



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO.51 OF 2012

DESHPAL OMPRAKASH.....PLAINTIFF/APPLICANT

=VERSUS=

HABIB ALI MOHAMED..... 1ST DEFENDANT/RESPONDENT

ABDALLA MWARINGA MAYE.....2ND DEFENDANT/RESPONDENT

IBRAHIM MUKHTAR ABASHEIKH.....3RD DEFENDANT/RESPONDENT

TAUHIDA TAHIR SHEIKH SAID.....4TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Plaintiff's Notice of Motion dated 14th September 2012 filed pursuant to the provisions of Order 40 Rules 1(a) and 2 of the Civil Procedure Rules and section 68 of the Land Registration Act.
 - a. That the 1st, 3rd, and 4th Defendants by themselves or through their servants or agents and/or through any one deriving title through them be jointly and severally restrained from constructing on or continuing with the construction of any buildings or any other structures on the parcels of land known as Kilifi/Jimba 441, Kilifi/Jimba 1382 and Kilifi/Jimba 1383 and on any of the subdivisions thereof pending the hearing and determination of this suit.
 - b. That the 1st, 3rd and 4th defendants by themselves or through their servants or agents or through any one deriving title through them jointly and severally be restrained from further alienating, selling, transferring, leasing and/or charging or in any other manner whatsoever from having any dealings with all those parcels of land known as Kilifi/Jimba/441, Kilifi/Jimba/1382 and Kilifi/Jimba 1383 and any of the subdivisions thereof pending the hearing and determination of this suit.
 - c. That the registration of any dealings of whatsoever nature with the parcels of land known as Kilifi/Jimba/441, Kilifi/Jimba/1382 and Kilifi/Jimba/1383 or any subdivision thereof be inhibited pending the hearing and determination of this suit.

d. That the costs of this Application be provided for.

The Plaintiff's/Applicant's case:

2. According to the Plaintiff's Affidavit, he is the proprietor of land known as Kilifi/Jimba /441 together with all the improvements as lessor from the Government of Kenya for a term of 99 years (the suit property).
3. It is the Plaintiff's deposition that on a date not known to him, the 1st, 3rd and 4th Defendants unlawfully entered upon the suit property without his authority and proceeded to erect a residential building thereon together with a borehole thereby depriving him of the use and enjoyment of the property.
4. The Plaintiff later on learnt that the 1st Defendant had subdivided the suit property into several portions, two of which are Kilifi/Jimba/1382 and Kilifi/Jimba/1383 and that the 1st Defendant sold and transferred the two portions to the 3rd and 4th Defendants.
5. It is the contention of the Plaintiff that the 1st Defendant's registration as the absolute proprietor of the suit property in the year 2006 was unlawful, fraudulent, null and void because at that point in time, he was the lawful registered proprietor of the leasehold interest in the suit property.

1st Defendant's/Respondent's case:

6. The 1st Defendant deponed that he had instructions to swear the Replying Affidavit in response to the Plaintiff's Application on his own behalf and on behalf of the 3rd and 4th Defendants.
7. It is the 1st Defendant's deposition that himself, the 3rd and 4th Defendants are the lawful and rightful registered owners of Kilifi/Jimba 441, Kilifi/Jimba 1382 and Kilifi/Jimba 1383 respectively; that when the 3rd and 4th Defendants bought Kilifi/Jimba 1382 and 1383, the property was registered in his name.
8. According to the 1st Defendant, he conducted an official search before he purchased the suit property whereafter he sub-divided it and sold off part of it to the 3rd and 4th Defendants who have developed their respective portions.
9. The 1st Defendant finally deponed that he purchased the suit property for value and consideration and did so without notice of any defect in title; that the Plaintiff has no right over the suit property and that all the titles were lawfully obtained.

The 2nd Defendant's/Respondent's case:

10. The 2nd Defendant deponed that he sold land known as Kilifi/Jimba/441 to the 1st Defendant; that as at the time of the said sale, he had a valid title and that he had already developed a residential house on the land in which he was staying.
11. According to the 2nd Defendant, he has been residing on the suit property for over 30 years and through the entire period, the Plaintiff never made any claim over the suit property.

