



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

PETITION NO. 105 OF 2012

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF EUROTRUCKS & TRAILERS (K) LIMITED AND ARTICLES 22, 23, 40, 47, 48, 165(3) & (5) AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF EUROTRUCKS AND TRAILER (K) LIMITED'S FUNDAMENTAL RIGHTS TO PROPERTY, FAIR ADMINISTRATIVE ACTION, ACCESS TO JUSTICE WITH REGARD TO KWALE/DIANI SETTLEMENT SCHEME/222

AND

IN THE MATTER OF: AN APPLICATION ON THE PART OF EUROTRUCKS AND TRAILERS (K) LTD FOR ENFORCEMENT

BY ORDERS OF JUDICIAL REVIEW OF ITS RIGHT IN KWALE/DIANI SETTLEMENT SCHEME/222

AND

IN THE MATTER OF: MSAMBWENI LAND DISPUTES TRIBUNAL CASE NUMBER 07 OF 2009

BETWEEN ABDALLAH SALIM MWAMAZURI AND KHALID MUSA; MOHMUD MUSA; MASUDI

MUSA; NAHID MOOSA; AHMED ALWY AND EUROTRUCKS AND TRAILER (K) LIMITED

AND

IN THE MATTER OF: THE DECREE OF COURT DATED AND ISSUED ON 21/09/2010 IN KWALE LAND CASE

NO. 25 OF 2010 BETWEEN ABDALLAH SALIM MWAMAZURI VS. KHALID MUSA; MOHAMUD MUSA;

MASUDI MUSA; NAHID MOOSA; AHMED ALWY AND EUROTRUCKS & TRAVELLERS LTD.

BETWEEN

EUROTRUCKS & TRAILERS LTD.....PETITIONER

VERSUS

1. JUMA ABDALLA MATATA

2. KWALE PM'S COURT.....RESPONDENTS

RULING

The Notice of Motion

1. This Ruling concerns a Notice of Motion dated 1st July, 2015 and filed on 2nd July, 2015. It seeks the following orders –

1. spent

2. An inhibition and/or conservatory order to be issued, for such period as the court may direct, for service on the Respondents and the County Land Registrar, Kwale, to preserve the title and register for plot Number Kwale Diani Settlement Scheme/222 (the suit land), registered in the name of the Petitioner, and expunge or render legally ineffectual any parallel title and/or register opened in contravention of the *lis pendence* principle, and without hearing the registered land owner, on the ground that the first respondent has wrongfully and illegally purported to obtain a title for the suit land from the County Land Registrar, Kwale, yet this action challenging the jurisdiction of Msambweni Land Disputes Tribunal and the constitutionality and propriety of the subordinate court's proceedings was pending hearing, and the respondent himself had commenced Mombasa ELC No. 75 of 2011 **Jumaa A. Matata vs. Ali Changoma and 5 others**, which is still pending before court;

3. the conservatory order be published or advertised for such period and in such manner as the court may direct in order to prevent a fraud on unsuspecting third party or parties through use by the First Respondent, or anyone claiming under him, of the parallel title document and register opened by the County Land Registrar, Kwale;

4. an order that the First Respondent do immediately surrender to the court the title issued in his name;

5. a direction on service of the Application and any order made ex parte upon the First Respondent and the County Registrar, Kwale, and a date for **inter partes** hearing is given (spent);

6. the costs of this Application and the proposed publication of the court order are provided for.

2. As noted already prayers 1 and 5, are spent. The First Respondent and the Attorney-General on behalf of the Second Respondent were duly served. They each instructed counsel Miss Shariff (for the First Respondent), Miss Lutta for the Second Respondent. I agree with submission by Miss Lutta that the dispute is basically between the Petitioner and the First Respondent.

The Rival Claims

3. The Petitioner/Applicant's claims that it is the registered proprietor in absolute of the parcel of land known as KWALE/DIANI/SETTLEMENT SCHEME, by purchase for the sum of Shs. 3,000,000/= and was issued with title on 2nd August, 2006. The Petitioner charged the land to Kenya Commercial Bank on 10th September, 2009, and a further charge on 6th July, 2011.

4. The Petitioner, through the Supporting Affidavit of Lanyasunya Naemu Catherine, a director of the Petitioner, claims that unknown to it, the same land was subject of Msambweni Land Disputes Tribunal, decision in which the Tribunal determined that the suit land belonged to the Estate of the deceased relative of the First Respondent, who went to the Tribunal as Administrator of the Estate. The decision of the Tribunal was confirmed by the Second Respondent; hence its being joined as Second Respondent.

5. The First Respondent also claims that the suit land is his ancestral land, and he disputes the alleged purchase by the Petitioner/Applicant of the suit land. That is however not the subject of this Ruling. This Ruling as noted, concerns the Notice of Motion for conservatory order; pending he determination of the Petition, as well as Mombasa ELC No. 75 of 2011.

Determination

6. An “inhibition” is a term not found in Article 23 of the Constitution of Kenya 2010. It is a term found in the repealed land statutes, and constituted an entry in the encumbrances section of the land register on application of any person interested, for instance a purchaser or where a proprietor’s certificate has been stolen, or lost. The order prohibits the registration or entry of any dealing with the registered land absolutely or upon the occurrence of an event named in the prohibition. The common term now is “restrictions” from dealing with the land pending further orders or actions by the interested party/parties.

7. Despite protestations by Miss Shariff counsel for the First Respondent, there is obviously a serious dispute between the Petitioner and the First Respondent as counsel for the Second Respondent correctly acknowledged. The First Respondent claims that the suit land is not family ancestral land, and disputes the acquisition thereof by the Petitioner/Applicant. On the other hand the Petitioner has title to the land upon which it has obtained loans from a commercial bank secured by a charge on the disputed title. On the same land, there is another title, though now surrendered to, and under the custody of the court

8. In addition the Petitioner/Applicant claims that the First Respondent’s title was obtained when the legality of the land Disputes Tribunal’s and lower court’s decision were under challenge in ELC Case No. 75 of 2011. The expression of **lis pendens or pendens lis** literally means “a pending action” usually in claims or proceedings pending in court relating to land, and to be binding, it must be registered or notified on title while the action is pending determination. The First Respondent cannot of course claim that there was no notification in the Register of the suit by the Petitioner/Applicant. The Respondent had actual knowledge of the Petitioner’s claim. It cannot claim ignorance. It might be inferred he was acting in bad faith in insisting on issue of title in his own name, and proceeding to issue notice to vacate to the Petitioner/Applicant.

9. In the circumstances, the appropriate order which lends itself for issue is a conservatory order by way of an inhibition, to prohibit the First Respondent from dealing in any manner whatsoever with the said title to the suit land, pending the determination of Mombasa ELC Case No. 75 of 2011 together with this Petition.

10. For good order, the conservatory order be published in the Daily Nation and Standard Newspapers once and also **posted** at the offices of the County of Kwale Land Registrar’s office, as well as the County Commissioner’s Offices.

11. Though this case is dubbed a Constitutional Petition, it is no more than a dispute over land ownership between the Petitioner and the First Respondent. I therefore direct that this file, be consolidated with ELC Case No. 75 of 2011 Juma A. Matata vs. Ali Changoma & 5 others for hearing and final determination of the claim between the parties.

12. There shall be orders accordingly.

13. The title surrendered shall be registered in the Register of securities held by the court and kept in the Strong Room/Safe.

Dated, Signed and Delivered in Mombasa this 11th day of December, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. S. Kimani for Petitioner

Mr. Odunde holding brief Miss Shariff for 1st Respondent

No Appearance for 2nd Respondent

Court Assistant Pamela Osodo