



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
HIGH COURT CIVIL CASE NO. 36 OF 2004

RANSA COMPANY LTD PLAINTIFF

-VERSUS-

HATIBU ABDALLA JUMA

MANCA FRANCESCO

KASSIM SHARRIF

THE SETTLEMENT FUND TRUSTEES.....DEFENDANTS

-AS CONSOLIDATED WITH MALINDI H.C.C.C No. 10 OF 2005-

RANSA COMPANY LTD.....PLAINTIFF

-VERSUS-

THE COMMISSIONER OF LANDS

THE CHIEF LAND REGISTRAR

THE LAND REGISTRAR KILIFI DISTRICT

THE LAND REGISTRAR MOMBASA

THE ATTORNEY GENERAL

SAID MOHAMED.....DEFENDANTS

JUDGEMENT

BACKGROUND

This is a matter that was filed way back in year 2004. The precursor to the main hearing of the suit, which started in year 2012 was a series of interlocutory applications. Hearing was completed in May 2013 but delivery of the judgement was delayed due to the involvement of the trial judge in Election Petitions. The delay is regretted.

THE PLEADINGS

The plaintiff, a limited liability company, instituted a suit being Malindi High Court Civil Case no. 36 of 2004 in September, 2004 against Hatibu Abdalla Juma, Manca Francesco, Kassim Sharrif, the Settlement Fund Trustees, being the 1st, 2nd, 3rd and 4th Defendants respectively. The Plaintiff pleads therein as follows:

That the plaintiff was the registered lessee from government for a term of 99 years of the parcel of land measuring 3.784 hectares or thereabout known as portion Number 671, Watamu (*the suit property*) with the dimensions abutments and boundaries delineated on the Deed Plan Number 168706, annexed to the grant No. CR23596/1 in favour of the Plaintiff.

That in the pretext of exercising of the powers conferred upon the 4th Defendant by the Agriculture Act (now repealed), the Commissioner of Lands, the Chief Land Registrar, the Land Registrar Kilifi District, the Land Registrar Mombasa wrongfully and unlawfully excised a portion of the suit property and issued a title thereto described, as Kilifi/ Jimba 439 measuring 1.21 ha. which parcel is non-existent. That the excise was void *ab initio* for reasons that the Commissioner of Lands is the custodian of all unalienated government land, whilst the suit property is located within Watamu township and was neither agricultural land nor part of a settlement scheme. It therefore fell outside the 4th Defendant's jurisdiction. Secondly, that the suit property having ceased to be unalienated government land treating it as such was void.

The plaintiff avers that the suit property having been registered under the Registration of Titles Act, in the name of the Plaintiff could not subsequently, without its consent, for the purposes of disposition be subject to the Lands Titles Act, the Trust Lands Act, the Adjudication Act, the Registered Lands Act, the Agriculture Act or the Government Lands Act. Hence the purported creation by the Defendants jointly of Plot No. Kilifi/Jimba 439 amounted to compulsory acquisition without following due procedure under the Land Acquisition Act, Cap 295. The Plaintiff claimed punitive and exemplary damages against the Defendants jointly and severally for loss and damage.

In January, 2004 one of the Plaintiff's directors learnt that one of the Defendant Manca Francesco had trespassed on the land claiming to have purchased the same from Kassim Shariff and Hatibu Abdalla Juma. Manca Francesco had in his possession a title deed issued on 2nd August, 2002 in the Mombasa Land Registry. It is alleged that Manca Francesco put up signs on the suit property for sale of the land and despite the Plaintiff's intervention did not cease the acts of trespass but commenced some developments on it.

The Plaintiff's prayers in H.C.C.C 34 of 2004 are as follows:

As against the Defendants jointly and severally a declaration that the only valid document of title in respect of the suit property was the grant registered as CR23596/1

As against the Defendants jointly and severally a declaration that all the acts carried out by the Defendants jointly and severally in the preparation and production of the title to the land known as Kilifi/Jimba 439 were void.

A declaration that the title to the land known as Kilifi/Jimba 439 was void.

A declaration that any sale or transfer by the 1st Defendant to the 2nd Defendant of the land known as Kilifi/Jimba 439 was void.

That the 1st, 2nd and 3rd Defendants or any of them be compelled to produce title number Kilifi/Jimba 439 to the Honourable Court or the Chief Land Registrar or the Land Registrar Kilifi District for purposes of cancellation.

An order restraining 1st, 2nd and 3rd Defendants from disposing, mortgaging, charging or in any other way dealing with the title to the land known as Kilifi/Jimba 439.

An order restraining 1st, 2nd and 3rd Defendants jointly and severally, their servants and or agents or any one of them from trespassing upon the Plaintiff's piece of land aforesaid.

The 2nd Defendant, his servants and or agents be directed by an order of mandatory injunction to remove all the bill boards, fences and any other developments made on the Plaintiff's portion of land known as portion Number 671, Watamu within 7 days of service of Honourable Court's Order and failure to which the Plaintiff be at liberty to engage the services of a contractor who will remove and cart away the said billboards and any other developments made by the 2nd Defendant on the said land at the 2nd Defendant's expense, in any event within a time to be specified by the Honourable Court should it become necessary.

The Plaintiff also seeks special damages and cost

The 1st and 2nd Defendants filed a joint statement of defence in which they state that they were strangers to the existence of plot Number 671, Watamu and denied that plot number Kilifi/Jimba 439 was excised from plot Number 671, Watamu. Further they aver that the 2nd Defendant was the registered owner of Kilifi/Jimba 439 since 19th August, 2004 when the transfer in his name was duly registered at the Kilifi Land Registry subsequent to which he was issued with a Title Deed. They denied the Plaintiff's claim for special damages.

The 3rd Defendant also filed a defence to the effect that the title document referred to as CR. 23596 cannot be authenticated. Secondly, that the Plaintiff was not in possession of title number Kilifi/Jimba 439 and that long before the Plaintiff came into the picture, he had been living on the suit property for thirty (30) years.

The 4th Defendant's Defence was to the effect that the Plaintiff lacked proprietary interest in the parcel of land and further that Kilifi /Jimba 439 was not excised from portion number 671 Watamu.

The Plaintiff instituted a further suit being Malindi High Court civil case no. 10 of 2005 against the Commissioner of Lands, the Chief Land Registrar, the Land Registrar Kilifi District, the Land Registrar Mombasa, the Attorney General, Said Mohamed, named as the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants respectively. In summary the second plaint states that the plaintiff is the registered lessee from government of the suit property vide grant no. CR 23596/1 issued in its favour.

That unbeknown to the plaintiff and in pretext of the exercise of the powers conferred upon the Settlement Fund Trustees by the Agriculture Act, the Commissioner of Lands, the Chief Land Registrar, the Land Registrar Kilifi District, the Land Registrar Mombasa wrongfully and unlawfully excised a portion off the suit property and issued a title thereto, christened Kilifi/ Jimba 439 measuring 1.21 ha. to one Hatibu Abdalla Juma. The plaintiff averred that the exercise was void. The reasons given were similar to those averred in the first plaint outlined above with regard to HCCC 36 of 2004. In addition the Plaintiff avers that Kilifi/Jimba 439 is comprised of a public road incapable of alienation to any one.

That the title is void for reasons that the suit property is situate within the Kilifi Land Registration District established under section 5 of the Registered Lands Act. Hence the Land Registrar Mombasa had no jurisdiction to issue title to land outside the Mombasa Land Registration District. Further that the title could only be issued by the Land Registrar in charge of Kilifi Land Registration District subsequent to either adjudication or setting apart of a section of the land under the Physical Planning Act.

The Plaintiff avers that the Defendants actions amount to abetting the diminution of the title held by plaintiff and trespass particulars include the fact that the 1st to 4th Defendants (in HCCC no. 10 of 2005) their servants and/or agents trespassed into the land and created, planned and issued a title named Kilifi/ Jimba 439 measuring 1.21 Ha. Further that without regard to Plaintiff's title and interest in the suit property the Defendants jointly and severally conspired to have the Plaintiff's land allocate to Hatibu Abdalla Juma and Kassim Shariff (the 1st and 3rd Defendants in HCCC 36

of 2004). It is also asserted that the 6th Defendant (in HCCC no. 10 of 2005) actively and unlawfully influenced the 1st Defendant to have the title to the Plaintiff's land cancelled and that the Defendants unlawful actions to acquire the Plaintiff's land amounts to trespass.

The prayers sought in the second plaint are almost similar to those in the first plaint. There is no defence on record with regard to the second plaint. Subsequently, the Plaintiff successfully sought an order for consolidation of the two suits. The plaint was amended to indicate, *inter alia*, that special damages prayed for were for trespass by the Defendants on the Plaintiff's land, that the order of injunction as against the Defendants was to prohibit the Defendants from, *inter alia*, dealing with the suit property at all.

THE EVIDENCE

I have deliberately reproduced the unusually lengthy pleadings of the Plaintiff, because I do not consider it necessary to go into similar detail on the evidence tendered, which was basically in accordance with the pleadings. That is not to say that the court endorses this type of voluminous pleadings, which in many ways offends the provisions of Order 2 Rule 3 Civil Procedure Rules. Briefly, the Plaintiff's evidence through its four witnesses (PW1- PW4) is that they were the rightful proprietors of the suit property since 1992, holding an indefeasible title under the Registration of Titles Act (RTA, now repealed). The Plaintiff asserts that all the Defendants, acting in concert purported to unlawfully excise a portion of the suit property in 2002 and christened it Kilifi/Jimba 439; thereafter registering in the name of Hatibu Abdalla Juma who, acting together with Kassim Shariff subsequently purported to transfer the land to Manca Francesco. The latter Defendant commenced development activities on the parcel claiming it to be hi property. Due to his persistent acts of trespass the Plaintiff filed the suits.

On his part, Manca Francesco (DW2) asserted that he holds a *bona fide* title over land portion Kilifi/Jimba 439, having purchased the same in 1993 from Hatibu Abdalla Juma for the sum of kshs. 3.5M. He produced a copy of his title deed in support of the claim. He complained that he had been unable to fence off the land due to objections raised by the Plaintiff. Martim Wendo (DW1) gave evidence in his capacity as the District Land Surveyor, at the request of the State Law office. Reviewing all the documents tendered in respect of the titles 671Watamu and Kilifi/Jimba 439 , his view was that the two overlapped, disputing contrary assertions by a fellow professional surveyor called by the Plaintiff, Walter Okoth Ombok (PW3.)At the close of the trial the Plaintiffs and the 4th Defendant in HCCC 36 of 2004 (Settlement Fund Trustees) put in written submissions.

COMMON GROUND

There is no dispute that each of the main protagonists herein, namely the Plaintiff and Manca Francesco, hold what they assert to be genuine title documents to support their claim on the suit property. The Court must determine whether the Plaintiff has established its case on a balance of probabilities to be entitled to the prayers in the plaint.

DISPUTED ISSUES

In my considered view the first place to start is the question of the “mother” tenure of the two parcels prior to acquisition by the said protagonists and secondly, whether the Defendants excised a piece off the portion Watamu 671 in order to create Kilifi/Jimba 439 thereby facilitating trespass by Manco Francesco. Ultimately the court will have to determine, which of the proffered titles is sanctionable.

As these issues are interrelated, I will consider them simultaneously. Through oral and documentary evidence the Plaintiff has sought to demonstrate that it has in its physical possession a well delineated plot complete with beacons and registered as Watamu 671. This land parcel was registered in favour of the Plaintiffs in the year 1993. The Commissioner for Lands, one of the Defendants herein, has through PW2 conceded that the allotment letter in respect of the said

property was genuine (P.exhibit.5). He testified that a letter (P.exhibit2) upon which Manca Francesco places reliance to cast aspersions on the Plaintiff's documents of title is a forgery. He conceded further that the land parcel Watamu 671 was originally Government Land which could only be privately alienated through allotment. In this regard he pointed the court to the existence of a Part Development Plan (PDP) which is a prerequisite for such allocation. I note however that the said exhibited PDP does not seem to be an endorsement on the title document, raising some doubt.

With regard to parcel Kilifi/Jimba 439, the witness stated that the title originates from the adjudication of trust land and subsequent registration under the Registered Land Act (RLA, now repealed). The evidence of this witness is heavily supported by the evidence of the surveyor, PW3. The surveyor's report (P. Exhibit 16) contains a concise account of the creation of the two titles. PW3 struck me as knowledgeable and thorough. Drawing from maps (produced as P.Exhibit 17) this witness demonstrated that the parcel Watamu 671 was an amalgamation of 3 parcels of Nos. 151, 152 and 153 created vide plan no. FR 133/46 in 1974. He asserted that plot no. 671 has never been subdivided hence his insistence that plot Kilifi/Jimba 439 lies within the road reserve provided to serve Plot 671 and others. PW3 stated that the creation of Kilifi /Jimba adjudication scheme which resulted in part in the creation of Kilifi /Jimba 439 was an error because the scheme was imposed on alienated former government land.

Contrary to averments in the complaints, this witness though hired by the Plaintiff was professional enough to state that there was no overlapping or imposition between Plot 439 and 671. DW2 did not conduct any inquiry on the dispute beyond a general site visit. He was at pains to persuade the Court that the two plots actually overlapped because the road reserve was not accurately identified on the Plaintiff's maps. Of the two maps made in 1974 and 1979 respectively, he conceded that he could not tell which one was authentic. During cross-examination he was forced to admit that the beacons placed around plot 671 were fixed and could not be moved.

Having looked at the two maps; the earliest FR 133/ 46 of 1974 shows that plots 151-153 adjoined the road measuring 42.67 metres. The latest map dated 2011 being Jimba/ Registration Section, diagram 12 shows plots 438 and 439 introduced to the front of the road and adjoining the land parcels 671 (FR 133/46). The road reserve is reduced to 40 metres. The most significant point is that the new parcels Kilifi/Jimba 438 and 439 were created either out of a road reserve (per PW3) and/or encroachment on the already delineated parcel no. 671 Watamu.

