



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 178 OF 2013

DANIEL RICCI.....PLAINTIFF

=VERSUS=

1. COUNTY LAND REGISTRAR KILIFI

2. THE HON. ATTORNEY GENERAL.....DEFENDANT

J U D G M E N T

Introduction

1. The Plaintiff has sued the Defendants vide a Plaint dated 9th October, 2013 seeking for the following orders:-

- (a) A declaration that the Plaintiff is the genuine and rightful owner of all that parcel of land known as CHEMBE/KIBABAMSHE/427 and that the Plaintiff acquired the said parcel of land legally and procedurally.
- (b) A declaration that the Plaintiff's parcel of land known as CHEMBE/KIBABAMSHE/427 is not a fish landing site hence a Government land.
- (c) A declaration that the revocation of the Plaintiff's Title Deed vide Gazette Notice No. 15444 of 9th December 2011 by the 1st Defendant's is illegal and unconstitutional.
- (d) An order revoking the said Gazette Notice NO. 15444 of 9th December 2011.
- (e) An order directing the 1st Defendant to reinstate the Plaintiff's Title Deed and make proper entries in the Register reinstating the Plaintiff's Title Deed and ownership of CHEMBE/KIBABAMSHE/427.
- (f) An order of compensation of damages suffered by the Plaintiff for loss of use of the land from the time of the Gazettement up to the date of determination of this suit at the rate of 310,800 Euros per month or Kshs.35,742,000/- per month.
- (g) Special damages of Kshs.15,000,000/- being money paid to the Architecture for designing the Villas plan

(h) In the alternative the Plaintiff prays for compulsory acquisition of the land and payment of compensation by the Government of the Republic of Kenya at the current market rate together with all expenses incurred by the Plaintiff since the issuance of the Title Deed until termination of the suit.

(i) Special damages of a sum of Kshs.10,000,000/- being money expended in resettling squatters.

(j) Cost of the suit.

(k) Interest thereon accordingly.

(l) Any other or further relief that the Court shall deem fit and just to grant.

2. The Plaintiff has averred in the Plaint that at all material times, he was the registered proprietor as owner of parcel of land known as Chembe/Kibabamshe/427; that without any reasonable cause or justification, the 1st Defendant revoked his title deed on 21st November, 2011 and that the said revocation was irregular and was in contravention of the Constitution.

3. According to the Plaint, the Plaintiff genuinely and procedurally acquired the suit property from Omar Khamisi Baleith who had purchased it from Stephen Mathenge Wachira and that the Plaintiff has suffered loss because he had planned to put an expensive and luxurious Tourist Resort and Residential Villas on the land.

4. The Plaintiff has pleaded in his Plaint special damages of Kshs.15,000,000 being the cost of architectural plan and Kshs.35,742.00 being the anticipated rent per month.

5. In their Defence, the Defendants averred that the cancellation and revocation of the registration of the suit property in the name of the Plaintiff was due to the fact that the land was irregularly and illegally acquired.

6. The Defendants averred that the Plaintiff always had knowledge that the suit property was not available for allocation because it was public land and that in any event, the Plaintiff has never taken possession of the suit property.

7. The Defendants have averred that the suit is res judicata and that the alleged ownership is illegal, irregular and against public interest.

The Plaintiff's case:

8. The land surveyor, PW1, relied on the survey report that was prepared by the District Surveyor and informed the court that other than the palm trees, the suit property does not have developments.

9. It was the evidence of PW1 that other than the marine reserve measuring approximately 3.9 Ha, the suit property is not public land.

10. In cross-examination, PW1 stated that he was not aware that the suit property was reserved as a fish landing site although there are fishing activities on some parts of the suit property.

11. The Plaintiff, PW2, stated that when he started developing the suit property, there was interference by the Defendants.

12. According to PW2, he acquired the suit property from Mr. Omar for value and a Title Deed was duly issued to him.

13. PW2 informed the court that before he was issued with the Title Deed, he was issued with the consent

of the Board and that he conducted an official search before he purchased the land.

14. PW2 produced the agreement he entered into with the previous owner together with the consent of the Board and original Title Deed for the suit property.

15. PW2 stated that he was shocked when his title was revoked in the year 2011 by the 1st Defendant.

16. It was the evidence of PW2 that by the time his Title Deed was cancelled by the Government, Tourism was high in Malindi.

17. PW2 informed the court that he had planned to put up 148 villas which were to generate an income of approximately 300,000 Euros per month as profits.

18. However, when the Title Deed was cancelled, he was unable to put the land to the intended use and in the premises lost a lot of business.

19. PW2 stated that he wants the Defendants to pay him for the actual value of the land and for the loss of use of the land.

20. In cross-examination, PW2 stated that he was chased away by people when he deposited materials on the site and that it was the District Land Registrar who cancelled his Title Deed.

21. PW3 informed the court that he is the one who sold to the Plaintiff the suit property in the year 2001.

22. It was the evidence of PW3 that there were squatters on the land whom he moved before selling the land.

23. According to PW3, several squatters filed a suit against him claiming for the suit property by way of adverse of possession, which suit was dismissed.

