



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Civil Case 323 of 2010**

**KENYA BROADCASTING
CORPORATION.....PLAINTIFF**

VERSUS

**MUNICIPAL COUNCIL OF
MOMBASA.....DEFENDANT
OLDBAY
LIMITED.....DEFENDANT**

RULING

This suit relates to ownership of a certain piece of land situated in Kisauni adjoining Nyali KBC Station, Mombasa. A dispute arose over ownership of the land between the Plaintiff and the Defendants.

The Plaintiff Applicant filed the present chamber summons applications seeking various injunctive orders. The application is a supporting Affidavit sworn by Mr. Musa Muthambi, the Acting Corporation Secretary of the Plaintiff.

It is the Plaintiff's case that:

- i) It was granted Title Number 1476 (Original No. 464/60)I/MN, C.R. 13088/1 and measuring 22.85 acres which land is delineated in Land Survey Plan Number 81176 in 1963 for a term of 99 years from 1st July 1962.**
- ii) The Plaintiff lost and/or misplaced the original title and was issued with a provisional Certificate of Title by the Registrar of Titles, Mombasa after a Gazette Notice No. 2547 was issued on 26th April 2002.**
- iii) On August 25th, 2003, the Plaintiff wrote to the Town Clerk, Mombasa Municipal Council to complain of trespassing and dumping of garbage on its land by the 1st Defendant's Contractors. The Plaintiff also notified the 1st Defendant that it was planning to fence the plot.**
- iv) On 1st September 2003, the then Mayor of Mombasa Cllr. Taib A. Taib in reply to the Plaintiff's letter dated 25th August 2003, wrote in part "*I assure you that remedial measures will be taken as soon as possible and by a copy of this letter the Director of Environment is advised to ensure this is done without any delay.*"**

v) **The Plaintiff wrote on 30th September 2003 to the Mayor of Mombasa in respect of his assurances in his letter of 1st September 2003 and that the 1st Defendant's contractors have not stopped dumping and trespassing into the Plaintiff's land.**

By a Replying Affidavit sworn by Tubmun Otieno, the Town Clerk, Municipal Council of Mombasa filed on 23.09.2010, he states in Paragraph 6, that:

“it is true that originally the plot subject matter of the suit did belong and was owned by the Plaintiff but subsequently the said plot was subdivided and other titles issued by the Commissioner of Lands”

The 1st Defendant however submits that it purchased two plots from the 2nd Defendant out of the sub-division at a cost of Kshs. 18,000,000.00/= and obtained valid titles to the said property. The 1st defendant further states that it conducted a search at the Lands Registry in Mombasa and established that L. R Nos. MN/I/10771 and MN/I/10772 were registered to the 2nd Defendant. In total, the 1st Defendant's case is that it is an innocent purchaser for value and that during the sale due procedure and process in acquiring the two plots were adhered to.

The 2nd Defendant filed replying Affidavit sworn by Abdalla Ali Taib, one of its directors in which he states that:-

i) **They bought the two plots in dispute in 1997 vide two sale agreements both dated 6th June 1997 and that the two plots were designated as Plot 'b' and 'c' as shown on the letters of allotments both dated 27th February 1997.**

iv) **They paid all official sums of moey for the purpose of acquiring the land from Government and that they were issued with official receipts and certifiactes of titles being Land Reference No. MN/I/10771 and Land Reference No.MN/1/20772. The 2nd defendant also argues that the Commissioner of Lands had the right in law to alienate the suit property and to issue title documents to the 2nd Defendant who subsequently sold it to the 1st Defendant.**

I have considered the respective submission. I have also considered the plaintiff's application. The Plaintiff's case is that it was issued with a title deed, L.R. No. MN/I/1476 in 1963 and it held the same uninterrupted since 1963. The Plaintiff never applied for sub-division of its title nor ever surrendered it to the Commissioner of Lands. The Defendants on the other hand have been in possession of two titles - Land Reference No. MN/I/10771 and MN/I/10772 since 2004 in respect of a portion of the Plaintiff land - a title within a title, a scenario never contemplated in practice and in law.