Pw2 maintained the latter parcel had never been subdivided. This conclusion is based on the fact that physically the parcel which the Plaintiff claims is the same one from which Manca Francesco claims a portion measuring about 1.2 or 1.6 ha. I agree with PW3 that the creation of the Kilifi/Jimba Adjudication Scheme on top of already alienated government land contributed to the confounding situation. For their part Manca Francesco and the purported vendors Hatibu and Shariff are unable to give any or a good account of the origin of their impugned title. Notably however, the vendor's title was irregularly issued twice; in Mombasa registry rather than Kilifi on 2nd August, 2002 and again on the same date in the Kilifi Registry. The acreage of the parcel in the former is 1.21 ha and 1.6 ha in the latter. Eventually, Manca Francesca got a title from Kilifi in August 2003. The Vendors Hatibu and Kassim did not give evidence to explain how they came into ownership. Suffice to say that like Manca Francesco, it appears they have never been in possession of the plot. The Plaintiff company has been in possession through its directors.

Chronologically, plot 671 Watamu was in my considered view the earliest to be in existence and acquired by the Plaintiff under the RTA. RTA titles are indefeasible save for fraud, which must be proved against the holder. On the other hand the clearly dubious title proffered by Manca Francesco comes under the RLA. It came some ten years later.

The Court of Appeal has had occasion to consider the two regimes in juxtaposition in **National Bank of Kenya v Lawrence Otweyo Gumbo [2006]eKLR**. The Court stated:

“Unlike RTA, a certificate of title under RLA is merely prima facie evidence of the matters shown therein (see Section.32 (2)) Those entries are subject to the entries in the register and overriding interests set out under Section 30 of the Act. We do not know what the land register for the subject property contains nor do we know whether or not there exists overriding interests which would include occupational rights....”

Section 23 (1)of the RTA states:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The Court of Appeal in *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR* held that:

“This statutory presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved.”

I have previously alluded to the fact that Manca Francesco and his two vendors have not demonstrated the manner in which plot 439 came to be or answer the challenges raised concerning their various title documents. The Plaintiff's evidence in this regard therefore stands unchallenged. Their title, very possibly only existed in the imagination of its unknown authors be they officials in the Lands Office or otherwise. In my considered view, the title to plot no. Kilifi/Jimba 439 is no more than a piece of paper. I believe the source of the mischief was clearly identified by PW2 to be the erroneous creation of an adjudication scheme (Kilifi/Jimba) and issuance of RLA titles over alienated Government land by various government agencies, in collusion with complicitous members of the public. Some things are obvious. As an apple tree invariably produces apples, so too titles created from mother titles tenured under different regimes.

DETERMINATION

I hope I have said enough in the foregoing to demonstrate that the land upon which plot Kilifi/Jimba 439 was purportedly created was formerly Government land already alienated to the Plaintiff vide an RTA lease and therefore legally unavailable for adjudication; that the purported exercise was irregular and cannot withstand the sanction of Section 23 (1) RTA; that Manca Francesco in purporting to assert proprietorship over the said property not only wielded an inferior (and)dubious title but trespassed on the Plaintiff's land; and finally that this Court finds that with respect to the land parcel in question, only the Plaintiff's title is valid and indefeasible.

I do however concur with Mr. Ngari for the Settlement Fund Trustees that it has not been proved to have played any factual or legal role under its mandate under section 167 of the Agriculture Act, in connection with the excision complained of, the issuance of the offending title Kilifi/ Jimba 439 or trespass upon the Plaintiff's suit land. No evidence was led in that direction and the Court cannot act on an assumption. Especially as it seems that the purported titles in respect of Kilifi/ Jimba 439 are likely to be principally the work of mischievous employees of the Lands Office. The titles have not been justified or defended in the trial by those who rely on them. Secondly, the role of Said Mohamed in the impugned transaction did not come out clearly. In the circumstances, no case has been made out against these two Defendants.

In considering the prayers in the two complaints, I note that they are similar but in light of the multiplicity of Defendant parties, I will order prayers 1 to 8 allowed in respect of the Defendants

Hatibu Abdalla Juma, Manca Francesco and Kassimu Sharrif in HCCC 36 of 2004. In HCCC 10 of 2005 prayers 1-4 are allowed against the Commissioner of Lands, the Chief Land Registrar, the Land Registrar Kilifi District, the Land Registrar Mombasa and the Attorney General.

There was no basis laid for the award of general or special damages (latter not specifically pleaded or proved). None are awarded. Finally, the cases have been pending in court for a very long period and it appears that some of the Defendants fell off along the way and did not participate in the trial. I order in the interest of justice that each party bears its own costs.

Dated and signed this **18th** day of **February, 2014**.

C. W. MEOLI

JUDGE

Delivered and signed this **18th** day of **February, 2014** in the presence of Mr. Sumba for the Plaintiff, Mr. Obaga for the 1st Defendant

A. O. ANGOTE

JUDGE