



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 462 of 2010

PHILIP JOHN WANYAMA MASINDE.....PLAINTIFF/APPLICANT

-VERSUS-

THE DIANI OASIS LIMITED.....DEFENDANT/RESPONDENT

RULING

The cause in the background comes by plaint dated **16th December, 2010** seeking permanent injunctions in relation to the suit property, L.R. No. 23159; and by the Chamber Summons of even-date, brought under Order 40 [Rules 1,3,4] of the Civil Procedure Rules and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya), the applicant sought:

“A temporary injunction.....to restrain the defendant, its agents and/or servants from trespassing upon the plaintiff’s land known as LR No.23159 registered at the Coast Land Registry as CR 30936 either for purposes of fencing thereon or for any other purpose whatsoever and/or from barring the plaintiff, his agents or servants from accessing the same as and when he wants, as lawful and legal owner of the said property.”

The application rests on the grounds that: the defendant has by its conduct made it impossible for the applicant to access his property; and the plaintiff is the lawful owner of property known as LR No.23159 and registered in the Coast Lands Registry as CR No.30936.

In his supporting affidavit of **16th December, 2010** the applicant avers that he is the owner of the suit land – and he annexes copy of the grant of title, and of the official search obtained from the Lands Registry. He deposes that he acquired the suit property by way of lease from the Government, after making all the required payments; and that he has invested substantially in the said property, and has embarked upon development projects thereon.

The applicant depones that it has become impossible for him to gain access to the suit property “*because of the hostility of the defendant and its agents towards [him and his] agents*”; the defendant is making a competing claim to the suit property, and has “*thwarted all [his] efforts to locate the beacons and build a*

perimeter wall around the said property.”

A director of the defendant, **Edmund Wandelin Duerr**, swore a replying affidavit on **31st January, 2011** deponing that the defendant is the owner of two properties, L.R. No. Kwale/Shimoni/1424 and L.R. No. Kwale/Shimoni/1423 which are being claimed by the plaintiff as part of his land. He deposes that the said two plots “*are not part of the plaintiff’s alleged L.R. No. 23159 and the defendant has all along [been] in possession.as a lawful owner having purchased the same for valuable consideration.*”

Of the plaintiff’s claimed L.R. No.23159, the deponent avers that it has not been clarified whether such a plot “*was ever surveyed [or] beacons placed*”, in particular as payment for the beacons took place only **22nd November, 2010** – and this date falls some **19 years** since the alleged allotment to the plaintiff of the land he claims. So, did the plaintiff know the location of the land he had been allotted? The deponent deposes that the defendant “*has valid legal documents and has taken possession.*”

Learned counsel, **Mr. D.M. Mabeya** submitted that the plaintiff had acquired the suit land as a 99-year lease-grant from the Government, recorded in a letter of allotment dated **4th February, 1991**. Counsel submitted that “*the defendant has not lawfully obtained title in respect of the said property which is already registered.*”

Counsel made a charge of fraud against the defendant, contending that if the defendant has map-sheets of the land it claims, then the same “*were obtained by fraud as the Government cannot make double allocations and [proceed] under different laws [the Registration of Titles Act (Cap.281, Laws of Kenya) and the Government Lands Act (Cap.300, Laws of Kenya)].*” Counsel submitted that the plaintiff “*has never caused or permitted the said parcel of land to be registered under the Registered Land Act (Cap.300)...*” He urged that “*the defendant has not lawfully obtained title in respect of the said property...*”

Counsel contended, on a matter which belongs to the realm of evidence at the trial, that “*the defendant, his servants and/or agents had destroyed all the beacons....*”

Learned counsel, **Mr. Nyabena** for the defendant, relying on the replying affidavit, urged that the defendant-company is the lawful owner of the suit properties which have been fenced. Counsel drew the Court’s attention to the copies of title documents and the certificates of search, in respect of L.R. No. Kwale/Shimoni/1423 and L.R. No. Kwale/Shimoni/1424.

