



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 117 OF 2013**

**MOHAMED OSMAN**

**NOOR.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**1. ROBERT SHUME**

**2. JONATHAN**

**NGAMBA.....DEFENDANTS/RESPONDENT  
S**

**RULING**

**Introduction**

1. Before me is the Plaintiff's Application dated 5<sup>th</sup> July 2013 seeking for the following reliefs:

**(a) That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants either by themselves, their servants, agents or any other person acting for or on their behalf from any adverse trespassing, using, wasting, obstructing, preventing subdivision, disrupting Applicant's enjoying peaceful possession of property and/or interfering in any manner whatsoever with Applicant's portion No. 7652 (original no.570/3 situated at Malindi Municipality pending hearing and determination of this suit or until further orders of this Court.**

2. The Application is premised on the grounds that the Applicant is the lawful and legal owner of plot number 7652 (original number 570/3) situated in Malindi (the suit property); that the Respondents have illegally prevented the Applicant from sub-dividing the suit property and that the Respondents have vowed not to respect the rule of law.

**The Applicant's case:**

3. The Application is supported by the Plaintiff's Affidavit in which he has deponed that he purchased the suit property from Samson Kazungu Kalama vide a deed of indenture of 17<sup>th</sup> July 2002.

4. Upon the purchase of the suit property, the Plaintiff has deponed that he took possession of the same immediately and that he has been enjoying peaceful and quiet possession until June 2013 when the Defendants prevented his surveyor from sub-dividing the suit property.

5. The Plaintiff finally deponed that unless the court issues restraining orders, the Defendants shall continue to obstruct the sub-division of the suit property thereby denying the Applicant peaceful enjoyment and user of the suit property.

### **Defendants' case**

6. The 2<sup>nd</sup> Defendant swore a Replying Affidavit on his own behalf and on behalf of the 1<sup>st</sup> Defendant. According to the 2<sup>nd</sup> Defendant, the Plaintiff testified in Malindi HCCC No. 144 of 2011 and disclosed that he had no problem with the Defendants occupation of the suit property; that the suit property is their ancestral property and that there are more than twenty (20) families in occupation and cultivating the suit property and that they have owned the property for more than 20 years.
7. The Defendants finally deponed that they have trees on the suit property which are as old as 40 years and that they have been harvesting cashew nuts, mangoes and coconuts every year and that the orders being sought by the Plaintiff shall render them homeless.
8. The Application was disposed of by way of written submissions which I have considered.

### **Analysis and findings:**

9. The Plaintiff/Applicant has annexed on his supporting affidavit an indenture dated 17<sup>th</sup> July 2002 between himself as a purchaser and Samson Kazungu Kalama as the vendor. The said indenture was registered on 23<sup>rd</sup> July 2002 in the Land Registry Mombasa.
10. The Plaintiff has also annexed on the Affidavit a Certificate of Postal search as on 7<sup>th</sup> June 2012. The Certificate of Postal Search shows the Plaintiff as the registered proprietor of the suit property.
11. Although the Defendants claim to have occupied the suit property since time immemorial, they have not annexed on the Replying Affidavit any evidence by way of photographs to show the alleged occupation. Consequently, the court cannot at this stage ascertain if indeed the defendants can succeed with a claim of adverse possession as against the Plaintiff.
12. In view of the fact that the Plaintiff has shown that he is the registered proprietor of the suit property, he should be allowed to enjoy quiet and peaceful possession of the suit property until the issue of the rightful proprietor is heard and determined at trial. The Plaintiff has shown that he has a prima facie case with chances of success.
13. For the reasons I have given above, I allow the Plaintiff's Application dated 5<sup>th</sup> July 2013 as prayed.

Dated and Delivered in Malindi this 24<sup>th</sup> Day of **February**, 2014.

**O. A. Angote**

**Judge**