



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.108 OF 2015

AEGIS LIMITED.....PLAINTIFF

=VERSUS=

KAZUNGU NGUMBAO.....DEFENDANT

R U L I N G

Introduction:

1. Before me are two Applications, one dated 8th July 2015 by the Plaintiff while the other one is dated 17th August 2015 and filed by the Defendant. The Defendant's Application is actually a response to the Plaintiff's Application.

The Plaintiff's case:

2. The Plaintiff's Application is seeking for the following orders:

(a) THAT the Defendant/Respondent by himself, his agents, servants, workers, employees or any other persons acting on his behalf, be temporarily restrained from entering, remaining, trespassing, cultivating, planting any trees plant and/or dealing in any manner with the Plaintiff's plot NO. MALINDI/RAMADA/33, pending the hearing and determination of this Application.

(b) THAT the Defendant/Respondent by himself, his agents, servants, workers, employees or any other persons acting on his behalf, be permanently restrained from entering, remaining, trespassing, cultivating, planting any trees plant and/or dealing in any manner with the Plaintiff's plot NO. MALINDI/RAMADA/33.

(c) That the costs of this suit be provided for.

3. The Plaintiff's Application is premised on the grounds that the Plaintiff is the absolute registered

owner of parcel of land known as Malindi/Ramada/33; that the Plaintiff is an innocent purchaser for valuable consideration having purchased the land from the previous owner, Godana Divicha Guyo and that the Defendant has trespassed on the suit property.

4. The Plaintiff's director has deponed that despite engaging the area elder, the chief and the sub-chief, the Defendant has refused to stop his acts of trespass.

The Defendant's case:

5. In response to the Plaintiff's Application, the Defendant filed a Notice of Grounds of Opposition and a Replying Affidavit.
6. In the Grounds of Opposition, the Defendant averred that the suit land is agricultural land; that the Plaintiff on which the Application is founded is incompetent and filed contra-statute; that the agreement for sale of land relied upon by the Plaintiff became null and void and legally unenforceable for failure to comply with the Land Control Act and that whoever obtained the letter of consent is an inter-meddler within the meaning of Section 45 of the Laws of Succession Act.
7. According to the Defendant's Affidavit, Godana Divicha Guyo was allocated the suit land and immediately sold it to him.
8. The Defendant has deponed that the agreement of sale of land relied upon by the Plaintiff became null and void after six months and that the instrument of transfer made on 14th May 2014 is a fraud on the Defendant because it was executed long before compliance with the Land Control Act.
9. According to the Defendant, by the time the letter of consent was reportedly issued to Godana Divicha Guyo on 19th February 2015, the deceased had already died.
10. It is the Defendant's case that in any event, the title exhibited by the Plaintiff was issued on 1st April 2015, long before the discharge of charge.
11. It is the Defendant's deposition that the Plaintiff is not an innocent purchaser for value without notice of the charge in favour of the SFT; or the occupation and working on the suit land by the Plaintiff since 1997 and the death of the former owner on 14th December 2014 long before the matter of sale of the suit land was taken to Malindi Land Control Board.
12. According to the Defendant, he has not trespassed on the land having taken possession of the same with the permission of the deceased owner.

The Plaintiff's Further Affidavit:

13. In response to the Defendant's Affidavit, the Plaintiff's director deponed that it is true that the Defendant resides on the suit property; that the Defendant did not purchase the suit property as alleged and that the photographs annexed on the Defendant's Affidavit are from the Defendant's residence where he stays with his family and that the crops seen in the photographs are on a different piece of land and not on the disputed suit property.
14. The Plaintiff's director in his affidavit wondered why the Defendant has not obtained the consent of the Board after allegedly entering into an agreement over the suit property.
15. The advocates for both parties appeared before me on 13th October, 2015 and made oral submissions. I have considered the submissions which are a reiteration of the depositions of the parties herein.

Analysis and findings:

16. Both the Plaintiff and the Defendant claim to have purchased the suit property from Godana Divicha Guyo who died on 14th December 2014.
17. Whereas the Defendant claims that he purchased the suit property from the late Divicha vide two agreements dated 19th April 2014 and 3rd May 2000, the Plaintiff's claim is premised on the fact that he has a title deed that was issued to it on 1st April 2015.
18. Although the Defendant has alleged that the Land Control Board did not authorise the sale of the suit property to the Plaintiff within six months as required under the law, the Plaintiff did not

- respond to that deposition at all.
19. The Plaintiff did not also annex a copy of the sale agreement that it entered into with the late Godana Divicha Guyo to ascertain the legality, prima facie, of the title deed that was issued to it in April 2015.
 20. Suffice to say that the Plaintiff's bundle of documents that were filed together with the Plaintiff shows that it entered into a sale Agreement with the Godana Divicha Guyo vide an agreement dated 30th April 2014. The said Godana Divicha is said to have also signed the Transfer of land on 14th May 2014, according to the Plaintiff's bundle of documents.
 21. However, the consent of the Land Control board shows that the Application for the consent to sale the suit property is dated 15th February 2015, by which time Mr. Godana had already died.
 22. The issue as to whether it is Mr. Godana who signed the Application for the consent of the Board can only be answered satisfactorily at trial.
 23. The Agreement between the Plaintiff and the Defendant is dated 30th April, 2014 while the consent is dated 19th February 2015. Whether the said consent is valid in view of the provisions of Section 6 of the Land Control Act, which requires the consent to be granted within six months from the date of the agreement, can only be dealt with conclusively at trial.
 24. All I can say for now is that the Plaintiff has not shown, prima facie, that it obtained the consent of the Board within the requisite period.
 25. The Defendant has also not shown that he has ever obtained the consent of the Board since he purportedly entered into an agreement with the late Guyo.
 26. However, considering that the agreements by the Defendant were first in time, I find and hold that it is the Defendant who was in possession of the suit property at the time the suit property was purportedly transferred to the Plaintiff.
 27. While awaiting for the determination of the legal issues raised by both parties, the interests of justice dictates that it is the Defendant who should continue being in possession of the suit property, having purchased it earlier than the Plaintiff.
 28. Indeed, the Plaintiff has not shown the irreparable injury it is likely to suffer if the injunctive order is not issued in its favour.
 29. For those reasons, I dismiss the Plaintiff's Application dated 8th July 2015 with costs.

Dated and delivered in Malindi this 26th day of February, 2016.

O. A. Angote

Judge