The Supplementary Affidavit:

12. The Plaintiff deponed in the Supplementary Affidavit that the register annexed to the 2nd Defendant's Replying Affidavit was purportedly opened on 22nd December 1986 and under edition number " II"; that edition number "I" is the true register proving the existence of his leasehold and that his leasehold title was issued to him on 27th July, 1992.
13. According to the Plaintiff, annexure AMM2 suggests that the property was vested in the Settlement Fund Trustee on 18th November, 2001 and on the same day transferred to the 2nd Defendant, an Indication that the transactions are at best fictitious; that entries 1 and 2 in annexure AMM2 were purportedly signed by the same registrar on 22nd December 1986 and 18th November, 2001, which is almost 15 years apart and that the registrar who purportedly signed the register is a former registrar known as Mary Kai who was not a registrar in Kilifi in 1986.

14. It is the contention of the Plaintiff that if the property was vested in the Settlement Fund Trustees, then the suit property was agricultural land yet there is neither a Land Control Board consent nor any proof of their having been a change of user.
15. The Plaintiff finally stated that if the property belonged to the SFT, then the same should have been charged and that the inconsistencies in the register should have given the 1st Defendant notice of the illegality of the 2nd Defendant's title under the provisions of section 31 of the repealed Registered Land Act.
16. The Advocates filed their respective submissions and reiterated the averments of their clients' cases, which I have summarised above. The Plaintiff's counsel submitted that in view of the irregularities pointed out by the Plaintiff and in view of the insufficient explanation given by the Defendants, the order of inhibition ought to be granted so as to prevent any further registration.
17. On the question of who will suffer irreparable in the event the injunctive order is given, the Plaintiff's counsel submitted that that requirement was qualified by the Court of Appeal in the case of **Aikman Vs. Muchoki (1984) KLR 353** in which it was held that a wrong doer cannot keep what he has unlawfully taken just because he can pay for it. Counsel also relied on the cases of **Joseph Mbugua Gichana Vs Cooperative Bank of Kenya, Mombasa H.C.C.C No. 74 of 2000** and **Waithaka Vs Industrial & Commercial Development (2001) KLR 374** which I have considered.
18. On the other hand, the 1st and 2nd Defendants' counsel submitted that the Plaintiff should not have acquired the land before establishing if indeed it was vacant; that the Defendants made inquiries at the lands office and confirmed that the land was not registered in favour of the Plaintiff and that the 2nd Defendant had good title which he passed to the 1st Defendant.
19. Counsel relied on the case of **Vijay Morjaria Vs Nansing Madhusign, Nairobi Civil Appeal No. 106 of 2000** in which it was held that a fraudulent conduct must be distinctly alleged and proved.
20. It was the Defendants' submissions that the Plaintiff had failed to establish that he has failed to prove the required ingredients for an injunctive order to issue.

Analysis and findings:

21. The conditions that a party must establish before the court can grant him the equitable order of injunction are now settled. The conditions are: the probability of success of the Applicant's claim; the likelihood of irreparable harm which would not be compensated for by way of damages and if the court is in doubt about the two conditions, the court should decide the matter on the balance of convenience (See **Giella -Vs- Cassman Brown (1973) EA 358** and **Aikman -Vs- Muchuki (1984) KLR 353**).
22. The Plaintiff's case is based on the ground that he was issued with a Certificate of Lease on 27th July, 1992 by the Government. Other than a copy of the Certificate of Lease, the Plaintiff annexed on his supporting affidavit a letter of allotment dated 19th June 1992 for land known as Kilifi/Jimba/441. The Plaintiff has also annexed a copy of the receipt showing that he paid the requisite charges of kshs. 18,920 before the Certificate of Lease was issued in his favour.
23. The Plaintiff also annexed on the Supporting Affidavit the receipts showing the payment of the land rent and rates for the suit property. It is the Plaintiff's contention that on those grounds, his title is genuine unlike the title that was issued to the 2nd Defendant on 8th November 2001.
24. The Plaintiff has averred in his Complaint and Supporting Affidavit that land known as Kilifi/Jimba 441 is owned by the Government as the freehold proprietor and that he acquired the leasehold interest in the said land.
25. The law governing the leasing and other dispositions of Government land was the Government Lands Act, now repealed. Under that Act, it is only the President, or his nominee, the Commissioner of Lands, who was allowed to make Grants or disposition over unalienated Government land.
26. The issuance of Leases over Government land was governed by the Provisions of Part VIII of the Government Land Act. Such Leases were required to be signed then forwarded to the respective district registry for registration either under the Registration of Titles Act or the Registered Land Act (repealed).

