



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 92 OF 2016

**JAPHETH CHARO BAYA (*suing as the administrator ad litem*
of the estate of KAZUNGU THOYA BAYA).....PLAINTIFF**

VERSUS

AHMED EBRAHIM.....1ST DEFENDANT

SAMUEL THOYA BAYA.....2ND DEFENDANT

RULING

1. In the Application dated 21st April, 2016, the Plaintiff is seeking for the following orders;

a. That upon inter-parties hearing this Honourable Court do issue a temporary order of injunction restraining the Defendant/Respondent's by themselves, servants, agents and/or employees from trespassing and/or interfering in any way whatsoever with the Plaintiff/Applicant's use, occupation, quiet possession, development and proprietorship of all that piece of land known as Plot No. Gede/Mijomboni/464 situated in Mijomboni, Gede within Kilifi County pending the hearing and final determination of this Application and suit.

b. An order directed to the OCS Malindi police station to ensure compliance with the order issued by this Honourable Court.

c. That costs of this suit be borne by the Defendant/Respondents.

2. The Application is supported by the Plaintiff's Affidavit in which he has deponed that his late father was the registered proprietor of parcel of land known as Gede/Mijomboni/464; that the 2nd Respondent, under the 1st Respondent's instructions, trespassed on the suit land and that the Respondents have proceeded to erect a structure on the suit land.

3. The Defendants filed a Notice of Preliminary Objection in which they averred that the suit should be struck out because the Plaintiff lacks the *locus standi*; that it is the Public Trustee who is the administrator of the Estate of the late Kazungu Thoya Baya and that the said Public Trustee has already confirmed the Letters of Administration.

4. In his Replying Affidavit, the 1st Respondent denied that the Plaintiff is the administrator of the Estate of Kazungu Thoya Baya; that the deceased sold the suit property to his father; that the balance of the

purchase price was paid through the Public Trustee and that indeed the Land Control Board gave its consent for the transfer of suit land.

5. According to the 1st Respondent, his family has been in possession of the suit land for more than twenty (20) years and that the only outstanding issue is the transfer of the suit land to his mother.

6. In his Supplementary Affidavit, the Plaintiff deponed that the family of Kazungu Thoya Baya has never been aware that the Public Trustee obtained Letters of Administration in respect to the Estate of Mr. Baya.

7. According to the Plaintiff, the person who purported to sell the suit property to the Defendant was not his father but his elder brother; that his brother had no capacity to sell the said land and that in any event, no purchase price has ever been paid.

8. The advocates for the Plaintiff and the Defendants have filed their respective submissions and authorities which I have considered.

9. It is not in dispute that parcel of land known as Gede/Mijomboni/464 is registered in the name of the late Kazungu Thoya Baya.

10. The Plaintiff has described himself as the administrator *ad litem* of the Estate of the late Kazungu Thoya Baya. The Applicant has annexed the Limited Letters of Administration that were issued to him on 8th March, 2016 by the court.

11. The Defendants have objected to the Plaintiff's *locus standi* to institute this suit.

12. According to the Defendants, the administrator of the Estate of the late Kazungu Thoya Baya is the Public Trustee. The Defendants have annexed a copy of the Grant of Letters of Administration that was issued to the Public Trustee by the court on 9th March, 2004. The said Grant was confirmed by the court on 14th September, 2006.

13. The issue as to who between the Plaintiff and the Public Trustee should administer the Estate of the deceased can only be dealt with by the Succession Court.

14. Indeed, until that question is dealt with, the Plaintiff cannot proceed with this suit further.

15. However, the issues that have been raised by the Plaintiff in the Plaintiff and the Application are not frivolous.

16. I say so because although the 1st Defendant claims that he bought the suit property from the deceased during his life time, the person who purported to sign the agreement of sale and the acknowledgment of receipt of the purchase price in installment is one Joseph Karisa Baya and not the deceased.

17. It is not also clear whether the full purchase price of Kshs. 170,000 was ever and whether the money that is said was paid to the Public Trustee was ever released to the family of the deceased.

18. Indeed, it is not clear from the documents that have been exhibited by the Defendants whether the purchase price for the land was Kshs. 170,000 or Kshs. 350,000.

19. In view of the conflicting documents before the court, and while awaiting the Succession Court to determine who as between the Plaintiff and the Public Trustee can bring a valid suit in respect to the Estate of the deceased, I am of the view that the *status quo* prevailing now should be maintained.

20. For those reasons, I make the following orders:

a. The Status quo prevailing as at the date of this Ruling to be maintained pending the hearing and determination of the suit.

b. Each party to pay for his own costs.

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

O.A. ANGOTE

JUDGE

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

J.O. OLOLA

JUDGE