



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 36 OF 2013

LILIAN MERCY MUTUA T/A LILIAN M. GEMSPLAINTIFF

- V E R S U S -

ELIZABETH WANGECHI OLONGINDA1ST DEFENDANT

SAMSON S. OLONGINDA2ND DEFENDANT

ALLAN L. OLONGINDA3RD DEFENDANT

WILLIAM L. OLONGINDA 4TH DEFENDANT

RULING

[1] This application is brought by the applicant. She prays that an injunction do issue restraining the defendants either by themselves or their agents/servants/employees from alienating, disposing of or interfering, disposing of, interfering with and/or otherwise, howsoever dealing with all that property situated on land reference nos. 1458/1-10 Machungwa "B" and 1459/1 - 10 Machungwa "A" pending the hearing of this suit.

This application is supported by the affidavit of Lillian Mercy Mutua who avers that she is the registered owner of land reference No. 1459/1 - 10 Machungwa "A" Kasigau Ranch Taita Taveta County, Mombasa. She avered that the defendants have without lawful justification encroached onto her land, purporting it to be land reference Machungwa 'B' Kasigau ranch and purported to undertake mining activities therein.

[2] The plaintiff/applicant states that the dispute was referred to Commission of Mines and Geology under the relevant Act, who ruled that the property belongs to the applicant. She further avers that such determination was referred to the High Court Mombasa for Judicial Review that the case is pending before court which I am informed has issued orders of stay of the orders of the said Commissioner.

The applicant therefore comes to this court for a order of stay to prevent the respondent from proceeding with mining activities to the detriment of the applicant pending the hearing of this case. The applicant argues that if those orders are not granted she will suffer irreparable damages and that the balance of convenience tilts in her favour.

The applicant attached transfer of Machungwa 'A' Kasigau Ranch, Taita Taveta County Mombasa, a certificate of renewal of registered mining location No. 11536, complaints to Commissioner of Mining, the ruling from the said Commissioner dated 1st February, 2013, orders of stay from the High Court,

Mombasa, Constitutional and Human rights division dated 6th February 2013. She argues she has not been served with the pleadings leading to the stay and that the respondent is trying to steal a match on herself. She avers that no prejudice shall be occasioned on the respondent if the orders are allowed as prayed.

[3] The respondents replied through a replying affidavit of Allan Lepapa Olongida. He stated that he is one of the administrators of the estate of late Olonginda Ngilurity Mendukenya. He averred that his father bought Plot no. 1459/1-10- Machugwa 'A' from the original owner Pentagon Geo Exploration. He attached a copy of the agreement. He argued that the same was pegged on 8th September 1988 and said that this is the area he has been mining upto today with other defendants. He argued that there was an error and what is shown as 1458/1-10 Machungwa "A" is actually 1459/1-10 "B" and he annexed a sketch plan. He argued that his father and one David Muthui Kariuki registered a company known as Naishorua Mining Co. Ltd and both took one (1) share each and that they later acquired mining location 1459/1- 10 Machungwa "B" which borders Machungwa "A".

[4] That on 20th October 2011 the said David Muthui Kariuki illegally sold alone mining location no. 1459/1-10 Machungwa "B" to the applicant herein and that that sale to the applicant was registered in October 2011. A copy of the transfer was attached. he avers that the plaintiff bought Machungwa "B" but was shown Machungwa "A". He says he found Lilian Mercy Mutua, the applicants on the mine Machungwa "A" and avers the mine does not belong to her but belongs to him and other beneficiaries. He states that he filed a complaint with the Commissioner of Mines. He states there was a hearing. He avers that there were two rulings one dated 27th July 2012 which he agrees with and another dated 13th November 2012 which he says is wrong and should be quashed. He argues that the sale of Machungwa "B" is null and void for the seller lacked capacity to sell and that injunctive orders cannot be issued on the basis of Commission of Mines ruling which is challenged in the High Court.

[5] These being the pertinent issues here, should the orders prayed for be granted?

The issue herein is whether the applicant or the defendant owns land reference No. 1459/1-10 Machungwa "A" Kasigua Ranch Taita Taveta Mombasa and/or Land Parcel No. 1458/1-11- Machungwa "B" Taita Taveta Mombasa.

There is also a pertinent issue as to what place on the ground is land parcel Machungwa "A" and "B" as it is alleged the records produced in these pleadings conflict.

A further issue is the capacity of one David Muthui Kariuki in selling to the applicant, the capacity of Allan N. Olonginda 3rd defendant in filing the replying affidavit without any proven letters of administration of the late Olonginda's estate and a final issue is the determination by the Commissioner of mines as empowered by the Mining Act. Chapter 306 Laws of Kenya which determination still is in force and favouring the applicant until it is appealed from by the respondents under Sec. 65 of Cap. 306 Laws Of Kenya. I am alive to the fact that there is a stay of those orders of the Commissioner of Mines by the Constitutional and Judicial Review Division of the High Court but a stay is not a final determination. The orders are still in place but stayed.

All these issues cannot be dealt with at this preliminary stage. To do so would be to determine the suit by an application. These issues must be canvassed at the full hearing of the case. Otherwise an injustice maybe occasioned on the parties. So, what orders should be made?. There is no doubt that there is a determination already by the Commissioner of Mines on 13th November 2012 under the provisions of Cap. 306. The reference to the Commissioner was at the instance of the respondents.

[6] It does not matter that the same is challenged in court and a stay given, this determination shall subsist until the judicial review is heard and determined. the status quo is that the status of land reference No. 1459/1-10 "A" Kasigau Taita Taveta favours the applicant. In any case Mr. Allan Lepapa Olonginda in his affidavit paragraph 16,17, 18 and 19 show that the applicant, after purchase, took over the mines and the 3rd defendant found her there.

The whole point about applications of this nature is to preserve status quo. The status quo is that the applicant has occupation of the disputed land and is in actual occupation of the mine. Truly the balance of convenience favours the applicant¹. I am therefore persuaded to grant the application dated 12th February, 2013 in terms of prayers 3,4 of the same pending the hearing of this suit. Each party shall be a their own costs.

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:

Mbuya Advocate for Ananda Advocate for the plaintiff/applicant

M/s. Sheriff for the respondents.

¹ Geilla v Cassman Brown [1973] EA. 358