



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.157 OF 2014

FELIX NGALA MWAVUO.....PLAINTIFF

=VERSUS=

EVANSON MPATHE ZIRO.....DEFENDANT

R U L I N G

Introduction

1. The Application by the Plaintiff is dated 19th August 2014. In the Application, the Plaintiff is seeking for the following reliefs:

(a) Pending inter party hearing of this application and hearing and determination of this suit thereafter, a temporary injunctive order be issued restraining the Defendant/Respondent, his servants, agents, employees or any person acting on their behalf from trespassing, constructing any building/structure or interfering in any manner whatsoever and whichever in a portion of land situated at Thalathameli within Malindi in Kilifi County.

(b) Pending hearing and determination of this suit, a temporary injunctive order be issued restraining the Defendant/Respondent, his servant, agents, employees or any other person acting on their behalf from further trespassing, constructing any building/structure or interfering in any manner whatsoever and whichever in a portion of land situated at Thelathameli within Malindi in Kilifi County.

The Applicant's case:

2. The Application is premised on the grounds that the Applicant's grandfather "gathered" and cleared the bush on a portion of land situated at Thelathameli; that the Applicant's grandfather gave the Applicant the said portion of land and that the Applicant has developed the suit property.
3. It is the Applicant's case that the suit property is their ancestral land and that he assumed all the rights and interest in the land; that the Defendant has trespassed on the land and that the Respondent does not have any proprietary rights over the land.

The Respondent's case:

4. In his Replying Affidavit, the Respondent deponed that the suit property comprises of $\frac{3}{4}$ of an acre

- within a large parcel of land which is owned by the family of Nassir Abdalla; that the Plaintiff's uncle, Karisa Mumba Kaviria, was permitted by the said family to cultivate the land and that on 5th December 2012, the Plaintiff's uncle and his family sold to the beneficial owner all the trees that he had planted on the suit property.
5. It is the Defendant's case that he purchased $\frac{3}{4}$ of an acre from the original beneficial owners on 11th December 2012 and that he took possession of the same and started development.
 6. In support of the Defendant's case, Amina Hadija Abdulrehman deponed that her family owned the suit property from time immemorial having bought it from Karisa Chai.
 7. It was her deposition that she allowed the Plaintiff's grandmother to cultivate the suit property and upon her demise, her son Karisa Mumba Kaniria started cultivating it. However, the Plaintiff's uncle sold to her family all the trees that he had planted; that the Plaintiff's late grandfather and uncle were mere licensees and that it is the Defendant who is the beneficial owner of the suit property.

Further Affidavit:

8. In the Further Affidavit, the Applicant deponed that it was his grandfather who cleared and cultivated a portion of land 10814 Malindi registered in the names of Coast Development Authority.

Submissions:

9. The Plaintiff's advocate submitted that the vendor who sold the suit property to the Defendant had no title capable of being transferred and that a person cannot sell what he does not have.
10. Counsel submitted that the Respondent has admitted that the Applicant's relatives are the ones who have been in occupation of the suit property.
11. The Defendant's counsel submitted that the Plaintiff has failed to describe the suit property sufficiently to identify it; that the suit offends the provisions of Order 4 Rule 3 of the Civil Procedure Rules and that no injunction should issue.
12. The Defendant's counsel further submitted that no evidence of ownership has been availed by the Plaintiff and that the mere fact that his grandfather is alleged to have cultivated the suit property did not confer on him ownership.

Analysis and findings:

13. Both the Plaintiff and the Defendant are claiming to have beneficial interests in the suit property. From the deposition of the Plaintiff, it would appear that the suit property is a portion of land owned by Coast Development Authority.
14. Although the Plaintiff has not described the suit property, it is clear from the Defendant's Replying Affidavit that the land he intends to fence by putting up a perimeter wall and measuring $\frac{3}{4}$ of an acre is the land in dispute, and the same is identifiable.
15. In view of the fact that both the Plaintiff and the Defendant do not have documents of ownership, and in view of the admission by the Defendant that he intends to put up a perimeter wall, the most appropriate order to issue is that of status quo.
16. For those reasons, I make the following orders:

(a) Both the Plaintiff and the Defendant are hereby restrained from constructing, dealing, depositing material, selling or interfering in any manner in the suit property pending the hearing of the suit.

(b) Each party to bear his own costs.

Dated and delivered in Malindi this 12th day of June, 2015.

O. A. Angote

Judge