



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 46 OF 2013

HANINGTON MALINGI JANJI.....PLAINTIFF

=VERSUS=

1. KATANA PEKESHE

2. CHARO SHANI

3. DAVID RODGERS

4. HAMISI SINEMA

5. FIKIRI SINEMA

6. TUME KITSAO

7. NELSON KITSAO

8. BARAKA KENGA.....DEFENDANTS

R U L I N G

1. What is before me is the Plaintiff's Application dated 22nd March 2013 seeking for the following orders:
 - a. **THAT this Honourable Court be pleased to issue a temporary injunction order restraining the defendants, their families, servants, agents, employees and any person deriving interest from them, from trespassing, entering, cultivating, planting, threatening the Plaintiff and his family, building and or dealing and interfering in any manner with the Plaintiff's plot no. 20 measuring 3 acres within and forming part of the block LR No. Mavueni group II plot no. 7 pending the inter parties hearing and determination of this suit.**
 - b. **The OCS Kilifi police station to provide security during the serving of the orders herein to the Defendants.**
2. According to the Applicant's depositions, he is the beneficial owner of plot number 20 measuring 3 acres situated within and forming part of L.R. No Mavueni Group II, Plot No. 7 which he bought

- from Kilifi south East F.C.S Ltd for Kshs.90,000/=.
3. The Applicant has deponed that on 5th November 2012, the 1st Defendant trespassed on his land, threatened the Plaintiff and his family, uprooted maize and cassava plants and proceeded to build a house without the approval from the Kilifi County Council and NEMA.
 4. Because of his acts of trespass, the 1st Defendant was arrested and charged in criminal case number 874 of 2013, which is still pending; that the Plaintiff and his family are the ones in occupation of the land and that he has a prima facie case with chances of success.
 5. In response, the 8th Defendant filed a Replying Affidavit on 15th May 2013 and stated that the Plaintiff had not shown how Kilifi South East Farmers Co-operative Sacco Limited owned plot number 7, Mavueni Group II before it was sold to him.
 6. It was the 8th Defendant's deposition that prior to filing the suit, they had lived and cultivated the suit property for over 30 years and have had quite possession, occupation and development and have built permanent houses on the suit premises.
 7. It was the 8th Defendant's deposition that the Plaintiff is now using the police administration to stop the Defendants from cultivating their parcel of land; that the suit land is the only place they call their home and that the suit should be dismissed.
 8. The Plaintiff's and the Defendants' Advocates appeared before me on 8th July 2013 and made oral submissions which I have considered.
 9. The Plaintiff has annexed on his Supporting Affidavit a Sale Agreement dated 25th January 2003 between himself and Kilifi south East F.C.S Limited.
 10. The Sale Agreement shows that the Plaintiff purchased plot number 20 which was to be excised from L.R. No. Mavueni Group II plot no.7.
 11. It is not clear from the said Sale Agreement the acreage of Mavueni Group II Plot No. 7 and whether the said land is surveyed or not.
 12. It is also not clear from the documents before me on how the said Kilifi South East F.C.S Ltd acquired the said land and whether the land was supposed to be sold to the members of the corporation or it was available to the public at large. In a nutshell, the proprietary interest of Kilifi south East F.C.S Ltd in the suit property has not been established by the Plaintiff at all.
 13. The Sale Agreement dated 25th January 2003 and which the Plaintiff is relying upon has a seal of the vendor. However, the plaintiff did not sign the Agreement.
 14. Section 3(3) of the Law of Contract Act, as amended vide Act No. 2 of 2002 which came into effect in June, 2003 provides as follows:

“No suit brought for the disposition of an interest in land unless:

(a) The contract upon the suit is founded:

(i) is in writing;

(ii) is signed by all parties thereto and

(b) The signatures of each party signing has been attested by a witness who is present when the contract was signed by such party.

15. The requirement of signing an agreement for sale of land by all parties is absolute. There is no room for courts to consider either unwritten agreements or agreements which are not duly signed and witnessed.
16. However, as I have stated above, the amendment of section 3(3) came into force on 1st June 2003, long after the Plaintiff had entered into the alleged agreement with Kilifi South East F.C.S Ltd.
17. The law that is applicable to the Sale Agreement dated 25th January 2003 is therefore the law that was prevailing before the amendment to section 3 (3) of the Contract Act which read as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon the suit is founded, or some memorandum or note thereof, is in writing and signed by the party to be charged or some person authorised

by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of contract.

i. ***has in part performance of the contract taken possession of the property or any part thereof.***”

18. The above provision recognised the equitable doctrine of part performance which permitted the party who had performed the act of part performance, to bring an action under an unwritten agreement.
19. This provision however restricted the equitable doctrine of part performance to two possible acts, to wit, taking of possession of the property or any part thereof; or being already in possession continues in possession in part performance of the contract and if a party has done some other act in furtherance of the contract.
20. Considering that the Sale Agreement of 28th January 2003 was not signed by the Plaintiff, it was upon him to show that he took possession of the land in question and that he paid for the said land.
21. The receipts annexed on the plaintiff's Supporting Affidavit indicate that that the land he purchased was plot numbers 8 and 26 and not plot number 20 as stated in his pleadings.
22. The Plaintiff has not shown whether he took actual possession of plot number 20 after purchase of the same in 2003. The Plaintiff did not file an affidavit to rebut the Respondents' deposition that they are the ones who have been using the suit property for the past 30 years.
23. It is trite law that in order for a right to property to be protected, a party alleging that that right has been infringed upon must establish a proprietary interest in the property. The Constitution does not in itself create these proprietary rights but only protects the proprietary interests acquired through the existing legal framework.
24. In **Nairobi Permanent Markets Society Vs Salim Enterprises & Others (1995-1998) 1 EA 232**, it was held as follows:-

“The Applicants have not disclosed what right or interest they have in the suit land. In the absence of that they could not expect the court to interfere with the Company's right of ownership by putting a hold on its activities or development of the suit land. We fully agree with the learned judge that in the circumstances the appellants prima facie did not have locus standi to bring the said action for an injunction against the Respondents.”

25. The Plaintiff has failed to establish his proprietary interest or that of Kilifi South East F.C.S Ltd in plot number 20 measuring 3 acres within and forming part L.R No. Mavueni Group II plot no. 7.
26. For the above reasons, I find and hold that the Plaintiff has not established that he has a prima facie case with chances of success.
27. Consequently, I dismiss the Plaintiff's Application dated 22nd March 2013 with costs.

Dated and Delivered in Malindi this 22nd day of **August**, 2013

O. A. Angote

Judge