The Plaintiff being a parastatal is subject to public procurement procedures as well as ministerial approvals to sub-divide its land, L.R. No. MN/I/1476. I have no doubt that the creation of the 1st Defendant's title deeds would have involved the surrender of the Plaintiff's title and issuance of a new grant with smaller acreage commensurate to the land remaining from the Defendant's land. However, there is no evidence that the Plaintiff's land was ever sub-divided and its title surrendered to the Commissioner of Lands for the purpose of sub-division and issuance of the 1st Defendant's title documents.

It is also not contested that the two disputed plots titled, L.R No. MN/I/10771 and L.R No. MN/I/10772, were excised from L.R. No. MN/I/1476. The Defendants have also never challenged or questioned the authenticity of the Plaintiff's title. Indeed the 1st Defendant admitted in its affidavit the land was owned by the plaintiff. As I have already stated hereinabove, Tubmun Otieno, the Town Clerk, in his replying affidavit filed in court on 23.9.2010 states at paragraph 6 that:-

“it is true that originally the plot subject matter of the suit did belong and was owned by the Plaintiff but subsequently the said plot was subdivided and other titles issued by the Commissioner

of Lands.”

Mr. Otieno’s predecessor, Rashid H. Mwakiwiwi, wrote on 13.2.2004 to the

Plaintiff’s then Managing Director on the subject matter of Plot No. 1476/I/MN with

following words:-

“.....

Plot No. 1476/I/MN

Our garbage collection exercise in Mombasa demands a transfer point for its operations. We used space at the above mentioned plot as shown on the attached sketch as transfer point from 13th August, 2003 to 6th November, 2003. The location is very much ideal and we had to vacate due to lack of some formalities not finalized with your Ministry.

We hereby request to be allowed to use part of the above-mentioned plot (approx. 1 acre) as shown on the sketch.

We take responsibility to have the area of operations well fenced and protected from scavengers.

We pray for a positive response in the spirit of keeping Mombasa clean.

Signed

Rashid H. Mwakiwiwi

TOWN CLERK (Emphasize Mine)”

The 1st Defendant knew the subject land as belonging to the Plaintiff. Therefore the motive to purchase plots forming part of an existing title deed which it had severally approached the Plaintiff to give the 1st Defendant access and the right to use it as a transfer point for garbage, and without checking with the Plaintiff, is questionable.

The 1st Defendant knew that the land belonged to the Plaintiff. The Plaintiff had lost and/or misplaced its original title deed and had applied to the Registrar of Titles, Mombasa for a provisional certificate. The Registrar of Titles placed a 90 day notice in the Gazette Notice No. 2547 dated 26th April 2002 which read in part:

“Whereas sufficient evidence has been adduced to show that the said certificate of title issued thereof has been lost, notice is given that after the expiration of ninety (90) days from the date hereof, I shall issue a provisional certificate of title provided that no objection has been received within that period.

F. B. Kiriago,

Registrar of Titles, Mombasa”

The Registrar confirmed in his Notice to the general public that the Plaintiff is registered as the proprietor of that “*piece of land known as subdivision No. 1476 (Original No. 464/60), Section I, Mainland North, situate within Mombasa Municipality in the Mombasa District, held by a Certificate of title registered as C.R No. 13088/1.*”

No objection was received over the 90 days period and the Registrar had to and did issue the Plaintiff with a provisional certificate of Title on 3rd September 2002 registered as CR. 13088/3 under Section 71 of the Registration of Titles Act (Cap 281). The provisional title was issued to the Plaintiff more than 4 months after the Gazette Notice. It is unlikely that the 1st and 2nd Defendants would have failed to notice

the contents of the Gazette Notice which was placed just a column below a notice placed on the same Gazette by Hon. Uhuru Kenyatta the then Minister for Local Government.

I have taken cognizance of the exhibits produced by the parties, the written submissions of the counsels and I have come to the conclusion that the Plaintiff is entitled to the orders sought in the application. In my view, the plaintiff has show a prima facie case with probability of success. I therefore allow the application dated 10th September 2010 as prayed with costs. It is so ordered.

Dated AND Signed At Nairobi on this 23RD Day of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered at Mombasa on this 25TH Day of SEPTEMBER 2012.

J.W. MWERA
JUDGE

In the Presence of: Both sides represented