



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC NO. 62 OF 2014**

HAGGAI O. TAMBO.....1<sup>ST</sup> PLAINTIFF  
LUCY I. A. ATIENO.....2<sup>ND</sup> PLAINTIFF  
CHRISTINE ATIENO.....3<sup>RD</sup> PLAINTIFF  
MILDRED ACHIENG.....4<sup>TH</sup> PLAINTIFF  
SARA JANET A. MZINGO.....5<sup>TH</sup> PLAINTIFF

=VERSUS=

KESRECT AGENCY LIMITED.....1<sup>ST</sup> DEFENDANT  
KHALID BADI SWEDI.....2<sup>ND</sup> DEFENDANT/APPLICANT  
MOAHMED ALI ALLAUSI.....3<sup>RD</sup> DEFENDANT/APPLICANT  
HALIMA HUSSEIN AHMED.....4<sup>TH</sup> DEFENDANT/APPLICANT  
ARBI MUSANI.....5<sup>TH</sup> DEFENDANT/APPLICANT

**R U L I N G**

**Introduction:**

1. The Application before me is the one dated 13<sup>th</sup> June 2014, filed by the 2<sup>nd</sup> , 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Application is seeking for the following orders:
  - (a) THAT this Honourable court be pleased to strike out the suit against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants
  - (b) THAT the Plaintiffs be condemned to pay the costs of this Application and the entire suit to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants'/Applicants' case

2. According to the Affidavit of the 4<sup>th</sup> Defendant, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants (Applicants) are the lawful beneficiaries and owners of plot number 141 Malindi having devolved on intestacy from the late Haji Ahmed Haji Ibrahim who was entitled to ½ share thereof, Time Binti Masoud who was entitled to ¼ share thereof and Halima Binti Basoud who was entitled to ¼ share thereof.
3. It is the deposition of the Defendants/Applicants that with the concurrence of all the beneficiaries, plot number 141 Malindi was subdivided in March 2013 and new portions were created complete with new deed plan numbers 13755-13764 and that the beneficiaries distributed their portions of plot number 141 Malindi amongst themselves.
4. According to the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants/Applicants, the 1<sup>st</sup> Defendant filed a suit in Malindi ELC Case Number 87 of 2013 against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants seeking for an injunction order where-after the suit was withdrawn by consent. A memorandum of understanding dated 26<sup>th</sup> February 2014 was then entered into between the said parties.
5. It is the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants' case that the Plaintiffs claim accrues as against the 1<sup>st</sup> Defendant whom the court has already ruled in the withdrawn case that he had no interest capable of protection in equity in plot no. 141 Malindi, or at all; that the alleged sale agreements executed by the Plaintiffs and the 1<sup>st</sup> Defendant are illegal, inadmissible and inactionable in law and that he Plaintiffs have no cause of action as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

#### **The Respondents' case:**

6. The 1<sup>st</sup> Plaintiff/Respondent swore an affidavit on his own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs in response to the Defendants' Application.
7. According to the 1<sup>st</sup> Plaintiff/Respondent, the Defendants in Malindi ELC No. 87 of 2013 knew that there was a suit against them touching on plot no. 141 Malindi and in order to deny justice to the Plaintiffs in that suit, they subdivided the suit property and distributed it among themselves; that an agreement of sale depicts an intention to create an interest in land and that the land has not been transferred to the 1<sup>st</sup> Defendant.
8. The 1<sup>st</sup> Plaintiff/Respondent further deponed that having pointed out the connection between the Plaintiffs in this suit and the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant's dealings with the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants herein, the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants' Application should be dismissed with costs.

