



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.65 OF 2015
AFRI SHINE LTD.....PLAINTIFF
VERSUS
KIRIMO FONDO SHUTU
ABEL KAHINDI CHARO
KAZUNGU FONDO SHUTU.....DEFENDANTS

R U L I N G

Introduction

1. The two Applications by the Plaintiff and the Defendant are dated 28th April 2015 and 30th April 2015 respectively.
2. In the Application dated 28th April 2015, the Plaintiff is seeking for injunctive orders restraining the Defendants from trespassing or interfering with the Plaintiff's quiet and peaceful occupation of parcels of land known as 12274, 12271, 12273, 12278, 12275, 12277, 12279, 12276, 12282, 12283 and 12280, the suit properties, pending the hearing of the suit.
3. The Defendants are seeking for similar orders against the Plaintiff.

The Plaintiff's case:

4. According to the Affidavit by the Plaintiff's director, the Plaintiff is the registered proprietor of the thirteen (13) suit properties; that the Plaintiff acquired the suit properties in the year 2014; that the Defendants started encroaching on the suit properties in February 2015 and that the erection of the semi permanent structures on the suit properties has defaced, devalued and deteriorated the value of the property.

The Defendants' case:

5. In their Affidavit in Support of the Application dated 11th May 2015, the 3rd Defendant deponed that the acquisition of the suit property by the Plaintiff was illegal and of no legal consequence because the transfers were effected contrary to the existing court injunction in ELC Case Number 172 of 2013; that the Defendants in ELC No. 172 of 2013 were restrained from transferring the suit property until the determination of the suit and that the suit property is where the Defendants have their share comprising 1.5 acres.

6. It is the Defendants' case that they have been in occupation of the suit properties which is the subject of ELC Case No. 172 of 2013 and that the sale of the land was illegal.

The Plaintiff's response:

7. In response to the Defendant's Application, the Plaintiff deponed that at the time the Plaintiff purchased the suit property, there was no inhibition, encumbrance or limitation limiting the acquisition of the land; that the Plaintiff was not aware of the existence of ELC No. 172 of 2013 and that as at the time of the purchase, the Plaintiff did so as an innocent purchaser for value without notice.

Submissions:

8. The Plaintiff's advocate submitted that the Plaintiff purchased the suit properties between September and February 2015; that the Plaintiff is an innocent purchaser of the suit properties and that there is no evidence that the suit properties are as a result of a sub-division of land known as C10840.
9. The Defendant's counsel submitted that portion number C10840 was at all material times registered in favour of Japhet Noti Charo; that the said Japhet Noti Charo holds the title in trust for the Defendants who are family members of the Shutu family and that the suit property is part of their ancestral land which originally belonged to their father, Charo Shutu Masha.
10. Counsel submitted that the transfer of the suit properties to the Plaintiff was done in contempt of the orders in ELC Case No. 172 of 2013 and that the Plaintiff's acquisition of the land was illegal and of no legal consequences.

Analysis and findings:

11. The Plaintiff's Application for injunction is premised on the ground that it is the registered proprietor of the suit property.
12. According to the Certificates of Title annexed on the Application, the suit properties were transferred to the Plaintiff on diverse dates between September 2014 and February 2015.
13. The Defendants' claim on the other hand is that the suit properties are a subject of litigation in Malindi ELC Number 172 of 2013 in which an order of injunction was issued; that the suit properties could therefore not have been transferred to the Plaintiff and that the suit properties are part of their ancestral home.
14. The Defendants have annexed on their Affidavit the order of this court in Malindi ELC No. 172 of 2013 in which this court restrained Japhet Noti Shutu alias Njanja as follows:

“ (a) THAT pending the hearing of this suit, the Defendant, his servants, agents, employees, nominees, or any other person or authority be and is hereby restrained from alienating, transferring or charging the suit premises.”

15. The suit property in ELC No. 172 of 2013 is plot “C10840 situated within Malindi”. The basis of the injunctive order in ELC No. 172 of 2013 is captured in the Ruling of this court of 5th September 2014 as follows:

“ However, pending the hearing of the suit, and considering that the Defendant has not denied that he signed the two agreements, the interest of justice demands the status quo pertaining now should be maintained. It will make no sense if the Defendant is allowed to deal with the suit property in any manner he deems fit before the issues that have been raised by the Plaintiffs are ventilated at a full hearing.”

16. By the time the court was delivery its Ruling in ELC No. 172 of 2013, there was no indication by Japhet Noti Shutu, the Defendant therein, that he had caused portion number C10840 to be subdivided into various sub plots. Indeed, his case in that suit was that he was the registered proprietor of plot number C10840.

17. However, it has now turned out that by the time this court delivered its Ruling on 5th September 2014, the Defendant in ELC No. 172 of 2013 had already subdivided the land into various portions and transferred them amongst his immediate family members. The family members of the Defendant in ELC 172 of 2013 subsequently transferred the subdivisions to the Plaintiff herein *pendente lite*.
18. Although the Plaintiff has taken the position that the suit properties herein are different from C10840, the copies of the titles annexed on its Supporting Affidavit shows that the thirteen subdivisions were curved out of portion number 10840.
19. Indeed, the said Certificates of Title shows that the initial registered proprietor was Japhet Noti Charo, the Defendant in ELC Number 172 of 2013.
20. Having purchased the subdivisions that arose out of portion number 10840 *pendente lite*, the Plaintiff cannot wriggle out of that suit. Indeed, the Judgment that shall be delivered in that suit will be binding on the Plaintiff herein.
21. In the case of **Carol Silcock Vs Kassim Shariff Mohamed, Malindi ELC No. 55 of 2011**, this court discussed at length the applicability of the doctrine of *lis pendens*.
22. This court quoted the case of **Belleny Vs Sabine (1857) I Dej 566, 584** where **Turner L. J** held as follows:

“ Where a litigation is pending between the Plaintiff and the Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienating pending the suit whether such allienees had or had no notice of proceedings. If that were not so, there could be no certainty that the proceedings would ever end.....”

23. In the **Carol Silcock** case (supra), I held that the doctrine of *lis pendens*, which is captured at Section 52 of the Transfer of Property Act (repealed) is in tandem with the provisions of Sections 1A and 1B of the Civil Procedure Act because it provides an avenue for the final determination of the matters before the court and in the general interest of public policy.
24. It is with the above in mind that I find and hold that the Plaintiff cannot be allowed to deal with the suit properties until this suit and/or Malindi ELC number 172 of 2013 is heard and determined.
25. In the event that the court finds that the Defendant in ELC No. 172 of 2013 was the legitimate owner of LR NO. 10840, then the Plaintiff herein can keep the land for good. However, if the court finds that the Defendants herein, who are Plaintiffs in ELC No. 172 of 2013 have a legitimate interest in LR. NO. 10840, the Plaintiffs interest in the suit properties is likely to be affected.
26. In the circumstances, and considering the orders that this court made in ELC No. 172 of 2013, I dismiss the Plaintiff's Application dated 28th April 2015 with costs and allow the Defendants' Application dated 11th May, 2015 in terms of prayer numbers 2, 5 and 6.

Dated and delivered in Malindi this 30th day of **October** 2015.

O. A. Angote

Judge