



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 50 OF 2013

AGNES KITONDO NDAMBU.....PLAINTIFF

=VERSUS=

RUTH VINYA (RUTH MUTHONI NJOROGE).....DEFENDANT

R U L I N G

1. What is before me is the Plaintiff's Application dated 4th April 2013 brought under Section 3 of the High Court (Practice and Procedure Rules), Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A and 63 of the Civil Procedure Act.
2. The Application is seeking 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 whatsoever 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 Group V/544 situated at Kilifi Plantation, Kilifi and or from continuing with constructions of illegal buildings and structures thereon pending the hearing and determination of the suit herein.**
 - b. **THAT the cost of this suit be in the cause.**
3. The Application is predicated on the grounds that the Applicant is the registered owner of plot number Group V/544; that the Applicant bought the suit plot from Kilifi Plantations Limited and that the Plaintiff was issued with the certificate of title and assumed vacant, quiet and peaceful possession and enjoyment of the property.
4. The Application is further supported by the Plaintiff's affidavit sworn on 4th April 2013.
5. The Plaintiff has deponed that the suit property was transferred to him on 14th January 2011 but to his surprise, the Defendant trespassed on the land and started erecting illegal and unauthorised structures.
6. The Defendant filed her Replying Affidavit on 17th April 2013 and deponed that she has been wrongly sued because the suit property was purchased by a welfare group known as "Home Economic Professional Group" (HEPROG) of which she is a member.
7. The Defendant further deponed that the said Welfare group purchased the suit property from the same organisation that is purported to have sold the property to the Plaintiff; that the organisation bought two plots, that is plot number V/507/37 and 38 for Ksh.470,000; that the Group commenced construction of a house on the suit property and that since 2002, the Group has been in occupation.
8. The Defendant finally deponed that she shall be filing a counter-claim to seek for cancellation of

- the entry in the Lands Registry.
9. The Defendant filed a Further Replying Affidavit on 28th May 2010 and deponed that the Plaintiff's plot is different from the Defendant's plot and that the court should appoint an independent surveyor to point out the two different plots and locations.
 10. The parties agreed to dispose of the Application by way of written submissions. The Plaintiff's advocate filed his submissions on 20th June 2013 while the Defendant filed his submissions on 28th June 2013 which I have considered.
 11. The case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 318** laid down the principles applicable for the grant of an injunction. Firstly, the Applicant must show a prima facie case with chances of success and secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and lastly, if the court is in doubt, it will decide the Application on the balance of convenience.
 12. A prima facie was defined by the Court of Appeal in the case of **Mrao Limited VS First American Bank Ltd & 2 others (2003) KLR 137** as follows:

“In Civil Cases it is a case in which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right, which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter..”

13. The Plaintiff has annexed on her Supporting Affidavit a Certificate of Postal Search as at 21st January 2013 showing that she is the registered proprietor of plot number Group V/544. The said property has been registered under the Registration of Titles Act Cap 281 (repealed).
14. The Plaintiff has also annexed a Transfer dated 31st December 2010 between Kilifi Plantations Limited and herself for sub-division number Group V/544 (Original number 507/37) Kilifi for Kshs.200,000.
15. The Transfer document shows that the suit property is alienated on survey plan number 248424 which was annexed on the Affidavit.
16. The Plaintiff has also annexed photographs showing the construction that is being undertaken by the Defendant or “Home Economic Professional Group,” as claimed by the Defendant, on the suit property.
17. The only document annexed on the Defendant's Replying Affidavit is a sale agreement between Kilifi Plantations Property Limited and Home Economics Professional Group (HEPROG). The agreement is in respect to land parcel number Group V/507/44 which was canceled and countersigned to read as Group V/507/37.
18. The said sale agreement does not state the legal capacity of HEPROG to enable the court determine whether the organization can legally own land.
19. It is not clear from the sale agreement annexed on the Defendant's Replying Affidavit if the signature of the vendor, Kilifi Plantations Properties Limited, was witnessed by its directors as required by Section 3(3) of the Laws of Contract Act.
20. In view of the fact that the Plaintiff is in possession of a title in respect of Group V/544 whose original number was 507/37, the Plaintiff has established a prima facie case that she is the legitimate owner of the land.
21. Until the Plaintiff's title is cancelled or it is shown that the same was fraudulently obtained, the Defendant cannot lay a claim on it.
22. The Defendant has averred that the Plaintiff's plot, to wit plot number V/544, is different from the Defendant's plots, to wit, Plot number V/507/37 and 38.
23. It is however clear from the Transfer document annexed on the Plaintiff's Affidavit that the portion that the Plaintiff is claiming is a subdivision of portion number 507/37. Portion number 507/37 is the same plot that the Defendant, without any valid documents, is also claiming.
24. If the plot that the Defendant is claiming is not the same as the Plaintiff's plot as she alleges, it was incumbent upon the Defendant to supply to this court the survey plans showing the distinction between the two plots. The Defendant has not done so.
25. The continued construction of permanent structures on plot number Group V/544 (original number 507/37) Kilifi will cause the Plaintiff irreparable damage which cannot be compensated by an award of damages unless the injunctive orders being prayed for are issued.

26. As was held in the case of **Niaz Mohamed Jan Mohamed -vs-The commissioner of Lands (1996) e KLR**, it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.
27. For the reasons I have given above, I allow the Plaintiff's Application dated 4th April 2013 as prayed.

Dated and Delivered in Malindi this **29th** day of **August**, 2013

O. A. Angote

Judge