



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 182 OF 2011 (OS)

IN THE MATTER OF: LAND TITLES NO. CHEMBE/KIBABAMSHE/420

AND

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

BETWEEN

MALINDI MUSKETEERS LIMITD.....PLAINTIFF/APPLICANT

=VERSUS=

1. THE HONOURABLE ATTORNEY GENERAL

2. THE LAND REGISTRAR KILIFI

3. KARISA MOLE MBITHA.....DEFENDANTS/RESPONDENTS

R U L I N G

1. The Notice of Motion before me is the one dated 13th May 2013 filed by the Plaintiff. The Application is seeking for the following prayers:
 - a. **THAT the Plaintiff/Applicant be granted leave to file a Supplementary Affidavit in support of the Originating Summons dated 5th December 2011.**
 - b. **THAT the Honourable court be pleased to grant leave to the Plaintiff/Applicant to enjoin DAVA LIMITED as the 4th Defendant/Respondent in this suit.**
 - c. **THAT the Honourable court be pleased to indicate the time within which parties shall file their respective documents in compliance with Order 3 Rule 2(a) (b) (c) and (d) of the Civil Procedure Rules and give directions towards the hearing of this suit.**
 - d. **THAT the Honourable court be pleased to order that the Notice of Motion dated 5th December, 2011 is now of no consequence since the same is overtaken by events.**
 - e. **THAT the Honourable court be pleased to order that the firm of Kilonzo & Aziz Advocates be disqualified from representing the 3rd Defendant/Respondent herein.**
 - f. **THAT the costs of this Application be in the cause.**

2. The Application is premised on the grounds that the 3rd Defendant's Replying Affidavit sworn on 20th April 2012 has serious allegations which the Plaintiff needs to respond to; that the Plaintiff has discovered that the 3rd Defendant has since sold the suit property to DAVA LIMITED, hence the need to join the said company. The last ground that the Applicant's Application is premised on is that he has since discovered that the firm of Kilonzo and Aziz Advocates drew the Agreement of sale and the transfer between the 3rd Defendant and the Intended 4th Defendant and the said firm should be disqualified from acting for the 3rd and the intended 4th Defendants. The Plaintiff's director has reproduced the above averments in his Supporting Affidavit.
3. In opposing the Application, the 3rd Defendant's advocate filed a Preliminary Objection dated 31st May 2013 and a Replying Affidavit sworn on 25th June 2012.
4. In the Preliminary Objection, the 3rd Defendant has stated that there is no suit in existence hence the Notice of Motion dated 5th December 2011 and 13th May 2013 are incurably defective, incompetent and bad in law.
5. The parties agreed to dispose of the Plaintiff's Application and the Preliminary Objection by the 3rd Defendant by way of written submissions.
6. According to the Submissions by the Plaintiff/Applicant's advocate, the Plaintiff is the absolute registered proprietor of Chembe/Kibabamshe/420 having been registered as such on 7th November 2007.
7. The Plaintiff's advocate further submitted that the Plaintiff has been enjoying quiet possession and occupation of the suit property until 29th September 2010, when, without any notice, the Kilifi Land Registrar registered "on top" of the Plaintiff's freehold title deed a certificate of lease in favour of the 3rd Defendant.
8. Counsel submitted that the institution of a suit is clearly stipulated under Order 3 Rule 1 of the Civil Procedure Rules and that a suit can be instituted by way of an Originating Summons. Counsel submitted that the 3rd Defendant's Preliminary Objection should be dismissed with costs.
9. On the other hand, the 3rd Defendant's counsel has submitted that the Originating Summons filed by the Plaintiff is legally untenable and does not constitute a valid claim against the 3rd Defendant and should be dismissed.
10. According to counsel, the Originating Summons is questioning the legality of proprietorship of plot number Chembe/Kibabamshe/420, which is a complex and contentious dispute that cannot be ventilated by way of Originating Summons. Counsel relied on the Court of Appeal decision in the case of **THEURI VS LSK (1988) KLR 334** to buttress his argument.
11. Before I can address the issue of whether the Plaintiff's Notice of Motion is meritorious, I should, as I am required to do, determine the preliminary point of law raised by the 3rd Defendant.
12. The Originating Summons dated 5th December 2011 and filed on the same day was drawn and filed pursuant to the provisions of order 37 Rules 3 and 8 of the Civil Procedure Rules. The Originating Summons is seeking for the determination of the following questions:

(a) The Honourable court be pleased to issue orders restraining the 3rd Defendant by himself, his agents and or servants from transferring, mortgaging and or dealing in any manner with the Plaintiff's plot no. Chembe/Kibabamshe/420;

(b) The Honourable Court be pleased to issue for cancellation of certificate of lease issued to the 3rd Defendant herein and fresh registration in the names of the Plaintiff;

(c) The Honourable Court be pleased to order that the District Land Registrar Kilifi to be ordered and or compelled to register the Plaintiff as the rightful and lawful owner of Chembe/Kibabamshe/420 in place of the 3rd Defendant;

(d) THAT the costs of this Application be provided for.

13. It is not in dispute that the suit property is registered under the repealed Registered Land Act, Cap 300. Other than the permanent injunctive order, the Plaintiff is seeking for the rectification of the

register by cancellation of the title deed in respect to the suit property that was registered in favour of the 3rd Defendant.

14. In the case of **Ngomeni Swimmers Limited Vs The Commissioner of Lands and 25 Others; Malindi HCCC No. 18 of 2013 (OS)**, I held as follows;

“Order 37 Rule 8 of the Civil Procedure Rules, 2010 provides that Applications under the Registered Land Act shall be made by way of an Originating Summons except under section 120, 128, 133, 143 and 150 of the Act. Section 143 of the repealed Registered Lands Act, Cap 300 is the only section that gives the court the mandate to rectify the register by directing that any registration be cancelled or amended once it is satisfied that the registration was made or omitted by fraud or mistake. In view of the fact that Order 37 Rule 8 of the Civil Procedure Rules, 2010 expressly prohibits the filing of an Originating Summons in respect to claims brought pursuant to the provisions of section 143 of the repealed Registered Land Act, this court cannot grant the declaratory orders that are being sought by the Plaintiff by way of an Originating Summons.”

15. That is the same scenario that the Plaintiff in this matter finds itself in. In view of the clear provisions of Order 37 Rule 8 of the Civil Procedure Rules as read together with the provisions of Section 143 of the Registered Land Act, Cap 300 (repealed), this court cannot order for the rectification of title by cancellation by way of an Originating Summons. The Plaintiff should have commenced his suit by way of a Plaint and not an Originating Summons.
16. In the case of **THEURI VS LAW SOCIETY OF KENYA (1988) KLR 334**, the Court of Appeal declined to grant to the Applicant interlocutory relief because the appellant did not file a Plaint as envisaged under the then Order XXXIX of the Civil Procedure Rules. The Court of Appeal found that there was no competent action on which the Appellant could base his claim for the grant of interim reliefs.
17. In the case of **Wakf Commissioner Vs Mohamed bin Umeya bin Abdulmaji Bin Mwijabu (1984) KLR 346**, the Court of Appeal held that an Originating Summons is intended for settling simple matters without the expense of a full trial and not for serious issues. The issues raised by the Plaintiff and the Interested Parties in this matter are complex issues which can only be dealt with by way of a Plaint and after the full hearing of evidence. A declaratory order for the cancellation of a title deed cannot be said to be a simple issue which can be decided by way of an Originating Summons.
18. The suit as currently instituted is in contra-statute and a nullity *ab initio*. In the circumstance, I shall, which I hereby do, allow the 3rd Defendant's Preliminary Objection dated 31st May 2013 and strike out with costs the Originating Summons dated 5th December, 2011 together with the Notice Motion dated 13th May, 2013.

Dated and Delivered in Malindi this 28th Day of **February**, 2014.

O. A. Angote

Judge

