



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 77 OF 2010

MUDIGO WA KUWANGA.....PLAINTIFF/RESPONDENT

=VERSUS=

NGUMBAO KAZUNGU.....1ST DEFENDANT/APPLICANT

KITSAO KAZUNGU.....2ND DEFENDANT/APPLICANT

R U L I N G

Introduction:

1. When this matter came up for hearing, the Defendants' advocate raised a preliminary objection. In the Notice of Preliminary Objection dated 10th September 2014, the Defendants have averred that the Plaintiff is a proprietor of the suit property in common with three other people who are now deceased; that the Plaintiff is not the administrator of the Estate of the deceased persons and that therefore the suit is incompetent and should be struck out.

2. The Defendants' advocate submitted that the Plaintiff herein has no locus standi and that he cannot legally file the suit on behalf of his co-tenants in the suit property who are now deceased.

3. According to counsel, the Plaintiff does not have an interest in the whole parcel of land and cannot therefore sue the Defendants in the manner he has done.

4. In response, the Plaintiff's advocate submitted that the issues raised by the Defendants can only be ventilated by way of an affidavit; that the preliminary objection does not raise purely matters of law and that the Plaintiff, being a co-owner of the suit property has the locus standi to file the suit as against the Defendants.

Analysis and findings

5. In the Plaint, the Plaintiff has averred that at all material times, he has been and is together with three others the registered owner of land known as Kilifi/Kinani/233 measuring 16.0 Ha; that on or about the year 2005, the Defendants wrongly and unlawfully entered into a portion of the land and that the Defendants have constructed various illegal buildings and structures on the Plaintiff's land. The Plaintiff is seeking for the eviction of the Defendants from the suit property.

6. The Plaintiff has admitted that he owns the suit property with three others.

7. It is trite law that a person who enjoys an interest in property as a tenant in common is not regarded as owning it in its entirety. He only enjoys a nominal share of the ownership which is owned by him.

8. Although tenants in common are regarded as owning separate shares in land, it does not mean that the land must be divided physically between them in proportions of their shares. The shares, until physically divided, only exist in relation to the metaphysically abstract ownership of the land and not in the physical land itself. (*See Land law, Sweet & Maxwell's Test book Series, 4th Edition pg 364, 12-008.*)

9. As discussed by Sweet & Maxwell's (*supra*), the undivided nature of the shares and inability to demarcate the land physically flows from the fact that unity of possession remains a necessary requirement of a tenancy in common, thus entitling a tenant in common to possess every part of the land.

10. The consequences of this doctrine of unity of possession entitle every tenant to possession of the whole of the land as tenant in common notwithstanding his shareholding.

11. Where someone encroaches or trespasses on any part of the land, any tenant of the land registered as tenant in common has the right to sue notwithstanding the fact that he is entitled to a fraction of the said land. That is what unity of possession of land is all about where individuals hold undivided shares in land.

12. Consequently, it does not matter whether the Defendants have encroached on the whole land or a portion thereof. It also does not matter that the Plaintiff's co-tenants are not parties to the suit. The Plaintiff has the right to file a suit against the Defendants because of the undivided nature of the shares in the land.

13. In any event, how will the Defendants determine the portion of land that every co-tenant holds where their shares are undivided for them to know on which portion they will encroach or have encroached, if at all? It is not possible to know.

14. For the reasons I give above, the Notice of Preliminary Objection dated 10th September 2014 is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **28th** day of **November**, 2014.

O. A. Angote

Judge