



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 31 of 2011

LA MARINA LIMITED.....PLAINTIFF

=VERSUS=

RIZIKI CHARO KAMBITI

GIDEON MAINA MURIUKI

SHADRACK NDUNDI.....DEFENDANTS

RULING

1. What is before me is an application for injunction under Order 40 Rules 1, 2 and 3 of the Civil Procedures Rules, 2010. The injunction sought in the application is to restrain the Defendants by themselves, servants and/or agents from further construction of a permanent wall, carrying on developments of whatsoever kind, transferring and or disposing plot number CHEMBE/KIBABAMSHE/398 and/or CHEMBE/KIBABAMSHE 641 pending the hearing and determination of this suit.

2. The application is based on twelve grounds, the main ones being that:

- (i) The plaintiff owns Plot Title Number **CHEMBE KIBABAMSHE/641**.
- (ii) The Defendants allege to own Plot Title Number **CHEMBE/KIBABAMSHE/398**.
- (iii) On the ground, Plot Titles Numbers **CHEMBE/ KIBABAMSHE/398** and **641** are one and the same.
- (iv) Plot Title Number **CHEMBE/KIBABAMSHE/398** was subdivided and four plots namely **CHEMBE/KIBABAMSHE/639, 640** and **641** were created and thereafter the title **CHEMBE/KIBABAMSHE/398** closed.
- (v) In the main suit, the Plaintiff prays that the court do determine which title deed(s) is valid between those held by the Plaintiff and that held by the defendants or one of them.

3. The application is supported by the affidavit of Philip Munge Ndolo, a director of La Marina Limited, the Plaintiff herein.

4. The essential elements of the depositions by the applicant are that sometimes in 1998, the

applicant was approached by some residents of Chembe Kibabamshe Settlement Scheme who informed them that they had property to sell. The applicant, through its directors, negotiated with each one of them and paid them off.

5. The applicant's director further depones that they acquired plot number Chembe/Kibabamshe 641 and a title deed, which has been annexed on the supporting affidavit, was issued in the name of the Plaintiff. Prior to the acquisition of the title deed in 2001, the applicant's director avers that there was Title Number Chembe/Kibabamshe/398 which was registered in the name of the Government of Kenya. Between 1998 and 2001, Chembe/Kibabamshe/398 was sub-divided into several portions namely Chembe/Kibabamshe/724, 639, 640 and 641.

6. The applicant's director further deponed that plot number Chembe/Kibabamshe/398 which is being claimed by the Defendants does not exist because the same was closed after the registration of the sub-divisions which created plot number Chembe/Kibabamshe 641 amongst others; that the title over Chembe/Kibabamshe/398 which was purportedly issued to the 3rd defendant and the leases that were issued to the 1st and 2nd Defendants were all issued by the same Government.

7. Consequently the applicant is apprehensive that further transactions over plot number Chembe/Kibabamshe/398 which on the ground is the same as Chembe/Kibabamshe 641 are likely to take place before the hearing and determination of this suit. For this reason, the deponent urges the court to maintain the status quo as per the prayers in the application.

8. In response to the application, the 1st Respondent on his own behalf and on behalf of the 2nd Respondent swore a Replying Affidavit which was filed in court on 2nd June 2011.

9. The 1st Respondent's deposition was that the letter of offer annexed on the applicant's supporting affidavit was not a genuine document as no payments of the Settlement Fund Trustees' loan was ever paid in respect of the said plots including plot number Chembe/Kibabamshe/641. Consequently, the allottees could not obtain Title Deeds for the plots shown in the annexed letter of offer and further that plot number 641 did not exist.

10. The 1st Respondent denies that plot number Chembe/Kibabamshe/398 was ever sub-divided as alleged by the applicant because the Registry Map Sheet No. 29 obtained from the Surveyor's office shows that plot number 398 has never been sub-divided; that if indeed the said sub division ever took place, then the mutation forms should have been signed by the District Land Registrar and registered accordingly and the same sent to the Director of Survey to amend the Registered Index Map sheet as required by the law.

11. To fortify the above argument, the 1st Respondent has annexed the affidavit of Mary Ndale Kai who was the Kilifi District Land Registrar in 2001 when the alleged sub-division of plot number 398 was done to create plot number 641 amongst others.

12. In her affidavit, the said Mary Ndale Kai denies ever signing the Title Deed for plot number 641 and that the signature on the said title is a forgery. She denies having ever signed the mutation forms which created plot number 641. Annexed on the Replying Affidavit is the Document Examiner's Report dated 9th May, 2011, which, according to the 1st Respondent, clearly states that the said Mary Ndale Kai did not sign the Title Deed for Chembe/Kibabamshe 641, amongst others.

13. The 1st Respondent finally depones that plot number 398 was originally Government land until the year 2011 when the same was allocated to him and a Certificate of Lease issued in his name. The 1st Respondent then sub-leased the said plot to the 2nd Defendant.

14. Faced with these serious allegations, the applicant sought the leave of the court to file a supplementary Affidavit, which leave was granted. The applicant filed its Supplementary Affidavit on 7th

November 2011 which was sworn by Vittorio Veneziani, the applicant's director. The deponent annexed on his supplementary Affidavit certified copies of the letter of offer for plot number 641, outright purchase assessment by the Chief Accountant, Settlement Fund Trustees Loan Clearance Certificate dated 2/3/2003 and an official receipt of Kshs. 15,248 to rebut the Respondent's allegations that the documents which were initially annexed on the Supporting Affidavit were a forgery.

