



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.169 OF 2014

1. GEORGE MADEMU MUNGA
2. DAVIS MKOKA MUNGA
3. JOHANA BONDERA MUNGA
4. FRANCKLINE SHIDA MUNGA.....PLAINTIFFS

=VERSUS=

1. RODGERS CHIRIBA NYAMBU
2. GEORGE BARUA.....DEFENDANTS

R U L I N G

Introduction:

1. The application for determination is a Notice of Motion dated 10th September 2014, brought under a Certificate of Urgency by the Applicant/Plaintiff. The Notice of Motion is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 63 of the Civil Procedure Act. The Applicant is seeking for the following prayers:-

(a) THAT, the Defendants/Respondents be restrained whether b themselves, their agents, servants, or representatives from trespassing into, cultivating, or in any other way interfering with plot no.125 Vinagoni pending the hearing and determination of this application.

(b) THAT, the Defendants be restrained whether by themselves, their agents, servants or representatives from trespassing onto, cultivating or in any other way interfering with Plot NO. 125 Vinagoni pending the hearing and determination of this suit.

(c) THAT the Defendants be compelled whether by themselves, their agents, servants, or representatives to vacate plot no.125 Vinagoni and stop trespassing on or cultivating or interfering with the plot in any other way.

(d) THAT, costs be to the Plaintiffs.

Plaintiffs' case:

2. The 2nd Plaintiff in his affidavit deponed that they are the owners of Plot No. 125 Vinagoni in line with the Land Adjudication process resting within the decision of the land adjudication officer dated 23rd March, 1999.

3. The Plaintiff's deposition is that the suit property has been subject of litigation resting with the decision of the Court of Appeal made on 6th December 2012 in Civil Appeal No. 236 of 2007; that the decision of the Minister in appeal no. 161 of 1999 was quashed by the Court of Appeal and is subject to a fresh hearing and is pending decision and that the defendants unlawfully and without permission from the Plaintiffs entered into the suit property and started clearing and cultivating it.

Defendants' case:

4. The Defendants case is based on 1st Defendant's Replying Affidavit with the list of documents annexed. The Replying Affidavit was sworn on 1st October 2014.

5. According to the 1st Defendant, the application by the Plaintiff lacks bonafide and is made in bad faith, is characterized by falsehoods and instituted under wrong assumptions.

6. The 1st Defendant deponed that he is a civil servant together with the second Defendant who works with Kilifi-Mariakani Water and Sewerage Company. Thus they are not farmers as claimed by the 1st Plaintiff in his Supporting affidavit and that as individuals, they have never cultivated the suit property.

7. Further, the defendants' averement is that the suit property is still under the process of adjudication and that non of them has a superior right, thus according to them, it would be unfair to restrain their parents from the land where they eke a living.

8. According to the Defendants, the Plaintiffs have annexed wrong copies of the document in reference to the demarcation process and cannot rely on it unless they produce the original copy which has not been tampered with.

Analysis and findings:

9. The Plaintiffs are seeking for injunctive orders restraining the Defendants from trespassing on plot No. 125 Vinagoni.

10. The Plaintiffs have annexed copies of pleadings, Rulings and Judgments showing the numerous occasions that this matter has been in Tribunals and the courts, which litigation commenced way back in 1953.

11. The proceedings exhibited by the Plaintiffs shows that during the adjudication process, the Land Adjudication Committee of Majajani adjudication section of Kauma location awarded the suit property to the 1st Plaintiff. The decision of the Committee was upheld by the Arbitration Board on 26th November, 1993.

12. On 23rd March, 1999, the Land Adjudication Officer once again upheld the decision of both the Committee and the Board pursuant to the provisions of the Land Adjudication Act.

13. The Defendants herein were not satisfied with the decision of the Committee, the Board and the Land Adjudication Officer and lodged an appeal to the Minister. On 17th July, 2002 the Minister dismissed the appeal and affirmed the previous decisions.

14. The 1st Defendant then lodged a Judicial Review Application in the High Court challenging the decision of the Minister, which Application was dismissed on 12th July, 2007.

15. Undeterred, the 1st Defendant moved the Court of Appeal. The Court of Appeal agreed with the 1st Defendant and set aside the decision of the Minister.

16. The decision of the Court of Appeal however did not set aside the award by the Committee, the Board and the Land Adjudication Officer. All the Court of Appeal did was to quash the decision of the Minister because there were no proceedings to show how the D.C sub-delegated his powers to a Mr. Chelimo Cheboi.

17. The Court of Appeal having set aside the decision of the Minister on 6th December, 2012, the Defendants were under an obligation to have the appeal re-heard by the Minister. There is no evidence before me to suggest that this was ever done.

18. Unless and until the Minister makes a decision that is contrary to the decisions of the Committee, the Land Arbitration Board and the Land Adjudication Officer, it is the Plaintiffs who should remain in possession of the suit land.

19. In the circumstances, I find and hold that the Plaintiffs have established a prima facie case with chances of success.

20. Considering that the Plaintiffs and the Defendants cannot co-exist on the suit property, the Plaintiffs will suffer irreparably unless the injunctive orders are issued.

21. For those reasons, I allow the Plaintiffs' Application dated 10th September, 2014 as prayed.

Dated, signed and delivered in Malindi this **16th** day of **September**, 2016.

O. A. Angote

Judge