



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 209 OF 2013

KHALID SALIM NAAMAN.....1ST PLAINTIFF

SAID SALIM NAAMAN.....2ND PLAINTIFF

=VERSUS=

PAULINE WAIRIMU KAMAU.....DEFENDANT

R U L I N G

Introduction:

1. What is before me is the Plaintiff's Application dated 19th November 2013 seeking for injunctive orders.
2. The Application is premised on the grounds that the Plaintiffs are the legal and beneficial owners of plot number 539/111/MN; that the Defendant has trespassed on to the suit property and that the Plaintiffs are entitled to exclusive and unimpeded right of possession, use, occupation and quite enjoyment of the said plot.

The Applicants' case:

3. According to the 1st Plaintiff's Affidavit, him, together with the 2nd Plaintiff are the administrators of the Estate of their late Mother Moza Toban who in turn was the administrator of the Estate of the late Mwana Ulu Binti Khamis Kombo Mutwapi.
4. It is the deposition of the Plaintiff that the suit property formed part of the Estate of Tobana Bin Basheikh which also formed part of the Estate of their mother Mwana Ulu – Binti Khamis Mtwapi Kome that they have inherited; that the Defendant was always a ground tenant of Plot number L.R. 539/111/MN where she has erected a temporary Swahili house and has been paying monthly rent albeit irregularly.
5. It is the deposition of the Plaintiffs that by a Deed of Partition dated 19th October 1984, the suit property was sub-divided amongst Mwana Ulu Binti, Khamis Kombo Mtwapi and Kombana Binti Salim Bin Khamis Kombo Mtwapi.
6. One of the terms of the Deed of Partition was that a portion of the partition was to be shaded while the other portion was to remain unshaded; that it was further agreed that the family of Moza Mwana Ulu Binti Salim Khamis Kombo Mtwapi be allocated the unshaded area while the family of Kombana Binti Salim Khamis Kombo Mtwapi were allocated the shaded area.
7. The Plaintiffs finally deponed that the Defendant occupies a portion meant for their late mother and that she should be stoooped from proceeding to construct on the suit property a permanent

structure on the suit property.

The Defendant's/Respondent's case:

8. The Defendant filed her affidavit and deponed that the Plaintiffs refused to disclose to this court that there is a pending suit between the parties herein over the same subject matter in Mombasa CMCC. No. 1127 of 2013 where they sought similar injunctive orders and that the said Application was dismissed by the court. The Defendant relied on the detailed affidavit that she filed in Mombasa CMCC NO. 1127 of 2013 in response to the current Application

The Plaintiffs' response:

9. The 1st Plaintiff filed a response on 3rd December 2013 and deponed that it was true that the Plaintiffs had previously filed Mombasa CMCC No. 1127 of 2013 which they have since withdrawn.
10. The parties' advocates filed their respective submissions which I have considered alongside the affidavits on record.

Analysis and findings:

11. The Applicants in this matter are seeking for injunctive orders, which are equitable reliefs. In their Complaint, the Plaintiffs have stated that there is no suit pending in court in respect of the subject matter. The Complaint is dated 19th November 2013 and was filed on the same day.
12. When the current Application was argued before me *ex-parte* on 19th November, 2013, the Plaintiffs' advocate did not inform me that they had filed a similar suit and Application in the lower court in Mombasa. The said Application was heard and dismissed by Hon. D. Wasike on 16th October 2013.
13. The Applicants now inform me that they have since withdrawn the suit in the lower court. According to the Notice of withdrawal annexed on the Applicant's subsequent affidavit, the same was filed in the lower court on 2nd December 2013, after the Respondent raised that issue in her Replying Affidavit. No reason has been given for the said withdrawal.
14. Although a party is entitled to withdraw his or her suit, I find it unbecoming of a party who withdraws a suit after a decision has been made by a court of competent jurisdiction and then file a similar matter in a different court seeking for the same orders. That is a party with unclean hands and a court of equity cannot aid him.
15. In the circumstances, and on that ground alone, I shall, which I hereby do, dismiss the Plaintiffs' Application dated 19th November 2013 with costs.

Dated and delivered in Malindi this 6th day of **June**, 2014.

O. A. Angote

Judge