



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LANDS COURT**

**AT MALINDI**

**ELC NO 227 OF 2016**

**BARDALE BAKARI TAPATA .....PLAINTIFF**

**=VERSUS=**

**GEORGE KARISA.....DEFENDANT**

**RULING**

1. I have before me a Notice of Motion application dated 2<sup>nd</sup> September 2016. The Plaintiff/ Applicant Bardale Bakari Tapata prays for Orders that: -

**1. Spent**

**2. Spent**

**3. THAT this Honourable court do grant a mandatory injunction against the Defendant, his agents, employees, servants, assignees and/or any other person authorized by him to quit, vacate and/or hand over vacant possession of the Plot No. 602 at Ngomeni Squatter Settlement Scheme in Malindi to the Plaintiff pending the hearing and determination of this suit.**

**4. THAT this Honourable court do grant in the alternative, an order of eviction of the Defendant from Plot No. 602 at Ngomeni Squatter Settlement Scheme in Malindi District and/or for the demolition of the structure he has constructed thereon pending the hearing and determination of this (suit).**

2. The Application is supported by the Applicant's affidavit sworn on 2<sup>nd</sup> September 2016. The gist of the application is contained in the grounds in support thereof which grounds are summarized as follows: -

*(i) That the Plaintiff is the bonafide owner of the suit property by virtue of having been allocated the same by the Malindi District Land Adjudication and Settlement Office.*

*(ii) That on 27<sup>th</sup> August 2016, the Defendant trespassed into the suit property and commenced construction of a permanent building thereon. That the Defendant's said acts are illegal, null and void as the same are in violation of the Constitution of Kenya 2010 and the Land Registration Act, 2012.*

3. The Application is opposed. In a Replying Affidavit sworn on 23<sup>rd</sup> September 2016, the Defendant

George Karisa accuses the Plaintiff of using the court process to unlawfully acquire ownership documents of the suit property. It is the defendant's case that the Plaintiff fraudulently obtained the Letter of Offer dated 10<sup>th</sup> May 2007 but still failed to comply with the requirements thereof to pay a 10% deposit within 90 days of the offer.

4. The Defendant further avers that he is the lawful owner of the suit property having purchased the same from one Kazungu Mole Mbitha vide a Sale Agreement dated 14<sup>th</sup> December 2004. It is his case that upon purchase of the suit property as aforesaid, he proceeded in March 2005 to plant casuarina trees thereon which trees the Plaintiff has seen grow for more than 11 years without a complaint. It is finally the defendant's case that the Plaintiff has failed to prove his ownership of the suitland and the application should therefore be dismissed.

5. I have considered the Application as well as the Affidavit in reply thereto. I have also considered the rival submissions placed before me by the respective Learned Counsels representing the parties herein.

6. The basis of the Plaintiff's claim as indicated above is the fact that he was allocated the suitland on 10<sup>th</sup> May 2007. Attached to his Supporting Affidavit is a Letter of Offer dated 10<sup>th</sup> May 2007 (marked 'BBT 1') from the Director of Land Adjudication and Settlement. The said letter reads in part as follows:

*"The Government through the Settlement Fund Trustee has offered you plot No. 602 of approximately 0.42 Ha at Ngomeni Squatter Settlement Scheme in Malindi District."*

*In pursuant thereto, please note that you are required to report to the District Land Adjudication and Settlement Officer, Malindi District so that you are shown the plot boundaries and be issued with a letter confirming this before documentation.*

*This offer is valid for 90 days from the date of this letter. Within this period, you should pay the 10% deposit for the plot and documented accordingly(sic), failure to which will lead to cancellation of the offer without further notice."*

7. It is not clear from the material placed before me whether or when the Plaintiff visited the Malindi District Land Adjudication office to be shown the boundaries and be issued with a letter confirming the offer and/or boundary. What is evident is that vide a receipt dated 28<sup>th</sup> April 2015, some 8 years after the offer was made, the Plaintiff paid the sum of Kshs 6,761/= to the Malindi Land Adjudication & Settlement Office. The Official Receipt issued by the office (marked "BBT 3") described the payment to be on account of "outright purchase for Plot No. 602-Ngomeni."

8. The Defendant in his Replying Affidavit has dwelt at length on the failure of the Plaintiff to make payment for the plot within the 90 days. It is indeed true that the Plaintiff/Applicant does not make any explanation as to why he failed to make the payment for a period of 8 years after the date of the offer.

9. It is the defendant's case that he planted Casuarina trees on the suitland way back in March 2005, a fact again not contested by the Plaintiff. I however find it curious that the Defendant purports to have bought the suitland from a private individual in 2004 when the property clearly belonged to the Settlement Fund Trustee. Indeed, at Paragraph 10 and 11 of the Replying Affidavit, the Defendant states as follows: -

10. *"That at the time I purchased the said portion, the Applicant was not on the ground, he is not a local indigenous person of the area where the land is situated.*

11. *"That a mere letter of offer is not a proof of ownership of land till a person is registered and (is) issued with an ownership certificate after clearing with (the) Settlement Fund Trustee, the land still belongs to the State and in this case, the Applicant is not able to prove ownership and it is unknown how he came to the subject land in recent years"*.

12. Thus while the defendant raises considerable grounds to dispute the Plaintiff's entitlement to the

suitland, his own entitlement thereto is not beyond per adventure. I note however that the construction on the suitland had reached an advanced stage and given the lack of clarity as to the person properly entitled to the suit property, I think it is proper that I hold everything even until such a time that the parties give oral and further testimony as to the proper ownership of the suit property.

13. In the circumstances, the parties are hereby ordered to maintain the Status quo prevailing as of today in regard to the suit premises until the suit herein is heard and determined.

14. The costs for the application shall be in the cause.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of July, 2017.**

**J.O. OLOLA**

**JUDGE**