



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 101 OF 2015

ANANIAS NYAMU KIRABU.....PLAINTIFF

=VERSUS=

1. ERIC MUGAMBI

2. FRANKLIN

MWIRIGI

3. MARTIN NJERU.....DEFENDANTS

RULING

Introduction:

1. The two Applications by the Plaintiff and the Defendant are dated 25th June, 2015 and 20th August, 2015 respectively.
2. In his Application dated 25th June, 2015, the Plaintiff is seeking for the following orders:-
 - (a) **THAT pending hearing and determination of the suit herein an injunction do issue restraining the defendants/respondents by themselves, hirelings, agents or otherwise howsoever from interfering with access or entry upon the property known as subdivision 655/(original 539/79) Sect III/MN by the Plaintiff/Applicant or persons doing so under his authority.**
 - (b) **THAT the costs of this application be provided for.**
3. In support of his Application, the Plaintiff has deponed that he is the registered owner of land known as subdivision No. 655 (Original 539/79) Sec.111MN (the suit property); that he purchased the suit property in the year 1977 in the neighbourhood of one of his business which is a bar and restaurant business and that the Respondents who are his sons, occupy semi-permanent structures on the suit land.
4. According to the Plaintiff, the Defendants prevented Messers Golan Ren and his three workers from carrying out a preliminary survey on the suit property.
5. On the other hand, the Defendants' are seeking for the following orders vide their Application dated 20th August 2015.
 - (a) **THAT pending the hearing and determination of this suit, there be**

issued an interim injunction restraining the Respondent, his partners, employees, servants and/or agents from felling trees, demolishing houses, transferring, threatening the Applicants and their families or dealing in any manner with land known as 655/III/MN, (original No. 539/39) and status quo be maintained as at the time of filing this suit.

(b) THAT directions for service and hearing of this Application be given.

6. The Application by the Defendants is premised on the grounds that they are the biological sons of the Plaintiff; that they have been residing on the suit property since birth and that the Plaintiff had allocated them their respective portions of land within the suit property.
7. According to the Defendants, they have developed the suit property by building houses, planting trees, keeping livestock and that their wives and children live on the said land with them.
8. It is the Defendants' case that the suit property was purchased through a joint venture of both parents and that it was agreed that the Plaintiff shall hold the title as the head of the family for the benefit of the whole family.
9. In addition to their Application, the 3rd Defendant filed a Replying Affidavit reiterating the contents of the Affidavit in support of their Application.

Submissions:

10. The Plaintiff's advocate submitted that Section 23 of the Registration of Titles Act recognised the Certificate of Title that was issued by the Registrar as conclusive evidence that the person named therein is the proprietor of the land; that the Plaintiff is entitled to enjoy full proprietary rights over the land and that the Defendants do not have a claim over the suit property.
11. Counsel submitted that the agreement that was entered into between the Plaintiff and his late wife was made whilst there was pending separation Cause No. 14 of 1993; that the separation cause was withdrawn unconditionally and that the suit property was in any event part of the proceedings in Mombasa HC Misc 242 of 2004 which abated upon the demise of the Plaintiff's wife.
12. The Plaintiff's counsel submitted that the very notion that a man should be compelled to bequeath his property to his offspring during his life time, or be deprived of the right of free enjoyment thereof is anachronistic.
13. The Defendants' advocate submitted that although the land in question is registered in the Plaintiff's name, the same was acquired through the joint contribution of the Plaintiff and his late wife; that the Plaintiff is holding the title in trust for the whole family and that the Plaintiff left the land and only went back in the year 2004 and allocated to the Defendants the suit property.

Analysis and findings:

14. It is not in dispute that the Plaintiff is the registered owner of plot number 655/III/MN. It is also not in dispute that the Defendants are the sons of the Plaintiff.
15. According to the Certificate of Title in respect to the suit property, the Plaintiff was registered as the proprietor of the suit property on 6th June 1985.
16. It is the Defendants' case that by virtue of the fact that their late mother was the wife of the Plaintiff and their mother having jointly acquired the suit property with the Plaintiff, the Plaintiff cannot deal with the suit property as he wishes because he is holding the land in trust for the entire family.
17. The Defendants' case is hinged on the agreement of 15th September 1993 between the Plaintiff and their late mother.
18. In the agreement, the Defendants' late mother agreed to withdraw separation cause no. 14 of 1993 if the numerous properties acquired by the two are divided as suggested in the agreement. The penultimate paragraph of the agreement provided for the division of the properties as follows:-

“2. That those properties acquired by the parties hereto comprising a one Decimal Eight (1.8) acre plot together with house standing onshall continue to belong to Mr. Ananias Nyamu Kiragu, Mrs Mary Miriko Kiragu

and their children.”

- 19.The Plaintiff has not denied having signed the said agreement. The Plaintiff has also not denied that the suit property is the one described in the agreement.
- 20.Indeed, on the basis of the said agreement, the late Mrs. Mary Miriko Kiragu withdrew the succession cause.
- 21.The Plaintiff has not denied the deposition by the 2nd Defendant that one of his sons, Kenneth Mwenda resides in the family house standing on the suit property together with his (Plaintiff's) daughter who is still a student and his grand children.
- 22.Having agreed in writing with the late Mary Miriko Kiragu that the suit property belongs to “Mr. Ananias Nyamu Kiragu, Mrs Mary Miriko Kiragu and their children”, the Plaintiff, in my view, cannot wait until the death of Ms Miriko to state that he can deal with the suit property as he wishes.
- 23.It is trite law that courts cannot re-write agreements for parties. Parties are bound by the agreements that they enter into. Until the Plaintiff shows by way of evidence that the agreement of 15th September 1993 should be set aside so as to allow him to deal with the suit property freely, the status quo prevailing now should be maintained.
- 24.In the circumstances, I find and hold that the Plaintiff has not shown that he has a prima facie case with chances of success. Instead, the status quo as pleaded in the Defendant's Application dated 26th August, 2015 should be maintained pending the hearing of the suit.
- 25.For those reasons, I dismiss the Plaintiff's Application dated 25th June 2015 with costs and allow the Defendants' Application dated 20th August, 2015 as prayed.

Dated and delivered in Malindi this 1st day of April, 2016.

O. A. Angote

Judge