



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 38 OF 2016

CORNELIUS NZIVO TUNJE.....1ST PLAINTIFF

MWAMUYE TUNJE NZIVO.....2ND PLAINTIFF

VERSUS

MUNDU MAGOTI NZAO.....1ST DEFENDANT

TOYA MAGOTI NZAO.....2ND DEFENDANT

CHITSAO JELA MAGOTI.....3RD DEFENDANT

RULING

1. The Plaintiffs' Notice of Motion dated 26th February, 2016 is seeking for the following orders:

a. That this Honourable Court do issue a temporary injunction restraining the Defendant/Respondent by himself, his servant, agents and/or anybody acting under the Respondents' instructions from trespassing, occupying, constructing and/or in any other way dealing with land parcel known as Kilifi/Banda Ra Salama/505 pending the determination of this suit.

b. That costs of this Application be provided for.

2. The Application is premised on the grounds that the Applicants are the registered owners of parcel of land known as Kilifi/Banda Ra Salama/505 (*the suit property*) having inherited it from their late father; that they have been in actual occupation of the said land and that the Defendants have trespassed on the suit land.

3. Besides the said trespass, the Plaintiff deponed that the Defendants have cut down trees and have put up temporary structures on the land.

4. In response, the 1st Defendant deponed that the Plaintiffs are intent of disposing them 12 acres of their land; that they occupy plot number 518; that their land is about 24 acres and that all the neighbours know the extent of their boundaries.

5. In the Supplementary Affidavit, the Plaintiffs deponed that the Defendants do not have the mandate of determining the acreage of their land; that the Title Deeds for the two plots were issued in 1987 and that the Defendants have never petitioned the Ministry of Lands for correction of the acreage.

6. I have considered the submissions that were filed by the Plaintiffs.

7. It is not in dispute that the Plaintiffs are the registered proprietors of the suit land. According to a copy of the Title Deed that was issued to the 1st Plaintiff on 30th December, 2013, the suit property measures approximately 15.0Ha.

8. It would appear that on the other hand, parcel of land number Kilifi/Banda Ra Salama/518 is registered in favour of the Defendants' relatives. The Title Deed shows that the said land measures 4.6 Ha.

9. According to the Defendants, their parcel of land measures approximately 24 acres and not 11.5 acres as indicated in the Title Deed.

10. It would appear that the suit property abutts Plot No. 518 which is occupied by the Defendants.

11. The Defendants claim that they are living and occupying the land whose boundaries were ascertained during the adjudication process.

12. The Plaintiffs did not annex a report of the Land Registrar or Surveyor to show the extent of the Defendants' trespass, if at all, or to show that the Land Registrar has fixed the boundaries as between the Plaintiffs' land and the Defendants' land.

13. Section 18(1) of the Land Registration Act prohibits the court from entertaining any action relating to a dispute as to the boundaries of registered land unless the boundaries have been determined by the Registrar.

14. In the circumstances, the Plaintiff should have referred the dispute to the Land Registrar and thereafter file the Registrar's report in this court.

15. In the absence of any report from the Land Registrar viz-a-viz the boundary dispute between the Plaintiffs and the Defendants, I find that the Plaintiffs have not established a *prima facie* case with chances of success.

16. In the circumstances, I dismiss the Plaintiffs' Application dated 26th February, 2016 with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE