



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT
AT MALINDI
PETITION NO. 5 OF 2013

JONATHAN MSUKO SHOKA.....PETITIONER/APPLICANT

=VERSUS=

SAMUEL GONA NDORO.....1ST RESPONDENT

JOSEPH KADENGE NDORO.....2ND RESPONDENT

DAVID NYIRO NDORO.....3RD RESPONDENT

RULING

1. I have before me an application dated 18th January 2017. It is brought under Article 22 and 23 of the Constitution and is seeking for an order: -

THAT pending the hearing and determination of this suit, the Respondents be restrained by way of a conservatory order from carrying out any fresh constructions and/or alienating Plot No. Kilifi/Ngerenyi/621. Further the Respondents be restrained from cutting, selling and/or harvesting the trees standing on Plot No. Kilifi/Ngerenyi/621.

2. The Applicant Jonathan Msuko Shoka has sworn an affidavit on 18th January 2017 in support of the Application. In the 8 paragraphs of the Affidavit, he avers that he is the registered proprietor of the suit property having acquired the same in 1977 from one Elijah Chengo. It is his case that the Respondents have now trespassed into the suit property and started claiming ownership thereof. In addition, the Respondents have now started cutting, selling and/or harvesting the trees standing on the suit property with a view of disposing the suit property. Accordingly, it has become necessary that this court issues orders to restrain the Respondents and to protect the substratum of the suit herein.

3. In a Replying Affidavit sworn by the 3rd Respondent David Nyiro Ndoro on 6th February 2017, the Respondents are opposed to the grant of conservatory orders as sought. They deny that they have trespassed into the suit property as alleged by the Applicant and aver that the suit property was subdivided in compliance with an Award of the Land Disputes Tribunal by virtue of which each one of them including the Applicant are now entitled to distinct portions of the subject parcel of land. In addition, they aver that this court has previously enjoined the Applicant from interfering with their peaceful occupation of their portions of the suit property, an order which they state the Applicant has not complied with.

4. I have gone through the application before me and the Affidavit filed in opposition thereto. I have also

studied the rival submissions and authorities filed by the Learned Advocates representing the parties herein. I have also gone through the file from the time this petition was filed in April 2013.

5. From the record, it is clear to me that an application very similar in nature and the intended outcome to the one presently before me was filed before this court on 2nd April 2013. Having heard the said application, the Honourable Justice Oscar Angote delivered a Ruling on 20th August 2013 dismissing the same with costs. In his Ruling aforesaid, the Learned Judge found as a matter of fact that the matters raised in this Petition had also been raised previously by the Applicant herein in Malindi High Court Civil Case No. 64 of 2008. That case was heard in full by the Honourable Justice Hellen Omondi who proceeded on 20th December 2010 to dismiss the suit in the following words:-

“My view is that the registration was tainted with misrepresentation made by the Plaintiff (the Petitioner herein) to the effect that the land was not encumbered yet he was fully in the picture regarding the dispute at the Land Disputes Tribunal....In any event Section 143(1) is a provision made subject to subsection (2) and I make a finding that the Plaintiff’s title is subject to challenge. His claim therefore fails and is dismissed with costs.”

6. The Honourable Justice Angote further found the Petitioner guilty of abusing the court process when it was discovered that he had initially preferred an appeal to the Judgement in HCCC 64 of 2008 only to withdraw the same on 10th June 2013 when the application came before him for hearing.

7. Looking at the application before me, it is not lost on me that the grounds stated by the Petitioner on the body of the application as well as the facts enumerated in the Supporting Affidavit are more or less the same as those stated in his application dated 2nd April 2013 which was heard and was dismissed as aforementioned by the Honourable Angote J. This application is clearly to me a misuse of the court machinery and processes. It lacks bonafides and is meant to cause the opposite party unnecessary anxiety, trouble and expense.

8. There are in existence valid court orders restraining the Petitioner/Applicant from interfering with the Respondent’s peaceful occupation and use of their respective portions of land. Those orders must mean that the Respondents are entitled to all rights that appertain to the use and occupation of those portions of the suit premises. They have not been set aside. Instead I am now being asked in a roundabout way to restrain them from use and occupation of the said land in the very manner that the earlier court orders had authorized them to do. I find no reason to do so.

9. The upshot is that the application dated 18th January 2017 is dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J. O. OLOLA

JUDGE