#### **Submissions:**

9. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' Advocates submitted that as a general rule, a contract cannot confer rights or impose obligations on strangers. Counsel relied on the case of **Mwangi Vs Braeburn Limited (2004) EA 196** where the court of Appeal held that as a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party to it even if the contract is made for his behalf and purports to give him the right to sue or to make him liable upon it.
10. Consequently, it was submitted, the Applicants cannot be bound by the terms of the agreements made between the Plaintiffs and the 1<sup>st</sup> Defendant because they were not privy to those agreements.
11. The Applicants' counsel further submitted that sale agreements do not create legal interests in land and therefore the Plaintiffs claim against the Applicants having been based on illegal sale agreements between themselves and the 1<sup>st</sup> Defendant is legally untenable.
12. Counsel submitted that there is no evidence to show that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who are owners of plot number 141 Malindi ever transferred the land to the Plaintiffs or the 1<sup>st</sup> Defendant; that no consent from the Land Control Board was ever obtained and that the Plaintiffs have not produced any Transfer instrument duly executed by the Defendants in their favour. Counsel relied on the case of **Opanda Vs AHN (1984) I KLR 208** where it was held that a contract of sale of land does not create an interest or charge upon land.
13. Consequently, it was submitted, the Plaintiffs' suit should be dismissed as against the 2<sup>nd</sup> to the 5<sup>th</sup>

- Defendants because it does not disclose a reasonable cause of action and that in any event plot no. 141 Malindi no longer exist.
14. The Plaintiffs' Advocate submitted that according to the Memorandum of Understanding between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> to 5<sup>th</sup> Defendants, the 2<sup>nd</sup> to 5<sup>th</sup> Defendants bound themselves to give a total of 8 acres and Kshs.500,000 to the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant believed it had an interest in land in plot number 141 Malindi and went ahead to sell part of this land to the Plaintiffs.
  15. Counsel submitted that if the court orders that the case as against the 2<sup>nd</sup> to 5<sup>th</sup> Defendants should be dropped, then the Plaintiffs will have no where to go in order to get their land; that the Memorandum of Understanding is a connecting factor between the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants and the 1<sup>st</sup> Defendant who sold the land to the Plaintiffs.
  16. According to counsel, although the 2<sup>nd</sup> to 5<sup>th</sup> Defendants were aware of ELC No. 87 of 2013, they went ahead and subdivided the land into various portions; that the said portions are still owned by the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants and that the court has powers to injunct the said portions.

### **Analysis and findings:**

17. This suit was commenced by way of a Plaint dated 4<sup>th</sup> April 2014 and filed on the same day.
18. In the Plaint, the Plaintiffs have averred that the 1<sup>st</sup> Defendant bought land from the 2<sup>nd</sup> to 5<sup>th</sup> Defendants and that therefore all the Defendants are joint owners of the said land; that in turn, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants sold the said land to the Plaintiffs and that the sale was reduced into writing.
19. The Plaintiffs are claiming for a permanent injunction against the Defendants, jointly and severally, restraining them from subdividing, selling, disposing off and parting with possession of the suit property until they transfer their respective portions to the Plaintiffs.
20. Contemporaneously with the Plaint, the Plaintiffs filed an application seeking for interim orders of injunction.
21. In the Supporting Affidavit, the Plaintiffs deponed that they bought the suit property from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants and that they paid the full purchase price. Several agreements of sale were attached on the Supporting Affidavits.
22. It is these agreements that the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants have stated that they were not a party to and that there is no privity of contract as between them and the Plaintiffs.
23. The first agreement that has been annexed on the Plaintiffs' Supporting Affidavit is between the 1<sup>st</sup> Defendant and the Plaintiffs. The Agreement is dated 1<sup>st</sup> April 2009.
24. The property that the 1<sup>st</sup> Defendant was selling to the Plaintiffs is described in the agreement as one acre plot in title number 141 and the consideration was Kshs.350,000. The agreement further shows that the Plaintiffs were to make a down payment of Kshs.90,000 and the balance of the purchase price was to be paid within 90 days from the date of the agreement.
25. The second agreement is dated 30<sup>th</sup> July, 2008 between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff. The property is described as two plots of one acre each in title number 141 and identified as plot number 141 Malindi.
26. The third agreement is dated 7<sup>th</sup> July 2008 between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff. The agreement defines the property being sold as one plot of one acre in title number 141. The agreed purchase price was Ksh.350,000.
27. Another Agreement annexed on the Plaintiffs' Supporting Affidavit is dated 19<sup>th</sup> June 2012 between Arbi Ali Musseni, the 5<sup>th</sup> Defendant and the 1<sup>st</sup> Defendant.
28. The agreement shows that the 5<sup>th</sup> Defendant was selling half of his undivided share out of plot number 141 to the 1<sup>st</sup> Defendant less four acres for Kshs.22,000,000 of which Kshs.2,200,000 was to be paid to the 5<sup>th</sup> Defendant before 25<sup>th</sup> June 2012. The balance of the purchase price was to be paid within 150 days from the date of the agreement.
29. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants also signed the agreement between the 1<sup>st</sup> Defendant and the 5<sup>th</sup> Defendant in which they agreed that they have no objection to the said sale.

