



**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL CASE NO. 8 OF 2014**

**FELIX NGALA MWAVUO.....PLAINTIFF**

**=VERSUS=**

**ALI BIN DHAHMAN.....DEFENDANT**

**RULING**

1. What is before me is the Plaintiff's Application dated 29<sup>th</sup> January, 2014 seeking for the following reliefs:
  - a. **Pending hearing and determination of this suit, a temporary injunctive order be issued restraining the Defendant/Respondent, his servants, 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 with a portion of land within land parcel No. 246 situated at Thalathameli within Malindi in Kilifi county.**
2. The Application is premised on the grounds that it is the Applicant's father who cleared the bush on parcel of land number 246 situated at Thalathameli within Malindi (the suit property); that the Applicant inherited the suit property from his father and that the Applicant has continued developing, cultivating and utilizing the said portion.
3. It is the Applicant's case that the Respondent, without the consent of the Applicant, has commenced depositing building materials in the suit property.
4. The Respondent opposed the Application and deponed that the Applicant does not have the legal capacity to institute the current suit.
5. According to the Respondent, the suit property was purchased by one Nancy Kagwira who sold the property to one Andrew Kaingu Mattaza. The said Mattaza then sold the property to the Respondent vide an agreement dated 4<sup>th</sup> December, 2013.
6. In his Further Affidavit, the Applicant deponed that he has beneficial rights and interest over the suit property; that he has been cultivating the suit property since the demise of his father; that Joseph Karisa Kiringi, the late Andrew Mattaza and the Respondent occupy distinct portions of land in Plot Number 246 and that Joseph Karisa Kiringi and Andrew Mattaza have built on their own portion of land within plot number 246.
7. The Defendant filed a Further Replying Affidavit which I have considered.

**Submissions:**

8. The Applicant's advocate filed his submissions on 14<sup>th</sup> March 2014. Counsel submitted that all

- agreements of sale of land must be in writing and signed by the parties. The said signatures must then be witnessed; that the Respondent failed to attach the alleged contract between Nancy Kagwira and the late Andrew Kaindu Mattaza and that the late Andrew Kaingu Mattaza had no proprietary or beneficial right in the suit property.
9. The Applicant's counsel further submitted that the alleged sale agreement between the respondents and the late Andrew Kaingu Mattaza is for  $\frac{3}{4}$  portion of an acre and the one between Joseph Karisa Kiringi and Nancy Kagwira is  $\frac{1}{2}$  an acre which is a contradiction.
  10. The Defendant's counsel submitted that the suit property is registered in the names of one Mohamed Hussein Haji Abdulrahim and that neither the Plaintiff's father nor the Plaintiff were parties to a claim lodged by the residents living on plot number 246 Malindi for adverse possession and that the Plaintiff's claim over the suit property was lodged before the Chief which claim was dismissed in favour of Katana Kiringi.

**Analysis and findings:**

11. From the averments in the Complaint and the Application, the suit property has had a long standing dispute between the Plaintiff's late father and one Karisa Kiringi. The Plaintiff has averred in his pleadings that Karisa Kiringi gave to his father vacant possession of the suit property whereafter the Plaintiff's father and his families have been utilizing it.
12. On the other hand, the Defendant annexed on his Affidavit an agreement of sale between Joseph Katana Kiringi and Nancy Kagwira dated 1<sup>st</sup> August, 2004. In the said agreement Kiringi bought from Ms. Nancy Kagwira land measuring  $\frac{1}{2}$  of an acre out of plot number 246, Malindi for KShs. 80,000. That agreement was signed by both parties and witnessed by Lughanje advocate. The suit property was then sold to Andrew Kaingu Mattaza who then sold it to the Defendant on 4<sup>th</sup> December 2013 for KShs. 750,000/=.
13. The Defendant has not exhibited the agreement that was made between Katana Kiringi and Andrew Kaingu Mattaza.
14. Although the agreement between Joseph Katana Kiringi and Nancy shows that the suit property measures  $\frac{1}{2}$  an acre, the agreement between Andrew Kaingu Mattaza and the Respondent shows the acreage of the suit property to be  $\frac{3}{4}$  of an acre. It is not therefore clear whether what the Defendant acquired by purchase is the same property that the Plaintiff is using.
15. What is clear from the pleading before me is that both the Plaintiff and the individuals who sold the land are squatters on the portion of land in dispute. It seems there is a pending suit by some other squatters claiming the whole of plot No. 246 by way of adverse possession. The rights of those squatters viz-a viz the suit property, including the Plaintiff who is said not to be a party to that suit, have not been determined by any court.
16. Until the said suit is determined, this court cannot at this stage pronounce whether or not the Plaintiff has a *prima facie* case with chances of success. However, if the Respondent is allowed to proceed with the development of the suit property, the Plaintiff is likely to suffer irreparably if at the end of this matter and the pending suit for adverse possession, it is found that none of the people who sold the suit property to the Defendant had a right to do so. The balance of convenience also tilts in favour of the Plaintiff considering that it is the Plaintiff who has been utilising the suit property.
17. For the reasons I have given above, I allow the Plaintiff's Application dated 29<sup>th</sup> January, 2014 as prayed.

Dated and Delivered in Malindi this 20<sup>th</sup> day of June, 2014.

**O. A. Angote**

**Judge**