



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 45 of 2012

SAMUEL KANOGO RITHO.....PLAINTIFF

=VERSUS=

- 1. DHANJI NARAN**
- 2. SUN & FUN LTD**
- 3. KARISA DHURI KOMBE**
- 4. JOHNATHAN NGUMBAO KATA**
- 5. PERMANENT SECRETARY MINISTRY OF LANDS & SETTLEMENT**
- 6. MUKIRA KIRIINYA**
- 7. G.NDICHU**
- 8. HON. ORWA OJODEH**
- 9. LAND REGISTRAR, KILIFI**
- 10. D. N. KAMBI**
- 11. MARY A. KAI**
- 12. S.BAMUSA**
- 13. A. M. MGENYI**
- 14. HON. AMOS KIMUNYA**
- 15. ZEITI INVESTMENT LIMIGTED**
- 16. M.K. MUNGIIRA**
- 17. C. O. OGUTO**
- 18. ANTONIO PEZZINO**
- 19. VANO MORETTI.....DEFENDANTS**

RULING

1. What is before me is the Plaintiff's application dated 7th December 2011 seeking for the following reliefs:
 - a) **THAT there be a stay of execution of the orders in Malindi Chief Magistrate's Court Civil Case No. 174 of 2010 while pending hearing and determination of this case.**
 - b) **THAT the said Malindi Chief Magistrate Civil Case NO. 174 of 2010 be transferred to this Honourable Court for hearing.**
 - c) **THAT the costs of this application be provided for.**
2. The application is premised on nine grounds which are a replication of the depositions of Geoffrey Avugwi Ritho, the plaintiff's attorney.
3. The Plaintiff's attorney has deponed that the Applicant is the registered owner of a parcel of land known as Kilifi/Chembe/Kibabamshe/414 and that he was issued with a title deed on 24th December 1978 after the adjudication process.
4. On 22nd December 1986, and on the strength of the Commissioner of Lands Circular dated 28th May 1986, the Applicant's attorney has deponed that the land registrar, Kilifi, purported to cancel the Applicant's title as the proprietor of Kilifi/Chembe/Kibabamshe/414 (the suit property) and in his place registered the Government of Kenya as the proprietor.
5. It is after the cancellation of the title of the suit property that the Applicant filed an application for Judicial Review vide High court Miscellaneous Application Number 185 of 1987 in which he challenged the Commissioner of Land's decision to cancel the title in respect to the suit property.
6. The Applicant has further deponed that Justice Shields allowed the Judicial Review Application and quashed the cancellation of the Applicant's title and that there has never been any appeal against the said order.
7. The Applicant has deponed that in the meantime, the 2nd Defendant conspired with the Ministry of Lands officials and had the suit property sub-divided to create two portions being Chembe/Kibabamshe 708 and 709 whereof the 2nd Defendant was allocated parcel of land Chembe/Kibabamshe 709.
8. The Applicant has further stated that even after suing the present 2nd Defendant for a declaration that the sub-division of plot number 414 to create plot number 708 and 709 was illegal, null and void, the 2nd Defendant filed a suit at Malindi Chief Magistrate's Court Civil Case No. 174 of 2010 against the Applicant's tenant, Kenya Friends of Malindi Limited.
9. According to the Applicant, the filing of the suit in the Chief Magistrate's Court by the 2nd Defendant herein is an abuse of the process of the court because the issues that have been raised in the Chief Magistrate's Court are the same issues which have been raised in this matter; that it is malicious and in extreme bad faith for the 2nd Defendant to file a suit against the Applicant's tenant and without joining the Applicant; that the 2nd Defendant had leased parcel of land number 414 from the Applicant and it knew the Applicant's proprietary interests and rights in the property.
10. The Applicant has finally deponed that he is apprehensive that the 2nd Defendant may use the injunctive orders issued in the Malindi Chief Magistrate's Court to evict the Applicant's tenant and illegally take possession and demolish the restaurant on the suit property; that temporary orders staying the orders made on 23rd June 2010 should be issued by this court and that the lower court matter be

stayed altogether.

11. The 1st Defendant filed his Replying Affidavit on 31st October 2012. The 1st Defendant deponed that he was swearing the affidavit on his own behalf and on behalf of the 2nd Defendant.

12. According to the 1st Defendant, the procedure adopted by the Plaintiff/Applicant to stay the proceedings in CMCC NO.174 OF 2010 is unlawful and otherwise an abuse of the court process.

13. The 1st Defendant deponed that he is the registered proprietor of plot number Chembe/Kibabamshe/709; that the developments on the plot were undertaken by the 2nd Defendant and that when he visited the plot in May 2010, he found strangers on the plot allegedly running the restaurant without his permission.

14. The 1st Defendant further deponed that after realizing that the stranger running the restaurant on the suit property was a company known as Kenya Friends Malindi Limited, he, through the 2nd Defendant filed CMCC NO. 174 OF 2010 and the court granted restraining orders against the said Kenya Friends Malindi Limited which order is still in force to-date.

15. According to the 1st Defendant, the Defendant in CMCC NO.174 OF 2010, Kenya Friends Malindi Limited, has never filed any document in opposition to the Plaintiff's claim; that the Applicant herein filed a Motion dated 1st November 2010 in CMCC NO.174 OF 2010 seeking to be enjoined in the suit as a 2nd Defendant and to stay the proceedings therein which Application was dismissed by the Magistrate on 30th November 2011.