30. The 2<sup>nd</sup> to the 5<sup>th</sup> Defendants have stated how, as the beneficiaries of plot number 141 Malindi, have allocated themselves the sub-divisions that arose from plot number 141.
31. The 2<sup>nd</sup> to the 5<sup>th</sup> Defendants have also annexed a certificate of postal search as at 14<sup>th</sup> November 2008 which shows that as at that date, plot number 141 was registered in the names of Haji Ahmed Haji Ibrahim, Time Binti Masoud and Halima Binti Masoud.
32. Another certificate of postal search has also been annexed on the Affidavit to show that as at 13<sup>th</sup> October, 2010, the said land had been transferred and registered in favour of the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants. The suit property was then sub-divided and portion numbers 13755-13768 were created. The copies of the Deed Plans for the said portions have all been annexed on the Applicants' supporting affidavit. All the Deed Plans are dated 28<sup>th</sup> March 2013.
33. There is no evidence that portion number 141 or the subdivisions that were created from the said portion have ever been registered in favour of the 1<sup>st</sup> Defendant.
34. There is also no evidence to show that the Plaintiffs ever entered into an agreement, oral or in writing, with the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants in respect to the suit property. There is therefore no privity of contract between the Plaintiffs and the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants in respect to the suit property.
35. It is only persons who negotiate and sign a contract that are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms or have any burdens from that contract enforced against him (**see Nairobi Civil Application No. 194 of 2009, Aineah Likuyani Njirah Vs Aga Khan Health Services**).
36. The only exception to the privity of contract rule is where the contract is made for the benefit of the third party; where the contract expressly states that the third party has a right of enforcement and where it was the intention of the parties to give a third party a right to rely on a term of contract (**See Aineah Likuyani case-supra.**)
37. The Plaintiffs in this case do not fall within those exceptions and consequently cannot enforce the agreements that they entered into with the 1<sup>st</sup> Defendant as against the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants. As was held in the case of **Muchendu Vs Waite (2003) KLR 419**, a contract cannot confer rights or impose obligations arising out of it in any person except the parties to it.
38. It does not matter that there were agreements in respect to the suit property between the Plaintiffs and the 1<sup>st</sup> Defendant in respect of portion number 141, Malindi considering that the 1<sup>st</sup> Defendant was not the registered proprietor of the said property. As at the time of the said agreements, the 1<sup>st</sup> Defendant did not have title to pass to the Plaintiffs.
39. It also does not matter that the 1<sup>st</sup> Defendant has now entered into some understanding with the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants in which the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants have agreed to cede some portion of land to the 1<sup>st</sup> Defendant. As was held by the Court of Appeal in the case of **Openda Vs AHN KLR**, a contract for sale of land creates no interest upon land.
40. The Plaintiffs can only claim from the 1<sup>st</sup> Defendant either the land that will eventually be transferred to it by the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants, if at all, or for a refund of the money they paid to the 1<sup>st</sup> Defendant. However, they have no claim whatsoever as against the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants.
41. In the absence of any agreement between the Plaintiffs and the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants, the Plaintiffs cannot succeed with a claim of a permanent injunction or specific performance as against the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants in respect to the suit property. The agreements between them and the 1<sup>st</sup> Defendant are only enforceable as against the 1<sup>st</sup> Defendant.
42. For the reasons I have given above, I find that the Plaintiffs have no cause of action as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' Application is therefore allowed in the following terms

**(a) The Plaintiffs' suit as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants is hereby struck out.**

**(b) The Plaintiffs' to pay to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants the costs of the suit and the Application.**

Dated and delivered in Malindi this **26<sup>th</sup>** day of **September**, 2014.

**O. A. Angote**

**Judge**