



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
HCCC NO. 72 OF 2008

SHEIKH ALI TAIBPLAINTIFF

VERSUS

**THE HEADMASTER, MTWAPA PRIMARY SCHOOL &
KILIFI COUNTY COUNCILDEFENDANTS**

JUDGMENT

1. By his amended plaint filed on 3rd August, 2010 the Plaintiff Ali Taib seeks one main order, namely:
 - a) *An injunction to permanently restrain the first and second Defendants by themselves and or their servants and or agents and or employees and in particular the headmaster, teachers, staff and students of Mtwapa Primary School and or howsoever from either entering upon; occupying, constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of the said suit land known as sub-division number 1921 (original number 1919 Section III Mainland) as delineated on Land Survey Plan Number 162469, Certificate of Title No. C. R. 22921 measuring O. 5471 hectares or thereabouts.*
2. The Defendants are the headmaster, Mtwapa Primary School and The County Council of Kilifi respectively. In the Plaint the plaintiff avers that he is the registered legal and beneficial owner of Plot No. 1921, delineated on Survey Plan No. 162469 and by virtue of a grant No. Cr 22921. The land parcel (hereinafter the suit property) measures O.5471ha. He complains that in March 2008 the Defendants trespassed onto and continue in wrongful occupation of the suit property.
3. The 2nd Defendant in a defence filed on 31st August 2010 disputes the Plaintiff's title to and the alleged trespass upon the suit property. The 1st Defendant also denied the Plaintiff's claims asserting that the school has occupied the suit premises which is public land, since 1985 and that the Plaintiff's land

parcel was obtained through fraud.

4. During the hearing the Plaintiff was represented by Mr. Lijoodi, while the 1st and 2nd Defendants were represented by miss Lutta and Mr. Kinyanjui, respectively. The Plaintiff adduced evidence through his attorney Rahim Baksh Ashraf (PW1) and two surveyors Maurice Otieno (PW2) and Batholomew Chakuri (PW3). One witness, Mohamed Stamburi testified on behalf of the 2nd Defendant.

5. It is common ground that the suit property was in July, 1992 registered in the name of Shariff Mundhar Hussein Twahir, under the Registration of Titles Act, and thereafter transferred to one other proprietor before the eventual transfer to the Plaintiff in 1998. During all this period, the suit property was used by the students of Mtwapa Primary School, a public school with over 1600 students. The school was established in 1985. By the time the Plaintiff came to court the said school had fenced off its land, including the parcel now claimed by the Plaintiff. I think in light of the nature of this dispute, it is important to cite entry no. 3 at the reverse of the certificate of Title. The entry is a caveat registered on 17th November 1993 under Section 65(10) (f) of the Registration of Titles Act (RTA).

6. This caveat remained in force until the 7th August, 1998, the same date when the property was transferred to the current registered owner. The Plaintiff and the 1st Defendant each claims the right of ownership to the suit property. On the basis of title documents in his name, the Plaintiff seeks an injunction to restrain the Defendants. For their part the 1st Defendant asserts that the property is public property which has always been in the possession of the 1st Defendant and that the registration to an individual was fraudulent. The court must determine whether the Plaintiff has proved his case on a balance of probabilities.

7. While the Plaintiff is the registered owner of the suit property since 1998, PW1 admitted that they have never been in possession thereof, that indeed the same was used as a play field by the students of Mtwapa Primary School. This seems to support the evidence of DW1 that this was public land alienated by the first owner in 1992, in apparently unclear circumstances. PW1 admitted that no survey or search was done prior to the acquisition of the parcel by the plaintiff, and, that the plaintiff had notice of the possession and occupation by the 1st Defendant.

8. I think that the plaintiff was obligated to explain to the court how the caveat of 1993 was lifted in 1998. This is because the caveat itself was under Section 65 (1) (f) of the RTA. The Section states:

“The Registrar may enter a caveat on behalf of the Government to prohibit the transfer or dealing with any land belonging to or supposed to belong to the Government and also to prohibit the dealing with any land in any case in which it appears to him that an error has been made by misdescription of the land, or otherwise in any certificate of title or other instrument, or for the prevention of any fraud or improper dealing or for any other sufficient cause;

9. This entry on the title appears to support the testimony of DW1 that the 1st Defendant resisted attempts around 1992 by Mundhar to take over the land. It also appears to confirm that this was suspected to be government public land at the time hence the caveat under section 65(1) (f) RTA. It is not clear how the caveat was lifted, and why the Plaintiff could have failed to conduct proper due diligence by way of search and survey when he was aware of the 1st Defendant's possession of the land.

10. I do not find it believable that the Plaintiff purchased property without conducting a proper search, or that his advocates could have failed to know about the caveat placed on the land. Allegations of fraud have been leveled against the registration but the Plaintiff opted not to testify save through a proxy who did not appear very well versed with the matters at hand. In the circumstances of this case, including the admissions both oral and documentary made by the plaintiff I must conclude that the Plaintiff must have been aware at least of the irregularity surrounding the land parcel.

11. Besides, this parcel hosts an important public utility, namely a school which also caters for handicapped children. The private interest of the plaintiff must be weighed against the public interest and trust. I have had occasion to consider this issue recently in **Malindi Misc. Application No. (JR 8 OF**

2011 Capoterra for Africa v Registrar of Titles MSA and would adopt the same approach in this case, and find that the plaintiff's case cannot succeed as the court cannot be a vehicle for enforcing fraud or irregularities that are clearly against public policy.

12. The plaintiff is not without recourse. He can take steps to recoup the purchase price. However, greater public harm would arise if an adverse order was to be made against the 1st Defendant.

With regard to the 2nd Defendant it was admitted by the Plaintiff that the only reason they were joined in the suit was that the school is in their jurisdiction. No fault or wrong doing has been proved against them. For all the foregoing reasons, I find that the Plaintiff's case has no merit and will dismiss it with costs to both Defendants.

Delivered and signed at Malindi this **18th** day of **March, 2013** in the presence of Mr. Shujaa holding brief for Mr. Taib for Plaintiff.

Miss Lutta for 1st Defendant, Mr. Kinyanjui absent.

C. W. Meoli
JUDGE

MR. SHUJAA – I seek temporary stay of thirty days. Copies of proceedings and judgment to enable filing of appeal.

C. W. Meoli
JUDGE

MISS LUTTA – 1st Defendant is in possession no suffering by the Plaintiff. Seven days will do.

C. W. Meoli
JUDGE

COURT – let a formal application for stay be made.

C. W. Meoli
JUDGE

FURTHER ORDER

Copy of judgment and proceedings be supplied to the Plaintiff.

C. W. Meoli
JUDGE