



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 102 of 2009

CHENGO KATANA KOI.....PLAINTIFF

VERSUS

PROTUS EVANS MASINDE.....DEFENDANT

RULING

1. The Plaintiff filed this suit vide a Plaint dated 12<sup>th</sup> May 2009. In the Plaint, the Plaintiff alleges that the Defendant was fraudulently registered as the absolute owner of plot number KILIFI/MADETENI/396. The Defendant filed a Defence and Counter-Claim on 11<sup>th</sup> January, 2010. In the Counter-Claim, the Defendant avers that he was legally issued with a title deed in respect of the suit property and is therefore the absolute owner with an indefeasible title thereof.

2. On 19<sup>th</sup> March 2010, the Defendant filed an application pursuant to the provisions of section 3A and 63(e) of the Civil Procedure Act and Order VI Rule 13(1), (b) and XXXIX Rule 1 (a) of the repealed Civil Procedure Rules. The said application is the one before the court.

3. The Defendant's application filed on 19<sup>th</sup> March, 2010 seeks for the following orders:

**(a) That this Honourable court be pleased to issue an order to restrain the Plaintiff/Respondent from cultivating, erecting any structures, continuing to trespass on, transacting and/or dealing and in any manner interfering with the quiet possession of the Defendant's land known as plot no. KILIFI/MADETENI/396 pending the hearing and determination of this application.**

**(b) That the Plaintiff's/Respondent's suit and Defence to Counter-Claim herein be dismissed as it is scandalous, frivolous or vexatious and judgment to be entered as prayed in the Counter-Claim.**

**(c) That the OCS Kilifi Police Station do assist in enforcing orders prayed herein above and**

**(d) That the costs of this application be provided for.**

4. The application is premised on the grounds that the Plaintiff is illegally occupying the Applicant's land without any lawful cause; that the Applicant's land may be wrongfully alienated by the Plaintiff if he is not restrained from dealing with the suit land which he has already trespassed; that the Applicant is the lawful owner of the suit land with indefeasible title and finally that the Applicant has a strong and

arguable case in his Counter-Claim.

5. The application is supported by the affidavit of the Defendant which was sworn on 18<sup>th</sup> March 2010. The Defendant's/Applicant's main depositions are that he validly acquired the suit property under the Land Adjudication Rule after successfully applying for the same to the Government of Kenya.
6. The Defendant/Applicant further avers that he was shown the physical boundaries of the suit property by the District Land Adjudication Officer and he subsequently paid the requisite fees for purposes of being issued with a title deed.
7. The Defendant/Applicant depones that as at the time he was allocated the suit property, there was nobody on site and the property was vacant; that the Plaintiff's suit has no basis and is merely meant to mudsling his repute and character. The Defendant/Applicant also denies that he has ever worked in the Ministry of Lands as alleged by the Plaintiff and that as at the time the Plaintiff was filed, he was working as a medical representative of Surgipharm Limited in Nairobi.
8. The Defendant/Applicant finally depones that the Plaintiff has trespassed on the suit property and he cannot develop the same and that unless this court restrains the Plaintiff, the Plaintiff is likely to commit further acts of waste thereon to his detriment.
9. In response, the Plaintiff/Respondent filed his Replying Affidavit on 8<sup>th</sup> April, 2010 and deponed that he was born and grew up on the suit property on which his grandfather and father were buried; that in 1983 his late father Mr. Katana Koi Mugumba applied to be granted the ownership of the suit property and was advised to pay Kshs. 375 to the department of lands which he did.
10. Upon the demise of his father, the Plaintiff/Respondent depones that he visited the Kilifi Lands office on several occasions with a view of being issued with a title deed for the suit property but he was informed that a final report was being awaited from the land adjudication office before a title deed could be issued. The Plaintiff/Respondent was later advised by the officer at the Kilifi Lands Office to obtain Letters of Administration so that the title could be issued in his name which he did in 2007.
11. The Plaintiff/Respondent further states that when he went back to the District Lands Office, Kilifi in 2009, he discovered that the suit property had been registered in the name of the Defendant/Applicant and that the Defendant/Applicant had been issued with a title deed on 29<sup>th</sup> June, 2005.
12. The Plaintiff/Respondent finally depones that the Defendant/Applicant should not have been issued with the title deed because he is neither a clan member of the deceased Katana Koi Mumba, the original owner of the suit property nor a resident of the area; that he was born and grew up on the suit land and that there are several graves of his family members on the suit property.
13. Finally, the Plaintiff/Respondent deponed that the letter of offer and the title deed was issued to the Defendant/Applicant fraudulently and that his father and grandfather had houses on the suit property; that the suit property being trust land, the same can only be allocated pursuant to the provisions of sections 115 and 116 of the repealed constitution and the Trust Land Act which was not the case in this matter.
14. Pursuant to the leave of the court, the Plaintiff/Respondent filed a Further Affidavit on 25<sup>th</sup> May, 2010 where he annexed a receipt dated 30<sup>th</sup> May 1983 for Kshs 200/- in respect to the suit property and a clearance certificate dated 30<sup>th</sup> May, 1983.
15. When the application came up for hearing on 6<sup>th</sup> December, 2012, the Plaintiff/Respondent was not in court neither was his counsel notwithstanding the fact that his advocate had been served with the hearing notice. The Defendant/Applicant was represented by Ms. Nyathira.
16. In her submissions, Ms. Nyathira, counsel for the Defendant/Applicant informed the court that though the Plaintiff/Respondent had annexed Letters of Administration showing that he is the legal

administrator of the estate of his late father, he had not annexed the Letters of Administration showing that his late father inherited the suit property from his late grandfather. According to counsel, a chronology of how the Plaintiff's/Respondent's father obtained the suit property from his grandfather should be supported by the letters of administration.