27. Under the Registration of Titles Act, the Grant was itself a Lease and would be signed by the Commissioner of Lands on behalf of the Government before it could be forwarded to either the Registrar of Titles in charge of the coastal registry or the Registrar of Titles in charge of the Inland Registry for registration and issuance to the Lessee.
28. If the Government land fell under the Registered Land Act, the Commissioner of Lands would sign a Lease and forward it to the respective district registry for registration for the issuance of a Certificate of Lease.
29. It is trite law that before a Certificate of Lease could be prepared by the District Land Registrar, the registrar was required to be satisfied that indeed the Government, as the Lessor, had signed a Lease. It is only upon the signing of a Lease by the Commissioner of Lands, on behalf of the president, that a register could be opened and Certificate of Lease be issued.
30. In view of the fact that the Plaintiff in this matter was unable to get an official search from the District Land Registry to prove, *prima facie*, that he was at some particular point in time the registered proprietor of the suit property, it was incumbent upon him to show to this court the Lease that was signed by the Commissioner of Lands.
31. It is not enough, in the absence of an official search, for the Plaintiff to exhibit the letter of allotment and the Certificate of Lease considering that the Defendants are in possession of title deeds which were issued after Kilifi/Jimba/441 was sub divided.
32. I say so because the District Land Registrar could have prepared the Certificate of Lease in possession of the Plaintiff without the authority of the Commissioner of Lands, as the Lessor, as required by the Government Lands Act. The Plaintiff's interest in the suit property is the leasehold described in the Lease, which must be exhibited, and not the Certificate of Lease.
33. Where a party claims that he has a valid title, the burden of proving that he has a valid title document rests with him. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows;-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

34. Although the Plaintiff has impugned the title deed that was purportedly issued to the 2nd Defendant before the 2nd Defendant sold it to the 1st Defendant, the 2nd Defendant has annexed on his affidavit the extract of the register in respect to Kilifi/Jimba/441. The said extract shows that the register in respect to the suit property was opened on 22nd December 1986 as “Edition II”.
35. According to the register, the land was initially Government land before the same was transferred to the Settlement Fund Trustees on 18th November 2011. On the same day, the Settlement Fund Trustees transferred the land to the 2nd Defendant who then transferred it to the 1st Defendant. The title deed was closed on 2nd June, 2011 upon sub-division. The sub-division of Kilifi/Jimba/441 gave rise to Kilifi/Jimba/1376-1383.
36. Although the Plaintiff stated that the register was purportedly signed by the same registrar in 1986 and 2001, it is not for this court, at this stage, to conclude that that could not have happened. The issue as to whether those entries are fraudulent can only be determined at the hearing of the suit, suffice to state that the extract emanated from the Lands office.
37. It is also not for this court at this stage to inquire into the reasons as to why the property was not charged to SFT and why the transfer of the property was transferred to the 2nd Defendant on the same day it was registered in favour of SFT. That, again, can only be dealt with after trial.
38. The 1st Defendant also annexed on his Replying Affidavit a copy of the official search showing that Kilifi/Jimba/1382 and 1383 were registered in the names of the 3rd and 4th Defendants respectively on 2nd May 2012.
39. In view of the documents annexed on the Defendants’ Replying Affidavits showing their interests in the suit property and considering my observations that the Plaintiff did not annex, in the absence of an official search, a Lease document on his affidavit, I find and hold that the Plaintiff

- has not established a prima facie case with chances of success.
40. The Plaintiff did acknowledge in his Supporting Affidavit that the Defendants have erected a residential building on the suit property together with a borehole. According to the 1st Defendant, him, together with the 3rd and 4th Defendants have developed their respective portions of land having purchased them.
41. On the other hand, the Plaintiff never took possession since the same was purportedly allocated to him. The Plaintiff will therefore not suffer any irreparable damage that cannot be compensated by way of damages in the event the injunctive or inhibition is not issued. The balance of convenience also tilts in favour of the Defendants considering it is the 1st, 3rd and 4th Defendants who are in possession of the suit property.
42. In the circumstances and for the reasons I have given above, I dismiss the Plaintiff's Application dated 14th September, 2012 with costs.

Dated and delivered in Malindi this **20th** day of **June**, 2014

O. A. Angote

Judge