



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 237 OF 2012

HELLEN NEKESA NIELSEN & ANOTHER PLAINTIFFS

- VERSUS -

DOROTHY NELIMA WAFULA & ANOTHERDEFENDANTS

RULING

[1] I have perused the Notice of Motion dated 25th October 2012. All the annexures annexed thereon particularly the certificate of title of **Kwale/Diani Beach Block/372** dated 31st March 2003 are in the names of Dorothy Nelika Wafula, Hellen Wekesa Nielsen, Paul Friedrich Nielsen and Johannes Fridrich Wilhelm Lowe as proprietors in common in equal shares.

[2] I have also perused the Green cards tracing the history of the land, one showing the suit property as being owned by Government of Kenya as at 22nd April 1985. The other showing the land belonging to Ocean Estates Ltd on 22nd April 1985.

[3] On 10th May, 1986 another Green card shows the land being owned by Dorothy Nelima Wafula, Helen Nekesa Nielsen, Paul Friedrich Nielsen and Johannes Fridrich Wilhelm Lowe as proprietors in equal shares ($\frac{1}{4}$ each). The title had a restriction by one Catherine Mary Wanjiru of P.O. Box 48587 Mombasa claiming beneficiary interest dated 4th July 2002.

[4] There is yet a final Green card showing on 31st March 2003 and 9th June 2003 certificate of leases were issued. Further that on 26th August 2003 the restriction was removed by the Land Registrar acting under Section 135 of the now repealed registration of Land Act Cap. 300. The land was registered in the name of Dorothy Nelima Wafula and Johannes Fridrich Wilhelm Lowe in undivided shares. There is no explanation of what had happened to the other tenants incommon Helen Nekesa Nielsen and Paul Fredrick Nielsen.

[5] This removal of names is what has brought the dispute herein. The reasons for removal of these names will be the issue at the hearing of the case. That issue cannot be dealt at this stage. The applicant prays that therefore a mandatory injunction directed at the 1st defendant restraining her from denying the plaintiffs access to the suit property and in particular the cottage designated as their cottage and for their use and accommodation and to receive and collect rents. I have perused the replies and affidavits of the respondent. The respondent generally opposes the application. Their agreement being that there is no *prima facie* case made out by the applicants. They argue that the applicants were man and wife during the turn of the century 2000 - 2006, lived on the suit premises which the defendant alleges was a family home and hotel and that the applicants never paid any rent. They admit there was a time the property was registered in the names of the parties as tenants incommon, The defendants raises the questions of

consideration and purchase.

[6] After perusing this application I find that the prayer No. 1 of the application is spent. I find that prayer No.2 is the same prayer no. 20 (a) of the plaint. Prayer No. 3 the same prayer No. 20 (b) of the plaint. Granting the orders prayed is tantamount to deciding the suit by an application and before the parties have given their own evidence in Court. Parties should and ought to be granted their day in Court. Denying them such an opportunity would be denying the right to be heard, which is their Constitutional right. This would occasion a fundamental breach of their Constitutional rights.

[7] However, having said that there are serious issues of ownership, transfer and tampering with documents at the land office Kwale raised by the applicants. The applicants right to have the suit property protected pending the hearing of the suit is also a constitutional right. They too must be protected from losing their land. I am not able to speculate how this matter will end before hearing the parties. I will therefore order that the *status quo* shall be maintained in respect of the suit property.

[8] To ensure that is done, the respondents who have the title to **Kwale Diani Beach Block/327** are restrained from dealing, selling, wasting, mortgaging or in any other way interfering with the suit premises. (safe for running the hotel using the same as their own accommodation) pending the determination of this suit.

[9] The applicants claim they have used a particular cottage as their home when visiting this country and wish to use the same as before. I will not order that they continue to do so for now. I do not find that practicable nor appropriate under the current circumstances. After the outcome of this case is known appropriate remedies may be sought for account etc if they so wish. I further order that due to the urgency of this matter this case be fixed in the registry on priority basis.

It is so ordered.

Dated and delivered in open court at Mombasa this 18th day of October 2013.

S. N. MUKUNYA

JUDGE

18.10.2013

In the presence of:

Umalla Advocate for Anyanzwa Advocate

Mburu Advocate for Matheka Advocate