



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 47 OF 2012

1. HUSSEIN ALI

2. KALUMEIY MOHAMED

3. MOHAMED BUTE

4. MOHAMED MURSAL

5. ABDI ABDULAHI.....PLAINTIFFS

=VERSUS=

1. THE COMMISSIONER OF LANDS

2. THE LAND REGISTRAR, LAMU

3. THE OFFICER COMMANDING STATION, MPEKETONI

4. ABDULWAHID MAHAMOUD

5. SWALEH A. BAJABER

6. BAJABER LIMITED

7. BAJABER SALT WORKS LTD

**8. THE HON. ATTORNEY
GENERAL.....DEFENDANTS**

R U L I N G

1. What is before me is the Plaintiffs'/Applicants' Application dated 8th November 2012. The Application is brought under the provisions of the Civil Procedure Rules, The Land Act and the Land Registration Act seeking for the following reliefs;
- a. **THAT this Honourable Court be pleased to issue an injunction against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants/Respondents from interfering, altering, making fresh entries, disposing, selling, alienating, subdividing, and/or dealing in the suit property known as L.R.**

- No.26781-Lamu pending the hearing inter partes and determination of this Application.**
- b. THAT this Honorable court be pleased to order the registration of an inhibition over L.R. No. 26781-Lamu pending inter-partes hearing and determination of this application.**
 - c. THAT the 1st, 2nd, 3rd, 4th, and 5th Plaintiff/Applicant and their dependents, family be allowed unfettered access to common grazing and water points situated on the suit property known as LR. NO26781-Lamu pending hearing inter partes and determination of this application.**
 - d. THAT the 3rd Defendant/Respondent be ordered by this Honourable court to maintain peace during the strict adherence and compliance of any order of this court.**
 - e. THAT this Honourable court be pleased to issue any further or orders as it may deem just and expedient and in the interest of justice, fairness and equity.**
 - f. THAT cost of this application be in the cause.**
2. The Application is supported by the Affidavit of the 1st Plaintiff/Applicant in which he has deponed that he has been granted authority by the other Plaintiffs to swear the affidavit.
 3. The main deposition by the Applicant is that they are inhabitants of Koreni area, Lamu and they reside adjacent to L.R. No.26781, Lamu which has been a grazing and water point since independence.
 4. The Applicant has deponed that on 19th July, 2005, the 3rd Respondent, with the blessings and authority of the 1st and 5th Applicants, who are the elders and face of the Koreni community registered a caveat on the L.R. No.2678 (the suit property); that the Applicants recently found that the 1st, 3rd, 4th, 5th, 6th and 7th Respondents had collectively and fraudulently been exchanging correspondences with a view of lifting the caveat.
 5. It is the Applicant's deposition that the suit property was subsequently fraudulently registered in the names of the 5th, 6th and 7th Respondents by the 1st to 3rd Respondents without including the representatives of the Koreni Community and more specifically the Applicants.
 6. The Applicants finally deponed that the 5th to 7th Respondents are illegally carrying out game hunting, salt extraction and further developments without the requisite approvals; that unless the injunctive orders are granted as prayed, the inhabitants and interested persons within the larger Koreni Community stand to lose immensely and that the suit property is a grazing land for the community.
 7. The 4th, 5th, 6th and 7th Respondents did not file Replying Affidavits despite being served with the Application and the matter adjourned on numerous occasions to allow them file Replying Affidavit.
 8. The Attorney General filed his Grounds of Opposition on behalf of 1st, 2nd, 3rd and 8th Respondents.
 9. According to the Attorney General, the Applicants have not satisfied the principles of granting orders of injunction and the prayers sought are incapable of being granted as against the 2nd Defendant.
 10. The parties agreed to dispose of the Application by way of written submissions which I have considered.
 11. The Applicant's main concern in this suit, as I understand it, is that the suit property has always been used as a grazing ground and water points, and they do not understand the circumstances under which the suit property was allocated to Bajaber Limited, the 6th Defendant.
 12. The Applicants have annexed on the Supporting Affidavit a Certificate of Postal Search as at 13th August 2008, which shows the registered owner of the suit property number 26781 S. W. of Lamu Township to be Bajaber Limited, the 6th Defendant.
 13. The said Certificate of Postal Search shows that a caveat was registered against the parcel of land in terms of section 65(1) (f) of the Registration of Titles Act, Cap 281. The caveat was registered pursuant to the Commissioner of Lands letter reference KCS/22379/06/05. There is no indication, either by the Applicants or the Respondents that the said caveat has been lifted.
 14. I have perused the numerous correspondences between the Ministry of Lands on one part and Kituo cha Sheria and the Lamu District Registrar on the other part.
 15. According to the letter dated 15th July 2005 by the Commissioner of Lands, the suit property was

