



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 17 OF 2014**

1. ABDALLA MOHAMED SALIM  
2. ALI MOHAMED SALIM.....PLAINTIFFS

=VERSUS=

1. OMAR MAHMUD SHALLO  
2. FAISAL HASSAN ALI.....DEFENDANTS

**R U L I N G**

**Introduction**

1. What is before me is the Plaintiff's Application dated 10<sup>th</sup> February, 2014 filed pursuant to the provisions of Order 40 of the Civil Procedure Rules. The Application is seeking for the following orders:-
  - a. An injunction to issue against the 1<sup>st</sup> and or 2<sup>nd</sup> Defendants/ Respondents, their agents, servants, employees, assignees and or any other persons authorised by them from dealing with the suit properties in any way including, selling, transferring, leasing, constructing thereon or occupying the same pending the hearing and determination of this suit.
  - b. The 1<sup>st</sup> and or 2<sup>nd</sup> Respondents do pay the costs of this application.

**The Plaintiffs'/Applicants' case:**

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that he is the registered proprietor of plot number Kilifi/Takaye/Musoloni/666 while the 2<sup>nd</sup> Plaintiff is the registered proprietor of Kilifi/Takaye/Musoloni 483 (the suit property).
3. In January 2014, the Defendant's agents started fencing the suit property and on inquiry, the Defendants informed the Plaintiffs that they were the owners of the suit property by virtue of a title document granted to them by the government on 21<sup>st</sup> February 2013 in respect of L.R. Number 13746 and registered as CR number 59993.
4. It is the 1<sup>st</sup> Plaintiff's deposition that the title document held by the Defendants does not relate to the suit property and if it does, then the same is illegal and therefore null and void.

**The Defendants' case.**

5. The 1<sup>st</sup> Defendant filed a Replying Affidavit on his own behalf and on behalf of the 2<sup>nd</sup> Defendant

on 21<sup>st</sup> February, 2014.

6. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant and himself are the registered proprietors of L.R. Number 13746. It is the Defendants' deposition that they have been paying the requisite rates to the defunct Municipal Council of Malindi in respect to the suit property.
7. When the dispute over ownership of the property arose, the Assistant County Commissioner, Malindi ward, referred the parties to the District surveyor for verification of the boundaries of the land in dispute. The District Surveyor identified the Defendants' beacons in the presence of the Plaintiffs but he could not verify the Plaintiffs' beacons; that the surveyor prepared a report in which he indicated that the Defendants are the legitimate owners of L.R. Number 13746 based on the beacons identified on the suit property and that based on the said report, the defendants proceeded to put up a perimeter fence around the suit property.

#### **Submissions:**

8. The parties filed written submission in respect to the Application. The Plaintiffs' advocate submitted that the Applicants acquired the suit property in 1995 after the Government established the Takaye/Musoloni settlement scheme. Having acquired the titles in respect to the portions of land, it was submitted, the Plaintiffs are the absolute owners of the land and are protected by Article 40 of the Constitution and section 24 of the Land Registration Act, 2012.
9. According to the Defendants' advocate, the Applicants' titles do not have deed plans, neither could the Applicants identify their beacons. Consequently, it was submitted, the Applicants have not established a *prima facie* case with chances of success.

#### **Analysis and findings**

10. It is not in dispute that the Plaintiffs are the registered properties of Kilifi/Takaye/Musoloni/666 and 483 while the Defendants are the registered proprietors of L.R. Number 13746.
11. The Plaintiffs' two titles were issued under the repealed Registered Land Act in 1995 while the Defendants title was registered on 21st May 2013 under the repealed Registration of Titles Act. Both parties are claiming that the titles they hold under the two registration systems are in respect to the same piece of land.
12. A distinction has to be made between the "general boundaries" as defined under the repealed Registered Land Act and "fixed boundaries" which are applicable in land registered under the repealed Registration of Titles Act.
13. Under Section 18 of the repealed Registered Land Act, the Director of Surveys was required to prepare and maintain a series of maps for every registration district. The type of survey that generated the registry index maps is what was known as "general boundaries" which has been defined in section 18(1) of the Land Registration Act, 2012 to mean "the approximate boundaries and the approximate situation only of the parcel." Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons.
14. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary survey principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of on plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.
15. It is therefore not true that because the Plaintiffs could not identify their beacons on the ground, their titles are *prima facie* invalid. Land registered under the repealed Registered Land Act need not have fixed boundaries.
16. All that the Applicants need to show for an Application for a temporary injunction to issue is a *prima facie* case as to the existence of the right alleged, and when such a *prima facie* case is made out, the property should be preserved in status quo, so that, if at the hearing, the Plaintiffs obtain a judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make judgment ineffectual (see ***Cotton L.J. In Preston Vs. Luck (1884) 27 Ch.D*** at Pg 50's).
17. Considering that the Defendants also have a title over the suit property, and in view of the fact that

the Defendants have already put around the suit property a perimeter fence, an order of *status quo* should be made until the court makes the ultimate determination of the valid title(s) in respect to the suit property.

18. For the reasons I have given above, I shall, which I hereby do, allow the Plaintiff's Application dated 10<sup>th</sup> February, 2014 in the following terms:

- a. **An order of *status quo* be and is hereby issued pending the hearing and determination of the suit. The *status quo* in the circumstances of this case means that none of the parties herein or their agents or servants shall deal with the suit properties in any manner whatsoever pending the hearing and determination of the suit.**
- b. **Each party shall bear his costs.**

Dated and Delivered in Malindi this 8<sup>th</sup> day of May, 2014.

**O. A. Angote**

**Judge**