15. To counter the allegations by Mary Kai that she never signed the Title Deed in respect of Plot Number 641, the applicant annexed the affidavit of Rael Muthoni Ndwiga and Rachael Gombe Nicholus who were Mary Kai's secretaries. The said two ladies according to their respective affidavits confirm that indeed it was Mary Kai who signed the Title Deeds for plot numbers 641, 651 and 652. The applicant did not respond to the issue of whether mutation forms were ever signed by the District Land Registrar and registered upon sub-division of plot number 398.

16. On 23rd December 2012, the parties agreed to dispose the application by way of written submissions. The court directed that each of the party do file their written submissions within 14 days. The applicant filed its submissions on 16th March 2012 and by the time this matter was being mentioned on 3rd December 2012, the Respondents had not filed their written submissions.

17. I have considered the Application which is before me, the Supporting Affidavit and the Supplementary Affidavit, the Replying Affidavit and the Applicant's written submissions. My task is to determine if the applicant has established a prima facie case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the main suit.

18. I will also determine whether, even if such a case exists, the applicant has shown that it will suffer loss that is incapable of compensation by an award of damages and if in doubt about the two, I will decide the application on a balance of convenience. These are the well-known principles in the **Giella-VS-Cassman Brown case (1973) E.A 358**.

19. A prima facie case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya & 20 others (2003) KLR 123** as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

20. I am alive to the fact that what is before me is an interlocutory application. Accordingly I am not required to determine the very issues which will be canvassed at the trial with finality. All I am entitled to inquire into at this stage is whether the applicant is entitled to a temporary injunction.

21. The applicant has annexed on its Supporting Affidavit and the Supplementary Affidavit a copy of the Title Deed for plot number 641 and certified copies of the letter of offer dated 30th June 1999 for plot number 641, the assessment of the purchase price for plot number 641 by the Director, Land Adjudication and Settlement, a certificate for outright purchase of plot number 641 and the official receipts showing payments of Kshs.15, 248 by the purported original allottee for plot number 641.

22. It may be true, as deponed by the 1st Respondent that the purported sub-division of plot number 398 as alleged by the applicant never happened and consequently the existence of plot number 641 which is said to have been curved from plot number 398 does not arise. Indeed, it will be upon the applicant at the trial of the suit to show how the sub-division of plot number 398 was commenced and whether all the prerequisite steps were followed in the creation of plot number 641. It will be upon the applicant to call the maker of the Title Deed for plot number 641 with a view of rebutting the 1st Respondent's evidence that the Registered Index Map has never been amended to show that plot number 398 was subdivided to create plot number 641 and that the Mutation forms were not signed and registered upon the subdivision of plot number 398. This evidence can only be produced at the trial and subjected to

cross examination.

23. Based on the material placed before this court it is not possible to ascertain the genuineness of plot number 641 or otherwise or if indeed plot number 398 was ever sub-divided to create plot numbers 641, 652 and 653 as alleged. That will be for the trial court to determine.

24. It is not disputed by the applicant and the respondents that they have had a long standing dispute in relation to the suit property. Indeed, the Plaintiff has annexed on the Supporting Affidavit pleadings to show the various suits that have been filed by the parties in respect to the same property.

25. From the applicant's annexures, it appears that a dispute was filed in 2005 at the Malindi Land Dispute Tribunal by Shadrack Ndundi, who is the 3rd defendant herein against Philip Ndolo, the original allottee of plot number 641 and La-Marina, the Plaintiff herein over parcel number 398. It also appears from the annexures that the said dispute was stayed by the High Court vide Miscellaneous Civil Application No. 34 of 2005. Another Miscellaneous Civil Application Number 770 of 2004 was filed and was given a new serial number as HCCC NO. 72 of 2006 over the suit property. This court is not aware of the position of all those suits. All I can say for now is that it is imperative that all the pending cases pertaining to the suit property be brought to the attention of the trial court for final determination of the issues therein.

26. I have always understood that once the applicable principles have been established, the whole purpose of an injunction is to preserve status quo of a suit property until the questions to be investigated can finally be disposed of.

27. All I can say for now is that having carefully perused the pleadings, and the annexures to the affidavits, I find that there are grey areas that require evidence before they can be determined. It is for instance not clear to me how two titles, or even more, could be issued in respect of the same piece of land. One of the titles is obviously a forgery, a fact which can only be determined after trial.

28. From the conflicting account of the parties, and considering that the applicant holds a Title Deed for plot number 641 which is an end product of a process, I hold that the applicant has established a prima facie case as defined in the *Mrao* case. Indeed, unless an injunction is granted as prayed by the applicant, then the continued construction of the suit property or the transfer of the suit property to a third party by the Respondents will compound the issue of proprietorship and increase the cost of litigation. The applicant is likely to suffer irreparable damage if that were to happen and its claim succeed.

29. In the circumstances, and for the reasons I have given above, I allow the application dated 13th April, 2011 in terms of prayer number C. The costs of the application shall be in the cause.

Dated and delivered at Malindi this 7th day of February, 2013.

O. A. Angote

Judge