



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

PETITION NO. 14 OF 2013

**IN THE MATTER OF: ARTICLES 19, 20, 22, 23, 64 AND 159 OF
THE CONSTITUTION OF KENYA**

=AND=

**IN THE MATTER OF: CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
40 OF THE CONSTITUTION**

=AND=

**IN THE MATTER OF: THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES 2013**

=BETWEEN=

JOYCE MUTHONI WACIUMA.....PETITIONER

=VERSUS=

CABINET SECRETARY FOR LANDS, HOUSING

AND URBAN DEVELOPMENT1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

DISTRICT LAND REGISTRAR

KILIFI COUNTY LANDS OFFICE4TH RESPONDENT

HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

R U L I N G

Introduction

1. What is before me is the Petitioner's Application dated 26th November 2013 and filed pursuant to the provisions of Rules 19, 23 and 24(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. The Application is seeking for the following reliefs:

(a) That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents whether by themselves and/or through their servants, agents, or any of them from transferring, charging, dealing, interfering, or developing the Plaintiff's property Title Number Chembe/Kibabamshe/424 (suit property) pending the hearing and determination of the main suit.

(b) That this Honourable Court be pleased to issue an order of mandatory injunction directing the 4th Respondent to produce for the inspection of the court and the parties herein the Original Land Register for the suit property together with the Transfer Forms, copies of Identification Cards, copies of PIN certificate, copies of application to Kilifi District Land Control Board to transfer the suit property, copies of transfer forms executed by Kilifi District Land Control Board to transfer the suit property, copies of transfer forms executed by Kilifi District Land Registrar concerning the suit property, copies of records showing the stamp duty paid, copies of Registry Map sheet 22 (Chembe Kibabamshe Registration section) from 30/5/1978 to the present date, that may have been used by the Respondents jointly, or severally in any purported subsequent transfer of the suit property to third parties.

(c) THAT costs of and occasioned by this Application be awarded to the Petitioner.

(d) THAT such other or further orders as may be just be made to meet the end of justice and to safeguard and protect the Petitioner's right and the dignity of this Honourable court.

2. The Application is premised on the grounds that the Plaintiff is the registered proprietor of parcel of land number Chembe/Kibabamshe/424 (the suit property) having been issued with a Title Deed on 21st December 1978.
3. However, in the year 2008, the Applicant learnt that there had been illegal land transactions in the Chembe/Kibabamshe Registration Section. When the Applicant attempted to conduct an official search on the property, the advocate was informed that the title to the suit property did not exist, and that neither was any such register, file or green card in existence in Kilifi District Land Registry.
4. It is the Applicant's deposition that she also learnt that the suit property seems to have been subdivided into two portions and transferred to third parties without his consent.
5. Although the Applicant wrote to the Respondents of her intention to file this suit, she has never received any response from the Respondents save for a copy of the letter dated 7th June 2013 addressed to the 4th Respondent by the 3rd Respondent asking the 4th Respondent to respond to the allegations of fraudulent dealings contained in the letter dated 21st May 2013.
6. It is the Applicant's deposition that the illegal and irregular actions of the Respondents have denied her her right to property contrary to the provisions of the Constitution.
7. Although the Attorney General was served on behalf of all the Respondents, he did not file any response in respect to the Application.
8. The Applicant's Advocate filed his written submissions and list of authorities which I have considered.

Analysis and findings

9. The Applicant is seeking for an interim prohibitory order and a mandatory injunction. The

- Applicant has annexed on her Affidavit the Land Certificate for Chembe/Kibabamshe dated 21st December 1978 and registered in her favour.
10. Although the Attorney General was served with the Application, he did not file any response. The assertion by the Plaintiff that she is the registered proprietor of the suit property has therefore not been challenged by the Attorney General.
 11. Although the Petitioner claims that the suit property seems to have been sub-divided into two portions and allocated to third parties, the Petitioner does not have details of the said sub-division and the allocation. The Petitioner has been unable to trace the records at the Kilifi District Lands Registry either in respect to her property or the sub-division thereof, thus this Application.
 12. In the absence of a response from the Respondents, I am persuaded that the Applicant has established a prima facie case with chances of success. In the circumstance, conservatory orders in terms of clause 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 should issue in favour of the Plaintiff.
 13. The Applicant has also sought for a mandatory order of injunction. A mandatory injunction can be granted at an interlocutory stage only in clear cases or where the Defendant had attempted to steal a march on the Plaintiff. The court also ought to feel a high degree of assurance before it can issue a mandatory injunction. **(see Locabi International Finance Limited Vs Agro Export and others (1986) I ALLER 901.**
 14. It is not clear from the evidence placed before this court what happened from 1978 when the Petitioner was granted a title to the suit property until 2008 when she discovered that the suit property seems to have been divided into two. The court cannot issue the mandatory order of injunction as against the Respondents at this stage before ascertaining what happened or if indeed the suit property has been sub-divided as alleged by the Petitioner. This is not a clear case for such an order to issue.
 15. In any event, the Respondent will be under an obligation to produce at the hearing of the Petition the information that the Petitioner is now seeking or during the process of discovery. In the absence of a response from the Respondents at the hearing of the Petition, the Petition will be decided in favour of the Petitioner. However, that can only happen after the Petition has been heard and determined.
 16. For the reasons I have given above, I allow the Application dated 26th November 2014 in the following terms:
 - a. **That a temporary injunction be and is hereby issued restraining the Respondents whether by themselves and/or through their servants, agents, or any of them from transferring, charging, dealing, interfering, or developing the Plaintiff's property Title Number Chembe/Kibabamshe/424 (suit property) pending the hearing and determination of the main suit.**
 - b. **The Respondents to pay the costs of the Application.**

Dated and delivered in Malindi this 4th Day of April 2014

O. A. Angote

Judge