24. PW3 informed the court that he bought the land from Mr. Wachira and was duly issued with a Title Deed before he sold the land to the Plaintiff.

25. PW3 stated in cross-examination that when he bought the land, there was ongoing fishing on the beach although the land was not being used as a fish landing site; that the fish landing site is on a different piece of land and that what fishermen used to do was to go onto the suit property after fishing in the ocean.

26. It was the evidence of PW3 that he moved the fishermen on to plot No. 369 which he purchased from the Municipal Council of Malindi for that purpose.

27. PW3 denied that the suit property was ever set aside by the government as a fish landing site.

The Defendants' case:

28. DW1 informed the court that after the adjudication process, the suit property was registered in favour of Mathenge Wachira.

29. However, due to the irregularities within Chembe/Kibabamshe registration section, it was the evidence of DW1 that the government recalled and cancelled the titles that were issued in 1978 and opened a new edition of green cards on 22nd December, 1986.

30. According to DW1, Mr. Mathenge was registered as the proprietor of the suit property in 1990 although there is no evidence to show that the government consented to the allocation.

31. DW1 informed the court that according to the green card, the suit property was transferred to Mr.

Omar in 1991 who later on transferred the land to the Plaintiff.

32. DW1 stated that the Minister of Lands recommended the cancellation of the Plaintiff's Title Deed for lack of proper documentation.

33. According to DW1, he did not have a copy of the Transfer and that the Title Deed was cancelled because of the anomalies in the presentation book.

34. In cross-examination, DW1 admitted that his official file had the original transfer documents which were duly imposed with stamp duty.

35. DW1 informed the court that he did not have a letter from the Minister directing the 1st Defendant to cancel the Title Deed and confirmed that indeed the Plaintiff's Title Deed was issued by the Registrar of Lands.

36. The Principal Fishing Officer, DW2, stated that fishermen have been using the suit property as a landing site for many years.

37. According to DW2, when the Title Deed was issued to the Plaintiff for the suit property, they requested the Minister to cancel it because the said land had been reserved as a fish landing site.

38. DW2 informed the court that the suit property was gazetted as a landing site for fishermen by the Minister in 1991 vide a legal notice number 34.

39. In cross examination, DW2 stated that the land in question is in Mayungu and that the landing site for fishermen was approximately 3 acres and not the entire suit property.

40. According to DW2, he was not sure if the Plaintiff was ever notified before his Title Deed was cancelled and that although the suit property was gazetted in 1991 as a fish landing site, they never obtained a Title Deed for it.

Submissions

41. The Plaintiff's advocate submitted that the Plaintiff carried out a search before he purchased the suit property from the previous owners; that the Plaintiff also obtained the requisite consents and that he has an indefeasible title to the land.

42. Counsel submitted that pursuant to the provisions of section 8 of the RLA (repealed), the 1st Defendant does not have the powers to revoke a title deed. Consequently, it was submitted, the actions of the 1st Defendant were unlawful, ultra vires, null and void.

43. Counsel submitted that in any event, no notice was given to the Plaintiff before the said cancellation was effected by the 1st Defendant.

44. Counsel relied on numerous decisions of this court and the Court of Appeal which I have considered.

45. The Defendants' counsel submitted that from the evidence adduced, it is not in dispute that fish landing activities have been taking place on the suit property.

46. Counsel submitted that the surveyor's report showed that the suit property has crossed over to public land meant for fish landing and that the Registrar was not at fault in cancelling the Plaintiff's Title Deed.

Analysis and findings:

47. The only issue for determination in this matter is whether the Plaintiff is the rightful owner of parcel

of land known as Chembe/Kibabamshe/427 (the suit property) and if so, whether the Plaintiff is entitled to special damages as pleaded in his Plaintiff.

48. It is not in dispute that on 1st March, 2001, the Plaintiff was issued with a Title Deed in respect to the suit property by the Kilifi Land Registrar.

49. The Plaintiff, PW2, informed the court that he purchased the suit property from Mr. Omar Khamisi Baleith, PW3, for Kshs.5,200,000. PW2 produced the agreement of sale dated 21st February, 2001 showing the transaction that he entered into with PW3.

50. PW3 informed the court that he had purchased the suit property from one Mr. Mathenge Wachira who had been identified during the adjudication process as the owner of the property. The adjudication record duly signed by the Chairman of the adjudication committee on 30th August 1977 was produced in evidence.

51. The Plaintiff also produced in evidence the Application for the consent of the Board and the consent that was issued by the Board on 29th January, 2001.

52. The duly signed, stamped and registered Transfer document was also produced in evidence together with a receipt showing that PW2 paid Kshs.208,010 towards stamp duty.

53. After the Title Deed was issued to the Plaintiff, the green card was duly amended showing the Plaintiff as the duly registered owner of the suit property.

