



1. Injunction

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 68 OF 2013

HADIJA BILALI SALI.....PLAINTIFF

=VERSUS=

1. HAMISI JUMBA BILALI

2. OMAR JUMA

3. YAKUT ABDULREHMAN

4. ABDUL ABDU.....DEFENDANTS

R U L I N G

1. The Notice of Motion before me is the one dated 24th April 2013 and filed on the same day. The Application is brought under Section 13(7)(a)&(2) of the Environment and Land Court Act No. 19 of 2011 and Order 40 of the Civil Procedure Rules.
2. The Plaintiff's Application is seeking for the following orders:
 - a. **THAT at the Hearing of this Application inter-partes a Temporary Injunction do issue against the Defendants, restraining them, by themselves, their agents or servants or any person claiming**

through them, from carrying out any construction or development or selling, transferring or charging in any manner on that parcel of land situated at Jimba Village and known as Title No. KILIFI/MBARAKACHEMBE/404 pending the hearing and determination of this case.

b. THAT costs of this Application be in the cause.

3. According to the Plaintiff's Supporting Affidavit, he is the registered owner of parcel of land known as Kilifi/Mbaraka Chembe/155; that in the year 1980, he allowed his late brother, Jumba Bilali to occupy a portion of the suit property on a temporary basis on condition that he does not sell, subdivide or part with possession of the said property.

4. The Plaintiff deponed that he subsequently subdivided the suit property into four portions and the portion on which he had allowed his late brother Juma Bilali to occupy on a temporary basis ended up being within Kilifi/Mbaraka Chembe/404.
5. It is the Plaintiff's deposition that his late brother, Juma Bilali, in breach of the permission that he was required to obtain from the Plaintiff invited the 5th Defendant to occupy a portion of Kilifi/Mbaraka Chembe/404; that the 5th Defendant proceeded to erect thereon a temporary residential house thereby denying the Plaintiff the right to use the land.
6. The Plaintiff finally deponed that the said Juma Bilali died in the year 2010 leaving behind the 1st, 2nd, 3rd and 4th Defendants who have proceeded to sell the property to the 6th Defendant on the portion of the land without his consent and the 6th Defendant has commenced construction. The 1st to 4th Defendants have also commenced the construction of a mosque which the Plaintiff wants stopped.
7. The 1st Defendant swore a Replying Affidavit which was filed in court on 22nd May 2013.
8. According to the 1st Defendant, he lives with members of his family on land parcel number Kilifi/Mbaraka/Chembe/404 after the Plaintiff, who is his paternal aunt sold it to his father for Kshs. 9,800. The 1st Defendant admitted that portion number 404 was part of portion number 155.
9. The Respondent further deponed that after the said purchase, his father started clearing the suit property; that his father planted coconut trees on the land amongst other trees and constructed a permanent house on the suit property.
10. It is the 1st Defendant's deposition that later, his father and the Plaintiff obtained the Land Control Board consent allowing the sub-division of the land thus creating parcel number 403 and 404 in 1995; that the Plaintiff retained parcel number 403 while the 1st Defendant's father settled on parcel number 404 with his family and that he has been living on the suit property since 1984.
11. The 1st Defendant finally deponed that although the title documents are still in her name, she ceased to hold such title twelve years after she received her full purchase price in 1975.
12. The parties agreed to dispose of the Application by way of written submissions. I have considered the filed submissions which have reinstated the averments of the filed affidavits.
13. The Plaintiff's claim is for vacant possession, demolition of the buildings and eviction of the Defendants from the suit property.
14. The Plaintiff has stated that she allowed her late brother, the father of the 1st-4th Defendants to occupy the suit property in the early 1980's.
15. The Defendants on the other hand allege that their father bought the suit property from the Plaintiff, who is their aunt in or about 1975. The Defendants defence to the claim is two pronged; that their father purchased the suit property from the Plaintiff and that they have lived on the suit property for more than 12 years thus extinguishing the Plaintiff's title in respect to the suit property.
16. The Plaintiff has not shown how she allowed the 1st to the 4th Defendant's father to occupy the suit property in the early 1980's and on which terms. Indeed, on the material placed before me, there is no indication that the 1st to the 4th Defendant's father was a mere licensee as alleged by the Plaintiff.
17. The Defendants have also not annexed any evidence to show that indeed their father bought the suit property and that the consent of the Land Control Board was obtained to that effect.
18. It is only after hearing the witnesses in this matter that the court shall be able to determine whether the defendants' father was a licensee and whether he breached the terms of the licence that he was given as at the time of occupying the suit property or whether indeed the 1st to 4th Defendants have acquired the suit property by way of adverse possession.
19. Consequently, the court is in doubt, at this stage, and on the material placed before it if the Plaintiff has established a prima facie case with chances of success. If the court is in such doubts, it is required to consider the Application for injunction on a balance of convenience.

20. The Plaintiff has admitted that the 1st to 4th Defendants and their father have been living on the suit property since the early 1980's until now. Obviously, and considering that the Plaintiff has another portion of land where she is staying, it will in the interest of justice that before the suit is heard and determined, the 1st-4th Defendant should be allowed to continue staying on the suit property, which fact, according to the way the prayers in the Application are framed, is not opposed by the Plaintiff.
21. However, the Plaintiff is opposed to allowing the Defendants or their agents from carrying out any construction or selling the suit property pending the hearing of the suit.
22. I agree with the Plaintiff's Advocates' submissions that the suit property is in danger of being wasted, damaged and alienated to third parties. The fact of alienation of the suit property to the third parties and the construction of a mosque has been admitted by the 1st Defendant.
23. If this alienation and the construction of the mosque were allowed to happen, that will occasion the Plaintiff irreparable damages that may not be compensated by an award of damage if the Plaintiff was to succeed at the main trial.
24. To the extent that the injunction orders being sought by the Plaintiff is to restrain the Defendants from alienating the suit property and developing the same, I find that the balance of convenience tilts in favour of the Plaintiff. The Plaintiff is also likely to suffer irreparable damage as I have stated above unless the injunctive orders are not issued.
25. I therefore allow the Plaintiff's Application dated 24th April 2013 as prayed.

Dated and Delivered in Malindi this 20th day of September, 2013

O. A. Angote

Judge