



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.73 OF 2014**

1. ISLAM SAID ISLAM
2. MOHAMED SAID ISLAM
3. FATUMA SAID MASJERY
4. SWALEH SAID MASJERY
5. ARIF IMAR BAKOR.....PLAINTIFFS

**-VERSUS-**

1. MALIK MBASHEE MAGUMBA
2. KENYA PORTS AUTHORITY.....DEFENDANTS

**R U L I N G**

**Introduction**

1. This Ruling is in respect to the Plaintiffs' Application dated 16<sup>th</sup> April 2014 in which they are seeking for the following reliefs:
  - (a) That a temporary injunction be granted restraining the 1<sup>st</sup> Defendant by himself, his servants, authorised agent or any person working under his authority entering into, occupying, alienating, working or in any way whatsoever dealing with the land parcels Nos 263, 264, 265, 266 and 267 pending the hearing and determination of this Application.
  - (b) That a temporary injunction be granted restraining the 2<sup>nd</sup> Defendant from in any way whatsoever, dealing in lands parcel Nos 263, 364, 265, 266 and 267 and compensating the 1<sup>st</sup> Defendant or any other person apart from the Plaintiffs pending the hearing and determination of this suit.
  - (c) That the costs of this Application be provided for.

**The Plaintiffs'/Applicants' case:**

2. The Applicants' case is that they are the proprietors of plot numbers 264, 265, 266 and 267 respectively; that they are the ones in actual possession of the said plots due to their customary rights and that the 1<sup>st</sup> Defendant has cancelled the Plaintiffs' names from the official list of owners of plots replaced with his name.
3. According to the Plaintiffs, the 2<sup>nd</sup> Defendant is in the process of acquiring the parcel of land allocated to the Plaintiffs and has agreed to compensate the owners; that the 2<sup>nd</sup> Defendant should not compensate people who are not owners of the plots and that the 1<sup>st</sup> Defendant is not the owner of the suit property.
4. The 1<sup>st</sup> Plaintiff has deponed that the suit property has not been surveyed and is unregistered.
5. It is the 1<sup>st</sup> Plaintiff's deposition that in the year 2010, the elders, under the auspice of Langoni Council of Elders sub-divided the suit property and had it numbered with a view of facilitating the registration of its ownership and that after the said subdivision, the Plaintiffs were allocated the five portions.
6. The 1<sup>st</sup> Plaintiff has deponed that in the year 2012, the 1<sup>st</sup> Defendant caused a new listing to be made, which, according to the 1<sup>st</sup> Plaintiff, is irregular.

#### **The 1<sup>st</sup> Defendant's/Respondent's case:**

7. The 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection in which he averred that the 1<sup>st</sup> Plaintiff has deponed falsely that he has been duly appointed and authorised to appear, plead or act on behalf of the other Plaintiffs; that the Verifying Affidavit is totally defective for lack of authority and that the Plaint does not sufficiently identify land parcel Nos.263, 264, 265, 266 and 267 contrary to the provisions of Order 4 Rule 3.

#### **Submissions:**

8. The Plaintiffs' advocate submitted that none of them is in possession of the Title Deed or any Title document; that it is common ground that both the Plaintiffs and the Defendants are laying a claim to unknown parcels of land and that there is a dispute over the suit properties.
9. Counsel submitted that the Preliminary Objection does not raise any serious issue or point of law and that if a document has not been filed, it can always be filed.
10. The Defendant's counsel submitted that on the Plaintiffs' own documents, the 1<sup>st</sup> Defendant's name is indicated and that the Plaintiffs' claim is premised on letters written by nondescript private entities.
11. Counsel submitted that the Verifying Affidavit to the Plaint does not provide proof that the Plaintiff has authority of the rest of the Plaintiffs to swear it and that in any event the Plaintiffs have failed to describe the suit property.

#### **Analysis and findings:**

12. The ultimate prayer in the Plaintiffs' Plaint is for a declaration that they are the owners of land numbers 263, 264, 265, 266 and 267.
13. The Plaintiffs have averred in the Plaint that they are the owners of the said parcels of land which are unregistered by virtue of customary land rights.
14. Although the Plaint has a total of five Plaintiffs, the Verifying Affidavit was signed by the 1<sup>st</sup> Plaintiff alone.
15. At paragraph 1 of the Verifying Affidavit, the 1<sup>st</sup> Plaintiff deponed that he has the authority of the other four Plaintiffs to swear the Verifying Affidavit.
16. Although the Plaintiffs, filed their list of witnesses and documents together with the Plaint, they did not file any document to show that they had authorized the 1<sup>st</sup> Plaintiff to swear the Verifying Affidavit and the Supporting Affidavit on their behalf.
17. Indeed, even after the 1<sup>st</sup> Defendant raised the issue of lack of authority by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Plaintiffs, the 1<sup>st</sup> Plaintiff did not file a Further Affidavit to annex the signed authority authorizing him to sign the Verifying Affidavit and the Supporting Affidavit on behalf of the other

- Plaintiffs.
18. Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules provides that where there are more Plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and the authority shall be in writing signed by the party giving it.
  19. The authority by the other Plaintiffs is a prerequisite for the filing of a suit where there is more than one Plaintiff. Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules has been couched in mandatory terms. Indeed, Order 1 Rule 13(1) and 2 is complimented by Order 4 rule 3 of the Civil Procedure Rules which provides that where there are several Plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.
  20. The failure by the 1<sup>st</sup> Plaintiff to file a letter authorizing him to swear the Verifying Affidavit and the Supporting Affidavit on behalf of the other Plaintiffs renders the Application for injunction fatally defective.
  21. For that reason alone, I shall, which I hereby, do strike out the Application dated 16<sup>th</sup> April 2014 with costs.

Dated and delivered in Malindi this **17<sup>th</sup>** day of **July** 2015.

**O. A. Angote**

**Judge**