17. Finally, counsel submitted that the Plaintiff has no cause of action as against the Defendant; that his evidence is far-fetched and that the Defendant's counterclaim has high chances of success.

18. My task in this application is to determine on the material placed before me, whether 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 this suit. I am also supposed to determine, even if such a case exists, if the Applicant has proved that he will suffer loss that is incapable of compensation by an award of damages. If in doubt about the two principles, I will decide the application on a balance of convenience. These are the well settled principles to warrant the grant of injunctive orders.

19. The Defendant/Applicant has annexed on his Supporting Affidavit sworn on 18<sup>th</sup> March 2010 a letter of offer from the Ministry of Lands and Settlement dated 9<sup>th</sup> December, 2002 informing him that his application for a settlement plot has been successful. According to the letter, the Government, through the Settlement Fund Trustee offered the Defendant plot Number 396 of approximately 3.20 hectares at MADETENI SETTLEMENT SCHEME IN KILIFI DISTRICT. The Defendant was required to report to the District land Adjudication and Settlement Officer so that he could be shown the plot boundaries. The offer was to remain valid for 90 days within which period the Defendant was supposed to have paid 10% deposit for the plot. The Defendant has also annexed an official receipt dated 21<sup>st</sup> October, 2004 which shows the payment of Kshs. 8,110 being the outright purchase for plot number 396.

18. After accepting the offer that was made in the above quoted letter, the Defendant, according to the official search, was issued with a title deed on 29<sup>th</sup> June, 2005 for Kilifi/Madeteni/396.

19. The Plaintiff/Respondent on the other hand, has annexed on his Replying Affidavit an official receipt which shows that Katana Koi Mungumba, the Respondent's father paid Kshs. 375/- on 10<sup>th</sup> October, 1983 for the mutation and survey fees for Kilifi/Madeteni 396. He died before the title deed could be issued in his name.

20. There has been confusion in this country as to how settlement schemes, which are supposed to settle the landless people in this country, are created. It is because of this confusion that the framers of the Land Act, No. 6 of 2012 came up with the provisions stipulating how the settlement schemes are supposed to be created by the National Land Commission and how and who is entitled to the land in these schemes.

21. According to section 134(2) of the Land Act, No. 6 of 2012 Settlement programmes shall include the provisions of access to land to squatters, persons displaced by natural causes, development projects, conversation, internal conflicts or such other causes that may lead to movement and displacements. Section 134(4) stipulates who identifies the beneficiaries of the people to access land in the settlement schemes while section 134(c) states that the National Land Commission shall reserve public land for the establishment of settlement programmes and where the public land is not available purchase private land subject to the Public Procurement and Disposal Act.

22. Prior to the enactment of the Land Act, No. 12 of 2012, there was no law codifying the creation of settlement schemes though many schemes were established in the country. The Agriculture Act, at section 167 provides for the establishment of a body corporate known as a Settlement Fund Trustees while Section 168 established the Agricultural Settlement Fund which is vested in the Settlement Fund Trustees. The Settlement Fund Trustees, using the fund, may purchase any land for resale. It would therefore be true to state that settlement schemes could be created either by purchase of private land or by utilizing public land (unalienated Government land).

23. Trust Land, in my view, is not "public land" because it is vested in the local communities of the

areas in which they are situated. Under both the current and the repealed Constitutions, Trust Land is neither owned by the Government nor by the County Councils . The County Councils simply holds the title in such lands on behalf of the local inhabitants of the area. For as long as Trust Land remains un adjudicated and unregistered, it belongs to the local people, groups, families and individuals in the area in accordance with the applicable African Customary Law.

**24.** The only way in which Trust Land can be legally removed from the communal ownership of the people is through adjudication and registration or setting apart. Adjudication and registration removes the particular lands from the purview of the community ownership and places them under individual ownership. Setting apart removes the trust lands from the dominion of community ownership and places them under the dominion of public ownership.

**25.** The Defendant/Applicant does not state under what circumstances he applied to be allocated plot no. 396 which, according to him is within the MADETENI SETTLEMENT SCHEME in Kilifi.

**26.** It is not clear to the court whether this settlement scheme and in particular the suit property was created by the purchase of the land by the Settlement Fund Trustees or the same was set apart so as to bring it into the purview of public land. It is also not clear from the Defendant's/Applicant's pleadings whether the local inhabitants, including the Plaintiff, who has deponed that his father and grandfather were the inhabitants of the suit property, were consulted when the same was adjudicated and allocated pursuant to the provisions of sections 115 and 116 of the repealed constitution. A title deed is an end product and where there are competing interests over the same land, it is not enough for one to just state that he holds a title deed which is absolute and indefeasible. One has to show the processes that were followed in the acquisition of the title deed so as to entitle him/her to the land to the exclusion of the other claimants.

**27.** In the absence of the evidence on how the Madeteni Settlement scheme was created, and whether the inhabitants of that area were consulted pursuant to the provisions of the Constitution, the Trust Land Act and the Land Adjudication Act, I hold and find that the Defendant/Applicant has not established a prima facie case with chances of success to enable this court to grant him injunctive orders. Further, the Defendant/Applicant will not suffer any irreparable damage which is incapable of compensation considering that he has never taken possession of the suit property since the same was registered in his name in 2005.

**28.** In the circumstances, and for the reason I have given above, I dismiss the Defendant's/Applicant's application dated 18<sup>th</sup> March, 2010 with costs.

Dated and delivered in Malindi this **8<sup>th</sup>** day of **March**, 2013.

**O. A. Angote**

**Judge**