An examination of the two sets of property documents shows as follows: (i) L.R. No. Kwale/Shimoni/1423 is registered under the Registered Land Act (Cap.300); (ii) this property measures 0.81 Hectares; (iii) the registered owners are **Amin Mbete Mtengo, Mgeni Mtengo Gaba** and **Mbwana Mwinyi Buramu**; (iv) the registration of this property took place at the Kwale District Land Registry, on **19th September, 2006**; (v) a title deed was issued on **19th September, 2006** (vi) a search conducted on **26th February, 2008** shows the registered proprietor to be the defendant herein; (vii) the defendant is shown to have been issued with the title deed on **25th July, 2007**; (viii) similarly as regards L.R. No. Kwale/Shimoni/1424 the plot covers 0.81 Hectares and is registered under the Registered Land Act (Cap.300); (ix) such registration took place on **19th February, 2006** in the names of **Chamira Mbwana Jamila, Rashid Mohamed Omar, Mohamed Omari Mgeni** and **Muhidini Mbwana Chamira** – with title deed issued on **19th September, 2006** (x) the official search shows that: the property was registered in the name of the defendant on **25th July, 2007** and a title deed issued.

Counsel submitted that the defendant not only had title documents for the two plots, but “*has always been in possession of [the same]*”. So he considered the pertinent question to be: Is the plaintiff seeking an injunction or is he seeking the eviction of the defendant who is *already in possession of the property*? The question breaks down to: Is the plaintiff seeking a *restraining injunction* or a *mandatory injunction-cum-eviction*?

Counsel submitted that the Orders sought could not be granted at this stage: for to grant the application as

framed would amount to a summary termination of the case, in particular as the application is a replication of the main cause; and the applicant had sought a temporary injunction in perpetuity, rather than pending full trial. Counsel submitted that since the plots claimed by the defendant have already been fenced, it is not possible to restrain the defendant against carrying out fencing.

Counsel contested the prayer that, notwithstanding the defendant's assertion of *possessory rights over fenced plots*, the defendant should nonetheless be required by mandatory order to facilitate the plaintiff "accessing the same as and when he wants, as the lawful and legal owner of the said property." The effect of such a prayer, counsel submitted, was that "the plaintiff, at this interlocutory stage, seeks that the Court [do] declare him the lawful and legal owner..."

The cogency of **Mr. Nyabena's** foregoing argument cannot be gainsaid; and the Court is persuaded by his argument that "such a declaration can only arise after a full hearing of the parties..." The outstanding burden which ought to precede a proper finding, just as learned counsel urged, "is left to the trial Court after hearing the witnesses whose evidence will have been tested by cross-examination."

Counsel urged that the applicant be not granted an injunction: because he had demonstrated no *prima facie* case with a probability of success: **Giella v. Cassman Brown & Co. Ltd.** [1973] E.A. 358. On the basis that the plaintiff did not, for 19 years, identify his alleged property, but the defendant purchased and immediately took possession, learned counsel submitted that "the balance of convenience tilts in favour of the defendant who is in possession and also has documents of ownership."

The foregoing review of evidence and submissions shows clearly that the parties hold to sharply-contrasting positions regarding the *true ownership* of the suit property, and indeed, on the vital, relevant question whether the property claimed by the plaintiffs is entirely *identical* with the one claimed by the defendant. At this stage it is not possible to see the unfolding of *right-and-duty*, in relation to the contrasting claims; this is a matter to be resolved by a full hearing of relevant *evidence*, as laid out in examination-in-chief, cross-examination and re-examination. Only thereafter, will the Court be in a position to commit the suit property in terms of *ownership claims*. On that element, it is injudicious to make Orders at this stage.

However, what is for certain at this stage, is that the *possessory rights* are with the *defendant*, and not the plaintiff. Possessory rights, as a matter of *judicial policy*, and as a matter of *equity*, will generally be sustained in the short-run, during the pendency of the trial. This is quite consistent with the idea of *balance of convenience*; and in this case, I find the balance of convenience to lie with the *defendant*.

I will make Orders as follows:

(1)The plaintiff's application by Chamber Summons of 16th December, 2010 is dismissed.

(2)Costs shall be in the cause.

(3)The suit herein shall be listed for mention and hearing directions within 14 days of the date hereof.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 16th day of February, 2012.

MAUREEN ODERO

JUDGE