54. All the documents that were produced by the Plaintiff were also produced by the Registrar of Lands in evidence.

55. It is therefore obvious that the documents that gave rise to the Title Deed that was issued to the Plaintiff were all sanctioned by the 1st Defendant.

56. The Green Card shows that vide Gazette Notice NO. 15444 dated 21st November, 2011, the Minister for Lands and Settlement revoked the Plaintiff's title.

57. The letter by the Minister revoking the Plaintiff's Title Deed was not produced in evidence by the Defence.

58. The actual gazette revoking the Plaintiff's Title Deed shows that the Title Deed was revoked because "it had come to the notice of the Government that the suit property was reserved for public purpose".

59. DW2 informed the court that the suit property was being used by fishermen as a landing site.

60. According to the evidence of DW2, the suit property had been reserved as a fish landing site. The witness produced in evidence a legal notice number 34 of 1991 reserving "Mayungu" as a designated fish landing station.

61. I have perused the forth schedule of the Fisheries (General Regulations), which shows the "designated fish landing stations".

62. The fish landing stations for Kilifi are "Ngomeni, Malindi, Mayungu, Watamu, Kilifi, Takaungu and Mtwapa".

63. There is no other information that was produced by DW2 to show the specific parcel of land in Mayungu that were designated as fish landing stations.

64. "Mayungu" by its very nature is an expensive area covering hundreds of parcels of land.

65. Considering that the Mayungu area was adjudicated in 1977, I do not see why the government did not specifically gazette the parcels of land that were to be reserved as “fish landing stations.”

66. Indeed, it is the same government that authorised the sale of the suit property to the Plaintiff, and issued him with the Title Deed.

67. Considering that the Plaintiff has all the requisite documents showing that he lawfully purchased the suit property and even conducted an official search thereafter, and in the absence of a part development plan or a map deposited in the Director of Surveys office showing that the government reserved the suit property for public purpose, I find and hold that the Plaintiff is the lawful owner of the suit property.

68. If, as claimed by DW2, fishermen have been using part of the suit property for their fishing activities, they have been doing so over private property.

69. Having failed to designate the suit property as a landing site, by way of a map or otherwise, the government can only acquire the said land by paying for its market value and not by arbitrarily cancelling the Plaintiff's Title Deed.

70. In any event, even if the suit property was reserved for public purpose, it is only this court that is mandated by the Land Registration Act or the Registered Land Act (repealed) under Sections 80 and 143 respectively to rectify the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

71. Consequently, the 1st Defendant or the Minister could not purport to rectify the register by revoking the Plaintiff's Title Deed because the law does not allow him to do so. The said revocation was therefore null and void ab initio.

72. In any event, the Defendants did not present any evidence to show that the Plaintiff obtained the Title Deed fraudulently, or by mistake. This court, even if it was called upon by the Defendant to order that the register should be rectified by canceling the Plaintiff's Title Deed, could not have done so.

73. Considering that the Defendants have not proved that the Plaintiff's predecessor was allocated the suit property unlawfully and in view of the fact that there is no evidence to show that the suit property was reserved for public purpose, or that the Registrar of Lands had the legal mandate to revoke the Plaintiff's Title Deed, I find and hold that the Plaintiff has proved that he is the one who is entitled to the suit property.

74. Although the Plaintiff is claiming for special damages of Kshs.15,000,000 being the money that was paid to the Architect for designing the villa plans and Kshs.37,742,000 per month for loss of use of the suit property, I find and hold that the said amount cannot be awarded because those damages were not proved.

75. The Plaintiff did not produce a receipt showing that he paid Kshs.15,000,000 to have the designs for the anticipated villas drawn.

76. In any event, the Plaintiff can still use the ambitious plan of putting up the villas on the suit property now that the court has ordered that the land reverts back to him.

77. Until the villas have been constructed, the issue of damages for loss of user of the suit land as pleaded by the Plaintiff cannot arise.

78. For those reasons, I allow the Plaintiff's Plaint dated 9th October 2013 in the following terms.

(a) A declaration be and is hereby issued that the Plaintiff is the genuine and rightful owner of all that parcel of land known as CHEMBE/KIBABAMSHE/427 and that the Plaintiff acquired the said parcel of land legally and procedurally.

(b) A declaration be and is hereby issued that the Plaintiff's parcel of land known as CHEMBE/.KIBABAMSHE/427 is neither a fish landing site nor Government land.

(c) A declaration be and is hereby issued that the revocation of the Plaintiff's Title Deed vide Gazette Notice No. 15444 of 9th December 2011 by the 1st Defendant is illegal and unconstitutional.

(d) An order be and is hereby issued revoking the said Gazette Notice NO. 15444 of 9th December 2011.

(e) An order be and is hereby issued directing the 1st Defendant to reinstate the Plaintiff's Title Deed and make proper entries in the Register reinstating the Plaintiff's Title Deed and ownership of CHEMBE/KIBABAMSHE/427.

(f) The Defendants to pay the costs of the suit

Dated signed and delivered in Malindi this 22nd day of **April**, 2016.

O. A. Angote

Judge