



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 72 OF 2013

1. RINGA KAINGU RINGA
2. KATUNDA KAINGU RINGA
3. MWANGUDZA KAINGU RINGA
4. CHILOMO KAINGU RINGA.....PLAINTIFFS

=VERSUS=

1. YAHYA SAID MASOUD
2. CHENDA MUHAMBI GOWE
3. FURAHA SAID KAHINDI MWABEKU.....DEFENDANTS

R U L I N G

1. The Plaintiffs' Notice of Motion before me is the one dated 2nd May 2013. The Application is brought under section 13 (7)(a) and (i) of Environment and Land Court Act number 19 of 2011 and Order 40 of the Civil Procedure Rules, 2010.
2. The Application is seeking for an injunctive order in the following terms:
 - a. **THAT at the Hearing of this Application inter-partes a Temporary Injunction be issued against the Defendants, restraining Defendants, by themselves, their servants or agents or any person claiming through them, from Planting any further crops and trees or further cultivation upon or trespassing, alienating, selling, constructing upon or charging the half undivided share of land measuring 3.61 acres or thereabout owned by KAINGU RINGA within ALL THAT parcel of land known as Plot 317/MALINDI registered as Title Number LT 27 Folio NO.3490 and situated at Kijiwetanga village Malindi within Kilifi County in the Republic of Kenya pending the hearing and determination of this case.**
 - b. **THAT costs of this Application be in the cause.**
3. The Application is supported by the Affidavit of the 1st Plaintiff and on the grounds stated on the

face of the Application.

