



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 225 OF 2015

MOHAMED RAFIK AYUB (*suing as an administrator of the estate of Ayub Ahmed*.....)**PLAINTIFF/RESPONDENT**

=VERSUS=

PENTECOSTAL ASSEMBLIES OF GOD.....**DEFENDANT/APPLICANT**

R U L I N G

1. Two Applications are before this court. The first Application was filed by the Plaintiff and is dated 8th December, 2015.
2. In the said Application, the Plaintiff is seeking for the following orders:-

(a) THAT there be a temporary injunction restraining the Defendant/Respondent by itself, its agents, savants, legal representatives or anyone claiming interest through it from constructing, trespassing, entering, remaining, selling, alienating and/or dealing with the suit property known as Plot number 93/2 registered in Volume L.T.35 Folio 374/6 Malindi measuring 2.94 acres in any manner whatsoever pending the hearing and determination of this Application interpartes.

(b) THAT costs to this Application be in the cause.

3. The second Application was filed by the Defendants and is dated 14th December, 2015. The Application is seeking to stay the orders that were made on 9th December, 2015. The determination of the issues in the first Application will determine the second Application.

The Plaintiff's/Applicant's case:

4. The Plaintiff has deponed that the deceased is the registered proprietor of the suit property; that the Defendant has trespassed on the suit property and that although the deceased had entered into an agreement of sale of the suit property with the Defendant, the Defendant was unable to meet the purchase price and the deceased rescinded the agreement.
5. According to the Plaintiff, the Respondent is now fencing the suit property.

The Defendant's/Respondent's case:

6. The Defendant's pastor deponed that the Defendant is the registered proprietor of plot number 93/2A and 93/2B Malindi measuring 0.95 acres and 0.2 acres respectively; that the two portions of

- land were acquired upon sub-division of plot number 93/2 and that the Defendant purchased the suit property from the late Ayub Ahmed.
7. According to the Defendant's representative, the Defendant took possession of the suit property and developed on it a church, a school, a toilet, a kitchen and other income generating structures together with a house for the pastor.
 8. It is the Defendant's case that the church has been conducting its worshiping activities on the land for over 40 years.

Submissions:

9. The Plaintiff's counsel submitted that the consent nullifying the Agreement of sale are clear; that the proposed sub-division was never approved by the Municipal Council of Malindi; that the contract was nullified and a refund of the deposit paid was made to the purchaser and that plot number 93/2 Malindi is still owned by the deceased.
10. The Plaintiff's counsel submitted that the Defendant remained on the suit property on condition that it pays a monthly rent of Kshs.4,000.
11. The Defendant's advocate submitted that the Defendant purchased the suit property; that the suit property was transferred to the Defendant way back in 1982 and that the Defendant has been in occupation of the land since then.
12. The Defendant's advocate further submitted that there was no consent for rescission of the agreement.

Analysis and findings:

13. The Plaintiff's case in this matter is that the late Ayub Ahmed is the registered proprietor of plot number 93/2 Malindi measuring 2.94 acres. To support this assertion, the Plaintiff has annexed an Indenture which was issued to the late Ayub in September, 1969. The Plaintiff has also annexed an Agreement of sale dated 30th December, 1975 between the late Ayub and the Defendant.
14. It is the Plaintiff's case that the said Agreement was rescinded by the consent of the parties. The purported agreement for rescission dated 3rd September, 1981 has been annexed on the Supporting Affidavit.
15. The Defendant on the other hand has annexed the Indenture dated 19th October, 1982.
16. The said Indenture was entered into between the late Ayub and the Defendant in respect of the suit property and was duly witnessed by Mr. Joseph Karisa Mwarandu advocate.
17. The Indenture was registered in the land registry on 2nd November, 1983.
18. Other than the Indenture that was registered in favour of the Defendant, the evidence before me shows that the Defendant has been in occupation of the suit property since 1983 when the Indenture was registered in its favour.
19. Although the Plaintiff claims that the sale agreement that was entered into between the Plaintiff's father and the Defendant was rescinded on 3rd September, 1981, and that the Defendant was allowed to occupy the suit property on condition that it pays the monthly rent, the Plaintiff has not explained why he has never collected rent from the Defendant since 1981.
20. The Plaintiff could not have possibly collected the monthly rent from the Defendant because the Defendant was registered as the owner of the suit property in 1983.
21. The evidence by the Defendant clearly shows that prima facie, it is the Defendant who is the owner of the suit property.
22. Consequently, I find and hold that the Plaintiff has not established a prima facie case with chances of success. The Plaintiff has also not established the irreparable injury that he shall suffer if the injunctive order is not granted considering that it is the Defendant who has been in possession of the land since 1983.
23. For those reasons, I dismiss the Plaintiff's Application dated 8th December, 2015 with costs.

Dated, signed and delivered in Malindi this 24th day of June, 2016.

O. A. Angote

Judge