



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 172 OF 2013

KAZUNGU FONDO SHUTU

BABEL KAHINDI CHARO.....APPELLENTS/APPLICANTS

=VERSUS=

JAPHET NOTI CHARO.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. The Application before me is the one dated 30th September 2013 by the Plaintiffs. The Applicants are seeking for the following orders:

(a) That pending the hearing and determination of this application inter partes, the defendant through himself, servant, agents, employees, nominees, assigns or any other person or authority connected therewith be restrained by an order of prohibitive injunction from continuing to trespass, to enter into, to deal with or in any way, interfering with the Plaintiffs'/applicants' quiet possession of their share of land comprised in plot C 10840 situated within Malindi.

(b) THAT the officer commanding Malindi Police Station be directed to assist and ensure compliance by the Defendant/Respondent with any orders issued by the court.

(c) THAT the respondent be condemned to pay the cost of this Application.

2. The Application is premised on the grounds that the Applicants are the bona fide, legal and equitable owners of the suit property; that the Defendant has no claim whatsoever over the suit property and that the Defendant's action to invade the Applicant's property and to erect a barbed wire fence is unlawful.

The Applicants' Case

3. According to the Affidavit of the 1st Plaintiff him and the 2nd Plaintiff are owners of 1 ½ acres of land comprised in land portion number C10840, Malindi; that the Defendant who is their half brother holds the title in respect to portion number C10840, Malindi in trust and on their behalf and that the suit property is part of their ancestral land that originally belonged to their father, Charo Shutu Masha.

4. The 1st Plaintiff has deponed that in 1992, the Commissioner of Lands erroneously allocated a chunk of their ancestral land to strangers there by rendering their family as squatters.
5. As a family, it was deponed, it was decided that the Defendant/Respondent acting as a representative of the family was charged with the responsibility of following up and protecting their interest in the suit property.
6. The suit property was eventually reinstated in the name of the Defendant. It is the Applicants' position that it was later on agreed that 1 ½ acres be transferred to them; that the Defendant later on freely and voluntarily signed and executed an agreement in their favour transferring 1 ½ acres and that the Defendant declined to honour the said agreement.
7. The Applicants deponed that they are apprehensive the Respondent may dispose of the suit property.

The Defendant's Case

8. The Defendant filed a Replying affidavit and deponed that he is the registered owner of the suit property; that the Applicants have been fighting him for a long time over the suit property and at one point, the 1st Applicant was charged in court for trying to murder him; that when he was threatened with violence, he was advised by the chief to sign an agreement and a transfer for the purpose of saving his life and that he signed the transfer under duress.
9. The Defendant finally deponed that the Plaintiffs do not have a prima facie in view of the fact that they have not prayed for the cancellation of title and that he cannot be accused of trespassing on his own land.

Submissions

10. The parties' advocates filed their respective submissions and reiterated their clients' cases. I have considered the said submissions and the evidence on record.

Analysis and Findings

11. The Plaintiffs have prayed in the plaint for a permanent order of injunction and for declaration that they are the rightful, legal, beneficial and bona fide owners of their share of 1 ½ acres comprised in plot number C 10840 Malindi.
12. The Plaintiffs, who are Defendant's half brothers and members of the Shutu family are relying on the agreements dated 3rd November 2005 and 7th December 2005 in support of their case.
13. In the agreement dated 5th November 2005, the Defendant agreed with the Plaintiffs, in the presence of the Assistant chief to give from the suit property 1 ½ acres and have it allocated to the two Plaintiffs and Francis Lawrence Fondo.
14. In the agreement dated 7th December 2005, the Defendant reinstated the contents of the agreement of 5th November 2005. In the agreement, the Defendant was to transfer the 1 ½ acres to the Plaintiffs as shareholders and beneficiaries. The said transfer was to be done within 30 days and the Plaintiffs were to use the 1 ½ acres as they wished. The second agreement was signed by all the parties in the presence of Mouko Advocate.
15. The Defendant also signed the Transfer document on 7th November 2005. The said transfer is of no effect considering that the suit property is registered under the Registration of Titles Act and not the Registered Land Act.
16. The Defendant has not denied that he signed the two agreements. However, it is the Defendant's

position that he signed those agreements under duress after he was threatened by the Plaintiffs.

17. The issue as to whether the Defendant signed the two agreements in which he agreed to transfer 1 ½ acres to the Plaintiffs under duress or not cannot only be dealt with on the hearing of the suit. In the event that it is found that the agreements were signed under duress, then the court would nullify the said agreements. However, if it is shown that the agreements were signed voluntarily and on the basis that the Defendant was holding the suit property in trust for the Plaintiffs, then this court shall enforce the said agreements by allowing the plaintiff.

18. However, pending the hearing of the suit, and considering that the Defendant has not denied that he signed the two agreements. The interest of justice demand that the status quo pertaining now should be maintained. It will make no sence if the Defendant is allowed to deal with the suit property in any manner he deems fit before the issue that have been raised by the Plaintiffs are ventilated at a full hearing.

19. The signing of the agreements in respect of the suit property by the Defendant shows that the Plaintiffs have a prima facie with chances of success. The Plaintiffs are also likely to suffer irreparable loss that may not be compensated in damages if the Defendant alienates the suit property.

20. In the premises and for the reasons I have given above, I allow the Application dated 30th September 2013 in the following term;

(a) Pending the hearing and determination of the suit, the Defendant, his servants, agents, employees, nominees or any other person or authority be and is hereby restrained from alienating, transferring or charging the suit premises.

(b) The Respondent to pay the cost of the Application.

Dated and delivered in Malindi this, 5th day of September 2014.

O. A. Angote

Judge