



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 183 OF 2013

DANIEL KATUMO NYAMAI (*suing as the administrator of the Estate of Onesmus Nyamai Kyengo (Deceased)*).....PLAINTIFF/APPLICANT****

=VERSUS=

1. GILBERT KANUNGU MWAGANDA

2. JOANNES CHARO KATANA

MRYANI

3. JUMWA KARISA

KIERIA

4. ZAWADI KIBEYU

MWANZA

5. PAUL KATANA

MUNYOKI

6. JOSEPH NGALA

**7. JONATHAN KENGA KATANA alias
GONA.....**DEFENDANTS****

RULING

Introduction:

1. What is before me is the Plaintiff's Application dated 16th October, 2013 seeking for the following reliefs:
 - a. **THAT an order of prohibitory injunction be issued to restrain the Defendants by themselves, their servants, agents or whomsoever claiming under them from subdividing, selling, transferring, developing, erecting structures, alienating, dealing, making roads on the suit property known as CR 27920 subdivision No. 176 (Original Number 163/1) of Section IV Mainland North pending the hearing and determination of this application and suit interpartes.**
 - b. **THAT an Order of Mandatory injunction be issued to compel the Defendants and their agents, servants, whatsoever claiming under them to vacate the suit property known as**

CR27920 subdivision No.176(Original Number 163/1) of Section IV Mainland North pending the hearing and determination of this application and suit interpartes.

- c. THAT the Officer Commanding Kijipwa Police Station and the Provisional police officer Coast do provide security to the plaintiff for purposes of service and enforcement of the orders of the court herein.**

The Plaintiff's/Applicant's case:

2. The Plaintiff has deponed in his affidavit that he is the administrator of the estate of the late Onesmus Nyamai Kyengo, the registered proprietor of land known as CR.27920 Subdivision number 176/IV/MN.
3. It is the Plaintiff's deposition that he has been living on the suit property with his siblings since the deceased bought the suit property; that the Defendants threatened to invade the suit property and that the 1st, 5th, 6th and 7th Defendants have erected structures on the suit land.
4. According to the Plaintiff, the Defendants have been charged on numerous occasions with the offence of forcible detainer including in Kilifi SRMCCC No. 684 of 2007 in which the 7th Defendant was charged and convicted.

The Defendant/Respondent's case:

5. The 7th Defendant swore an affidavit on his own behalf and on behalf of the other Defendants.
6. The 7th Defendant deponed that him, together with the other Defendants have been in occupation of the suit property for over 100 years having been born there; that they have homesteads on the disputed land and that they have not violently invaded the suit property as alleged.
7. According to the Defendants, there is a pending suit being HCCC No. 155 of 2013 (os) in which they are seeking to be declared as the owners of the suit property by virtue of the doctrine of adverse possession.
8. It is the Defendants' case that they are not selling any portion of the disputed parcel of land other than farming the land.

Submissions:

9. The Plaintiff's counsel submitted that this suit is a simple and clear case of unlawful interference with the Plaintiffs interests to the suit property; that the Defendants have been involved in an unlawful scheme of selling off parts of the suit property and that there is no evidence that the Defendants have any right to the suit property.
10. The Defendants' advocate submitted that it will not be proper at this stage for the Plaintiff to be granted mandatory orders of injunction.
11. Counsel submitted that the Plaintiff has not disclosed when the alleged forceful entry in the suit property by the Defendant happened.
12. Counsel submitted that according to the letters dated 26th October 1965, 20th February 1968 and 20th August 1968, the families of the Defendants have always been on the suit property; that the Defendants have always co-existed with the family of the Plaintiff and that it is the Plaintiff who has always provoked the Defendants.

Analysis and findings:

13. According to the Plaintiff and the Plaintiff's Affidavit, the late Onesmus Nyamai Kyengo was registered as the proprietor of the suit property measuring 48.06 Ha on 22nd May 1996. That position is confirmed by the annexed Certificate of Title.
14. On the other hand, the Defendants case is that they have been living on the suit property for over 12 years, and consequently, the Plaintiff's claim for an order of eviction or injunction is time barred.
15. Although the suit property was registered in favour of the late Onesmus Nyamai Kyecho in 1996, the Plaintiff has not stated when the Defendants invaded the land.

16. The Defendants have annexed on the Replying Affidavit letters which were authored in 1965, 1968 and 1970 showing that there has been a long standing dispute between the registered owners of the suit property with the squatters, including the Defendants or their relatives.
17. In the letter dated 24th December, 1970, the then Secretary to the Kilifi Land Control Board suggested that in order to find a solution to the dispute between the proprietor of the suit property and Kaluma Katherji and Katana Mwanza, who were said to be the two main squatters, the Plaintiff's father he was to subdivide the land and allocate the occupied one to the said squatters.
18. Whether the Defendants occupation of a portion of the suit property is legitimate or not can only be determined at the hearing of the suit.
19. Considering that the Defendants have raised the Defence of limitation of time viz-aviz the Plaintiff's right to the suit property; and considering that there is in existence a suit by the Defendants in which they are claiming to be recognised as the proprietors of the suit property by virtue of the doctrine of adverse possession, I am of the view that the status quo should be maintained pending the hearing of the suit.
20. For those reasons, I make the following orders:

(a) That the Defendants to continue occupying and utilizing the portions of the suit property that they are occupying and utilizing pending the hearing of the suit.

(b) Both parties should not sell, alienate, transfer or charge the suit property pending the hearing of the suit.

(c) Each party to bear his own costs.

Dated and delivered in Malindi this 13th day of March, 2015.

O. A. Angote

Judge