16. The 1st Defendant/Respondent has finally deponed that instead of appealing against the decision of the learned magistrate, the applicant has filed a similar application in this court; that the Applicant is not a party in CMCC NO.174 OF 2010 which he is seeking to stay and therefore lacks the capacity to move this court for orders of stay of CMCC NO. 174 OF 2010.

17. When the Application came up for hearing on 26th February 2013, I was informed that the parties had agreed to dispose of the application by way of written submissions. I directed the Applicant to file his written submissions within 14 days and Respondents to respond within 14 days after service. The Application was fixed for mention on 16th April 2013.

18. On 16th April 2013, I was informed that the parties had agreed to rely on their respective affidavits in respect to the Application.

19. I have considered the Affidavits filed by the Plaintiff and the 1st Defendant.

20. According to the Plaintiff's Further Re-Amended Plaint filed on 11th December 2003, the Plaintiff was the first registered proprietor of Kilifi/Chembe/Kibabamshe/414. However, on or about 22nd December 1986, and on the strength of the Commissioner of Lands circular letter number 113936/55 of 28th May 1986, The Commissioner of Lands cancelled the Plaintiff's title, which action the Plaintiff has challenged in the current suit.

21. In the current suit the Plaintiff is seeking for a permanent injunction against the Defendants from interfering with the quiet enjoyment of Chembe Kibabamshe/414 and the subsequent sub divisions. Kenya Friends Malindi Limited, the Defendants in CMCC NO. 174 of 2010 are not parties in the present proceedings.

22. The 1st and 2nd Defendants herein filed their defence on 27th October, 2003 in which they claim to be the lawful owners of the suit property.

23. I have perused the pleadings in CMCC NO. 174 of 2010 in which the 2nd Defendant herein has sued Kenya Friends Malindi Limited. In the Chamber Summons filed on 2nd September, 2010, the Plaintiff/Applicant herein sought to be enjoined in CMCC NO. 174 of 2010 as a 2nd Defendant and for stay of execution of the magistrate's order issued on 23rd June, 2010.

24. In the said Application, the Plaintiff herein argued that he was the registered owner of the suit property in CMCC NO. 174 of 2010 which is also the subject of the current suit. The said Application was opposed by the 2nd Defendant herein, and the Plaintiff in CMCC NO. 174 of 2010 and the same was dismissed by the learned magistrate for non-attendance.

25. The Plaintiff/Applicant herein filed another Application in CMCC NO.174 OF 2010 dated 6th October 2011 in which he sought for the stay of execution of the orders of 23rd June, 2010 and for setting aside of the Orders dismissing the Chamber Summons dated 1st September 2010. That application was dismissed by the learned Magistrate in the following terms;

“The orders which the third party is seeking to stay were confirmed when the third party was not a party. He is a stranger to the suit. Order 40 Rule 7 of the Civil Procedure Rules is clear that the court may vary or set aside an order made under the order on the application by a party. The third party cannot apply to set aside or vary the orders which have been confirmed.”

26. The learned Magistrate further found and held that the Application dated 1st September 2010 was *res-judicata* as the court had made a Ruling on a similar application which had been filed by th interested party.

27. The Applicant herein did not Appeal against the two Rulings by the Magistrate. Instead, he has filed the current application which is seeking for orders of stay of the order issued by the learned Chief Magistrate in CMCC NO.174 OF 2010 and for the transfer of CMCC NO.174 OF 2010 to this court for hearing.

28. In the current Application, the Applicant has deponed that he has leased the suit premises to the Defendant in CMCC NO.174 OF 2010 and that the 2nd Defendant herein has obtained an order of eviction against the said Defendant in CMCC NO. 174 OF 2010. This is the same ground that the Applicant relied on when he moved the learned Magistrate for orders of stay of execution, which application was dismissed. Consequently, the Applicant should have filed an appeal against the said Ruling instead of filing the current application seeking for a stay of execution. That is an abuse of the court process and I disallow the prayer.

2. 9 The second limb of the Applicant's application is for an order that CMC NO.174 OF 2010 be transferred to this court for hearing. The applicant has not stated why he wants CMCC NO. 174 OF 2010 to be transferred for hearing in this court. He is not clear as to whether the transfer of CMCC NO.174 OF 2010 should be transferred to this court because the lower court does not have jurisdiction or because he wants the two matters consolidated.

30. Section 18 of the Civil Procedure Act provides circumstances under which the High Court can transfer a case from one court to another. The High Court (and this court) can only withdraw a suit pending in the lower court and thereafter try or dispose of the same.

31. The Applicant is not seeking the withdrawal of the suit in the lower court so as to have it heard in this court. And if he wants to withdraw the suit in the lower court so as to transfer it to this court, he would be unable to do so because he was never enjoined as a party. His attempt to be enjoined as a party was disallowed by the Magistrate and no appeal was preferred against the decision. In the circumstances, I find and hold that the Applicant herein has no *locus standi* to pray for an order of withdrawal and transfer of CMCC NO.174 of 2010 to this court for trial and disposal.

32. For the reasons I have given above, I dismiss the Plaintiff's Application dated 7th December 2011 with costs to the 1st and 2nd Defendants.

Dated and Delivered at Malindi this 30th day of **May**, 2013.

O. A. Angote
Judge