



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 279 OF 2016**

**FELIX NGALA MWAVUO.....PLAINTIFF**

**VERSUS**

- 1. JOSEPH KARISA KIRINGI**
- 2. NANCY KAGWIRA**
- 3. ALI BIN DAHMAN (ALI OMAR SHEIKH)**
- 4. COUNTY LANDS REGISTRAR, MOMBASA COUNTY**
- 5. HON. ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. Before me for determination is a Notice of Motion application dated 17<sup>th</sup> October 2016. The Plaintiff Felix Ngala Mwavuo prays for an order of inhibition to issue for such a period as the Court may order, against the Defendants, their agents or servants to injunct, inhibit and freeze any dealing with all that parcel of land measuring approximately 1/2 acres, which parcel is part of portion 246 Malindi.

2. The application is premised on a number of grounds stated therein inter alia that:-

- i) Plot 246 Malindi is agricultural land registered in the name of one Mohamed Hussein Haji Abdulrahim and Kassim Haji Esmail;***
- ii) The said 1/2 acre of land has been exclusively possessed, worked and used by the plaintiff, his father Charo Mumba before him and grandfather Mumba Kanina who are now deceased;***
- iii) The Defendants have been dealing with the land illegally, and the person developing it now is minded to dispossess the Plaintiff permanently and to prevent the Plaintiff from ingress and egress from the said land;***
- iv) The Defendants claim authority to deal with the land on the ground that there is a suit in Court, wherein the Claimants therein claim Plot 246 Malindi, by way of adverse possession yet the matter has not been determined or concluded;***
- v) There is need to maintain status quo ante, as the plaintiff urges his rights over the land both in this suit and the other action reportedly brought under the doctrine of adverse possession;***

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are yet to enter appearance and/or to file any papers in response to both the suit and the application herein.

4. In a Replying Affidavit sworn on 26<sup>th</sup> October 2016 and filed herein on 27<sup>th</sup> October 2016, the 3<sup>rd</sup> Respondent Ali Bin Dahman (aka Ali Omar Sheikh) however avers that the plaintiff is merely engaged in a fishing expedition. It is his case that nothing has prevented the Plaintiff from seeking to be enjoined in the pending suit and that the Plaintiff's suit herein therefore amounts to circumvention of the due process.

5. The 3<sup>rd</sup> Defendant further avers that all claims raised in the Plaintiff's pleadings herein can aptly be prosecuted and determined in the pending proceedings for adverse possession owing to the commonality of issues and interests among the parties and that the stance taken by the Plaintiff is an attempt at forum shopping. The 3<sup>rd</sup> Defendant has also filed Grounds of Opposition dated 31<sup>st</sup> October 2016 in opposition

to the application.

6. On their part the County Land Registrar Mombasa and the Honourable the Attorney General sued herein as the 4<sup>th</sup> and 5<sup>th</sup> Defendants, respectively, have filed Grounds of Opposition dated and filed on 7<sup>th</sup> November 2017 stating that they oppose the grant of the Orders sought herein on the grounds that:-

***i) The Orders sought against the Government are expressly prohibited under the provisions of Section 16 of the Government Proceedings Act;***

***ii) The suit does not disclose any reasonable cause of action against the 4<sup>th</sup> and 5<sup>th</sup> Defendants;***

***iii) The applicants have not satisfied the legal requirements for the grant of injunctions; and***

***iv) The Plaintiff's suit is brought too late in the day, (and) in the circumstances the Plaintiff is not entitled to equitable relief.***

7. I have considered the application and the respective responses thereto. I have equally considered the detailed submissions placed before me by the Learned Advocates acting for the parties herein.

8. Section 68(1) of the Land Registration Act provides that:-

***“The Court may make an order(hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, generally until a further order, the registration of any land lease or charge.”***

9. An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transactions over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction such an order preserves the property in dispute pending trial.

10. From the material placed before me, the Plaintiff contends that his family has occupied and owned the subject piece of land for many years. The land said to measure about half an acre is part of the Portion of land known as No. 246 Malindi and registered in the names of Mohamed Hussein Haji Abdulrahim and Kassim Haji Esmail. The said portion No. 246 Malindi is apparently the subject of an Originating Summons filed in Mombasa being Mombasa High Court Civil Suit No. 107 of 1993; ***Ali Mattaza –vs- Mohamed Hussein Haji Abdulrahim and Kassim Haji Esmail*** in which the claimants seek to be registered as the owners thereof under the doctrine of adverse possession in lieu of the Respondents who are the registered proprietors thereof.

11. According to the Plaintiff, he woke up one day in the year 2014 and found that the 3<sup>rd</sup> Defendant had deposited building coral blocks and sand/ballast on the land he occupies. When he inquired from the 3<sup>rd</sup> Defendant why he had done so, the 3<sup>rd</sup> Defendant apparently informed the Plaintiff that the land had been sold to him by the 1<sup>st</sup> Defendant herein who traces his entitlement to a purchase from the 1<sup>st</sup> Claimant in the Mombasa High Court Case aforesaid.

12. It was the 3<sup>rd</sup> Defendant's case that this suit is res judicata the Mombasa High Court Civil Suit No. 107 of 1993 aforesaid. Nothing was however placed before me to show that the Mombasa Case has been heard and finally determined. Indeed a consideration of the issues herein would show that the parties in the Mombasa case are not only different but the cause of action would also appear to be quite different from the one the Plaintiff has against the Defendant herein.

13. At any rate, I do not think a Claimant in an action founded on the doctrine of adverse possession can pass any interest in land before he is decreed as the owner of the property claimed in the action based on adverse possession. It is therefore highly doubtful that the first and second defendant herein had a good or any title at all capable of being passed to the 3<sup>rd</sup> Defendant.

14. Considering all the issues herein, it is my view that the injustice that would be caused to the Defendants/Respondents if the Plaintiffs were granted an order of inhibition as sought and later failed at the trial is much less in weight than the injustice that would be suffered by the Plaintiff if the prayer for inhibition were dismissed at this stage and later at the trial the Plaintiff succeeds in proving his case. Since both the Plaintiff and the 3<sup>rd</sup> Defendant claim to be entitled to the subject Portion of land, an order of inhibition will not affect those rights but will serve the greater interest by preserving the said land while their proprietary interests and rights are determined.

15. Accordingly and in view of the findings herein above, this Court makes the following orders:-

***1. An Order of inhibition is hereby issued inhibiting the registration of any dealing such as a transfer or charge on that parcel of land measuring approximately 1/2 acre, being part of Portion 246 Malindi and occupied by the Plaintiff herein until this suit is heard and determined.***

***2. The Plaintiff/Applicant shall have the costs of this application.***

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of April, 2018.**

**J.O. OLOLA**

JUDGE