



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 200 OF 2013

MWASAHA MWAGAMBO MWASAHA T/A

GOOD SAMARITAN VISION.....PLAINTIFF

=VERSUS=

JUMWA DADU HINZANO.....1ST DEFENDANT

DAMA NGUMBAO NGARI.....2ND DEFENDANT

RULING

Introduction:

1. What is before me is the Plaintiff's Application dated 11th November 2013 filed pursuant to the provisions of Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules.
2. The Plaintiff is claiming for the following reliefs:
 - a. **That this Honourable Court be pleased to issue temporary orders of injunction restraining the defendant, her servants, agents, hirelings, employees and or whosoever from trespassing, dealing and or in any other way from interfering with the plaintiff's peaceful and quiet use and occupation of the suit plot known as KILIFI/MTONDIA/1003, KILIFI/MTONDIA/1005 and KILIFI/MTONDIA/1008 and or from continuing with constructions or illegal buildings and structures thereon pending the hearing and determination of the suit herein.**
 - b. **That the cost of this application be in the cause.**
3. The Application is premised on the grounds that the Defendants are the administrators of Dadu Hinzano Dadu; that the Plaintiff bought the suit property from the late Dadu Hinzano Dadu and assumed possession and that the Defendants have refused to effect the transfer in favour of the Plaintiff.

The Plaintiff's case:

4. According to the Plaintiff's Affidavit, he bought 6 acres of land which was hived from Kilifi/Mtondia/219 from the then registered owner Dadu Hinzano Dadu on 20th March, 2006.
5. It is the Applicant's deposition that the property was later sub-divided to create Kilifi/Mtondia/1003 – 1008 and that he assumed ownership of Kilifi/Mtondia/1003 measuring approximately 6 acres.

6. It is the Plaintiff' deposition that he further bought Kilifi/Mtondia/1005 and 1008 measuring on(1) acre each; that he then took possession of the plots and that although they obtained the consent of the Land Control Board to transfer the property in his favour, the said transfer was never effected because the registered proprietor had lost his national identity Card. The registered proprietor later on died.
7. The Plaintiff deponed that although the Defendants have obtained a Certificate of Confirmation in respect of the Estate of the late Dadu Hinzano Dadu, they have refused to effect the transfer of the suit property in favour of the Plaintiff.

The Defendant's case:

8. The Defendant's advocate filed Grounds of Opposition in which he averred that the Application is fatally defective, incompetent and has been filed in total misconception of the provisions of the law and that the Plaintiff cannot injunct the Defendant from using their own property especially when no proprietary interest is vested in the Plaintiff.

Submissions:

9. The parties' advocates filed their respective submissions. The Plaintiff's advocate submitted that the proprietor of parcels of land number Kilifi/Mtondia 1003,1005 and 1008 which had been purchased by the Plaintiff died before the said parcels of land were transferred to the Plaintiff.
10. The Plaintiff's counsel submitted that his client has a right to the land and that the Applicant has enormously invested and developed the suit properties; that the Applicant has put up an orphanage institution which has over one hundred pupils and that he is likely to suffer irreparable damage unless the injunctive order is issued.
11. The Defendant's counsel submitted that in the absence of the transfers, the Plaintiff is yet to obtain any proprietary interest in the suit property; that in any event, the Kilifi District Land Registrar has declined to issue to the Defendants the original title deeds and that the Defendants have filed Malindi Misc. Civil Application NO. 12 of 2013 to have the said titles released to them.
12. The Defendant's counsel further submitted that there is no evidence that the Plaintiff has made any personal investments on the suit property and that the orders being sought by the Plaintiff cannot be effected because the Defendants have not been issued with the title deeds.

Analysis & Findings:

13. According to the Plaintiff's Plaint, the Plaintiff is seeking for a permanent injunction restraining the Defendants and their families from interfering with the suit properties. The Plaintiff is also seeking for a declaration that the suit properties belong to him.
14. The Plaintiff/Applicant has annexed on his Supporting Affidavit a copy of the Title Deed for Kilifi/Mtondia/291. Although the Plaintiff has deponed that this property was sub-divided to create Kilifi/Mtondia/1003-1008, there is no evidence that the title deeds for the sub-divisions have been issued either in the name of the late Dadu Hinzano Dadu or the Defendants. The Plaintiff's claim as against the Defendant in the absence of the said titles, is therefore premature.
15. The Plaintiff's claim is not for specific performance. The Plaintiff simply wants the suit property which he purportedly purchased from the Defendants' father be declared to be his. Such an order cannot be granted until the suit properties are transferred to the Plaintiff by the Defendants. The failure to pray for an order of specific performance in the Plaint renders the Application incompetent in view of the fact that the Plaintiff is not the registered proprietor of the suit property.
16. For the reasons I have given above, I find that the Plaintiff has not shown that he has a *prima facie* case with chances of success. The Plaintiff did not also provide to this court any documentary evidence to show the developments that he has invested on the suit property. There is also no evidence that the Plaintiff paid the full purchase price for the said three plots.
17. In the circumstances, I find and hold that the Plaintiff's Application dated 11th November 2013 is unmeritorious and the same is dismissed with costs.

Dated and delivered in Malindi this **4th** day of **July**, 2014.

O. A. Angote

Judge