- amongst the parcels of land whose ownership was to be determined by the Land Titles Tribunal. In the said letter, the Commissioner of Lands directed the Registrar of Titles to put a caveat on the title until the case is finalised.
16. The Applicants have also annexed a letter on their affidavit dated 28th June 2005 authored by the District Surveyor and addressed to the 4th Defendant herein. In the said letter, the District Surveyor informed the 4th Defendant that his office had never carried out any survey in respect to the suit property and was not aware of the minutes allocating the land.
 17. In his letter dated 4th July 2005, the Commissioner of Lands informed the Registrar of Titles, Mombasa, that he did not have records of the allocation of the suit property to the 5th Respondent, or at all.
 18. The Applicants have annexed more letters written by the then Provincial Administration and the Commissioner of Lands showing that the issue of ownership of the suit property had never been established.
 19. The 4th, 5th, 6th and 7th Respondents did not file Replying Affidavits to show how the title to the suit property was issued to the 6th Respondent.
 20. The Attorney General, who appeared for the 1st, 2nd, 3rd and 8th Respondents, did not file any documents to show the process that was followed to allocate the suit property to the 6th Defendant to the exclusion of the Applicants and the Koreni Community as a whole. Instead, the Attorney General has opposed the granting of the injunctive orders by filing the Grounds of Opposition and submissions.
 21. As I have held in many other Rulings in this court, a title deed or a Grant, as in this case, is an end product of a process. For the rights of registered owner of land to be protected by this court pursuant to the provisions of Article 40(1) of the Constitution, it is incumbent for the holder of the Title or Grant to establish to the satisfaction of the court the processes that he followed to acquire the Title or the Grant.
 22. A right to property can only be protected if the same is acquired legally. If the holder of a title does not show that he followed the laid down procedures in acquisition of the title, the court will be entitled to make an inference that such a title was acquired illegally and therefore not capable of protection.
 23. According to the Grant which was issued to the 6th Respondent, the suit property measuring 1674.1 Hectares is Government Land.
 24. The law pertaining to the allocation of Government land is found in the Government Lands Act, Cap 280 (now repealed). Under the said Act, unalienated Government land, on application could only be allocated to an individual by the President.
 25. After the allocation of such land by the President, a part development plan would be prepared and approved by the Director of Physical Planning or the Minister of Lands and a letter of allotment duly signed by the Commissioner of Lands would be issued to the allottee.
 26. Unalienated government land could only be surveyed by either a private surveyor or a government surveyor if the above procedure had been followed to the letter. That was the law before the Constitution was promulgated in August, 2010 and when the Grant in question was issued to the 6th Respondent.
 27. It is therefore curious for the counsel who appeared on behalf of the Attorney General to submit that the Applicants have not established a prima facie case with chances of success without presenting to this court the documents from the Commissioner of Lands showing that the process of allocation of the suit property and the issuance of the Grant to the 6th Respondent was followed.
 28. To the contrary, the documents before this court shows that the Commissioner of Lands distanced his office from the allocation of the suit property and directed the Registrar of Titles to register a caveat pursuant to the provisions of section 65(1) (f) of the Registration of Titles Act, Cap 280.
 29. Under the said section, the Registrar may enter a caveat on behalf of the Government to prohibit the transfer or dealing in any land belonging to or supposed to belong to the Government. In view of the caveat, it would appear that the Commissioner of Lands was not satisfied with the manner in which the land had been allocated to the 6th Respondent.
 30. Considering that the suit property is government land, the Applicants, as members of the Koreni Community have the right to question the allocation of the suit property to the 6th Respondent.

31. In the circumstances, and for the reasons I have given above, I find that the Applicants have established a prima facie case with chances of success. I also find and hold that unless the injunctive orders are issued, the Applicants are likely to lose what they consider as their grazing land, which right is protected under Article 63(2)(d)(ii) thus suffering irreparable damage.
32. The injunctive order shall however be directed to the 6th Defendant who is the registered owner of the suit property in the following terms.
- a. **THAT this Honourable Court hereby issues an injunction against the 4th, 5th, 6th and 7th Defendants/Respondents from interfering, altering, making fresh entries, disposing, selling, alienating, subdividing, and/or dealing in the suit property known as L.R. No.26781-Lamu pending the hearing inter partes and determination of the suit.**
 - b. **THAT the 1st, 2nd, 3rd, 4th, and 5th Plaintiffs/Applicants and their dependents and family be allowed unfettered access to common grazing and water points situated on the suit property known as LR. NO26781, Lamu, pending the hearing of the suit.**
 - c. **The 3rd Defendant/Respondent to maintain peace during the strict adherence and compliance of the order of this court.**
 - d. **The Respondents to pay the costs of this Application.**

Dated and delivered in Malindi this 12th day of **July**, 2013.

O. A. Angote

Judge