Mzae from the six acres before the suit is heard and determined, or the possibility of the Defendant selling the entire land or a portion thereof, will be detrimental and prejudicial to the Plaintiff and the family of Antony.

23. In the circumstances, I allow the Application dated 18th October 2014 as prayed.

Dated and delivered in Malindi this **10th** day of **July** 2015.

O. A. Angote

Judge