4. The 1st Plaintiff has deponed that him, together with the 2nd, 3rd and 4th Plaintiffs are the co-administrators of the Estate of Kaingu Ringa who is the registered proprietor of half undivided share of land measuring 3.16 acres within plot number 317 Malindi (the suit property); that the suit property was surveyed in December 2010 and the Defendants occupy plot number 310 which is adjacent to the suit property.
5. It is the Plaintiffs' averments that in March 2013, the 1st Defendant trespassed on the suit property and alienated a portion of the suit property measuring 1.8 acres to the 2nd and 3rd Defendants who proceeded to cultivate the land and that the Defendants are likely to alienate or charge the suit property and in the process deny the Plaintiffs' right of user of the suit property thus occasioning the Plaintiffs irreparable loss.
6. The 1st Defendant filed his Replying Affidavit on 22nd May 2013 and stated the history pertaining to the suit property.
7. According to the 1st Defendant, the suit property was allocated to Nyawa wa Amani and Afwa binti Hassanali on 20th December 1915 as tenants in common.
8. On 19th April 1968, Afwa binti Hassanali sold a portion of her share to Mwanasandal binti Mohamed bin Ali Malo.
9. It has further been deponed that upon the death of the said Mwanasandal binti Mohamed, her administrators under Administration Cause Number 17 of 1965 delivered her share to her daughters and heirs, Bishamba binti Abdalla bin Ali and Riyadhha binti Abdalla bin Ali.
10. The current half share of Afwa binti Hassanali is currently being owned by her grandchildren. The said portion is not in dispute.
11. The 1st Defendant deponed on how the other half of Nyawa wa Amani, the suit property, devolved.
12. According to the deponent, the current heirs of the half share of Nyawa wa Amani are eight and following a succession petition lodged at the Kadhi's Court, the heirs of Nyawa wa Amani agreed that the 1st Defendant be registered as trustee for all of them in respect to the suit property.
13. The 1st Defendant further deponed that the title document annexed on the Plaintiffs' Supporting Affidavit is a forgery; that the alleged title document is registered in file number 3490 which is not the genuine file and the certificate of search shows that Ringa Kaingu owned the entire plot and not a half thereof.
14. The 1st Defendant finally stated that the Applicant has not shown how the alleged Shariff Hassan Alwi acquired the said half a share which belonged to Nyawa wa Amani; that his grandmother's house and a mosque constructed by his father is on the suit property and that he tried to locate file number 4390 for purposes of doing a search but the file was not available.
15. Faced with the 1st Defendant's response, the Plaintiff filed a Supplementary Affidavit on 6th June 2013 and disputed the fact that Nyawa wa Amani sold her interest in plot number 317 to Nasibu wa Amani who is alleged to have subsequently sold it to Faraj Mlondia; that it is not true that the half share of Nyawa wa Amani (the suit property) was ultimately inherited by the 1st Defendant since the same ceased to belong to the Estate of the said Nyawa Wa Amani long before the sale and transfer to Hassan Bin Juma Jiwani who subsequently transferred it to Sharrif Hassan Alwi.
16. The Plaintiff alleges that the said Sharrif Hassan Alwi sold the suit property to the Plaintiffs' father, Kaingu Ringa; that file number 3490 exists at the Land Titles Registry; that it was an error by the officers at lands to have indicated that the Plaintiffs' father, Kaingu Ringa, owns the entire plot number 317; that the Plaintiffs' father owns half a share of plot number 317 as indicated in the second search; that the parcel of land was at one point used as a collateral and that the 1st Defendant has no right to the suit property.
17. The Plaintiff finally deponed that there is no mosque or house within the boundaries of the suit property as alleged by the Defendants and that the 1st Defendant is attempting to dispossess them of the property.
18. 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.
19. The Application was disposed of by the parties by way of written submissions. The Plaintiff's advocate filed his written submissions on 2nd July 2013 while the Defendants' Advocate filed his submissions on 22nd August 2013 which I have considered.
 20. From the Affidavits placed before me, the Plaintiffs and the Defendants are in agreement that parcel of land number 317, Malindi measuring 7.22 acres was initially owned by Nyawa wa Amani and Afwa binti Hassanali as tenants in common.
 21. The half share belonging to Afwa binti Hassanali is not in dispute. What is in dispute is the share that belonged to Nyawa wa Amani.
 22. According to the 1st Defendant's depositions, Nyawa wa Amani sold half ($\frac{1}{2}$) share to her paternal brother Nasibu wa Amani who in turn sold it to Faraj Mtondia who died without being blessed with children, but his share was inherited by Matano bin Suleiman, his cousin.
 23. The Plaintiffs' version is different. The 1st Plaintiff deposed that half ($\frac{1}{2}$) share of Nyawa wa Amani ceased to belong to the Estate of Nyawa wa Amani upon the sale and transfer of his share to Hassan Bin Juma Jiwanji who subsequently transferred the land to Sharrif Hassan Alwi. The Plaintiffs annexed a copy of the Transfer between the said Hassan Bin Juma Jiwanji and Shariff Hassan Alwy dated 2nd November 1977.
 24. The transfer between Hassan Bin Juma Jiwanji and Shariff Hassan Alwy is in respect of half undivided share in land known as plot number 317 measuring 7.22 acres. The transfer was registered in file number 3490 on 14th April 1978.
 25. However, the Plaintiff did not annex the transfer or Sale Agreement between Nyawa wa Amani and Hassan Bin Juma Jiwanji.
 26. The Plaintiffs also annexed on their Supporting Affidavit the Transfer between Shariff Hassan Alwi and Kaingu Ringa for the undivided share in plot number 317 measuring 7.22 acres dated 26th June 1978. The said transfer was registered in file number 3490 on 3rd July 1978.
 27. Considering the competing arguments on whether Nyawa wa Amani sold the land and if so to whom, it was incumbent on both parties to show by way of documentary evidence that indeed such a sale took place. Neither the Plaintiffs nor the Defendants did this.
 28. The 1st Defendant has annexed copies of the pleadings in Succession Cause No. 9 of 2012 in the Kadhi's Court in which he claimed he sought for an order vesting in him the title to the suit property in trust for all the beneficiaries named therein. The Petition was allowed by consent.
 29. It would appear that the 1st Defendant used the Succession Cause No.9 of 2012 to confer the suit property to himself as a trustee because there was no dispute between himself as a Petitioner and the Respondent.
 30. I have arrived at this conclusion because upon perusal of the Answer to the Petition, the Respondent simply confirmed the averment of the Petitioner and prayed that the Petition should be allowed. The Kadhi's court did not here the Petition on its merit.
 31. In any event, by the time the said succession cause was filed, the suit property was already registered in the name of the Plaintiffs' father.
 32. Had the Kadhi's court been informed that the suit property was registered in the name of the Plaintiffs father, the consent that was recorded by the parties allowing the Petition would not have been allowed by the court. Indeed, the Kadhi's court would not have had jurisdiction to deal with the issue in view of the registration of the land in the name of the Plaintiff.
 33. It may be true, as argued by the 1st Defendant that the certificate of postal search that the Plaintiff has annexed on his affidavit is a forgery. However, the court cannot make a determination on whether the document is a forgery or not at this stage. That is an issue which would be determined at the full trial. Of course it would have been different, had the Defendants annexed a document from the Ministry of Lands showing that the said search was a forgery.
 34. In view of the fact that the Plaintiffs have annexed a certificate of postal search showing that $\frac{1}{2}$ undivided share of portion number 317 Malindi is registered in the name of the Plaintiffs' father, and considering the fact that the Defendants have not annexed any documents to show that the search did not emanate from the Ministry of Lands offices, I find and hold that the Plaintiffs have established a prima facie case with chances of success.
 35. The 1st Defendant has admitted that he occupies plot number 310 which is adjacent to the suit property. The defendants or the beneficiaries of the suit property whom he claims to represent do

not stay on the suit property.

36. In the circumstances, I am of the view that until the title that the Plaintiffs' father holds is cancelled, the Plaintiffs should be allowed to continue using the suit property.

37. The usage of the suit property by the Defendants to the exclusion of the Plaintiffs will cause the Plaintiffs irreparable damage that will not be adequately compensated by way of damages.

38. For the above reasons, I allow the Plaintiffs' Application dated 2nd May 2013 in terms of prayers number 3 and 4.

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

O. A. Angote

Judge