



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Case 71 of 2012

JOSEPH KIAGO KAGURU.....PLAINTIFF

VERSUS

1. RAMANDE LTD

2. DANIEL KIHICO.....DEFENDANTS

RULING

1. This is the Plaintiff \s Notice of Motion dated 30th March, 2012, brought under Sections 1A and 1B of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. It seeks to restrain the Defendants/Respondents, their agents or anyone working under their directions from interfering with the possession, or occupation of Plot Number LR MN/1/6564 Nyali. It is supported by the Affidavit of Joseph Kiago Kaguru, and annexures thereto.

2. The grounds on which the application is premised are are:

“a) That the Plaintiff/Applicant is the rightful allottee and officially registered as the owner of Plot Number MN/I/6564 Nyali whose official title has not been issued.

b) That the Plaintiff/Applicant has learnt that through false documents the Defendants/Respondents have claimed ownership of the said Plot and continue to convince the Municipal Council of Mombasa that they are the bona-fide owners which is not true.

c) That unless an injunction is issued by this honourable Court the Defendant/Respondent will continue to use false documents to intimidate the Plaintiff/Applicant into failing to develop, fence or in any other way using his plot which is genuinely his.

d) That it is the interest of justice that an injunction do issue.”

3. In his affidavit, the Plaintiff depones that in around 1990 he applied for, and was allotted by the Commissioner of Lands a Plot Number 38 Nyali. He received a letter of Allotment “JKKI” dated 29th August, 1990 for “**Unsurveyed Residential Plot 38- Nyali, Mombasa.**” He paid the stand premium and other fees and charges demanded by the Government amounting to KShs. 143,345/- as shown by “**JKK2**”, a Receipt No. F 705380 dated 10th September, 2009, nineteen years later. The plot was allegedly surveyed and on 20th March, 2012 he was given Plot Number LR MN/1/6564 (JKK3\').

4. By the time JKK 3 was issued, someone called Kiango was claiming ownership of the plot, alleging he had lodged documents with Municipal Council of Mombasa. When the Plaintiff first checked and searched the land at the Council, he came across documents in the name of Ramanda Limited, the 1st Defendant who had been issued a Title Number LR 49410 for LR MN/1/6564 ("JKK4"). On doing a search at the lands office, no suit title was found.
5. The Plaintiff, therefore considers the aforesaid title issued on 10th June, 2010 to the 1st Defendant to be a forgery as it has an IR ("**Inland Registry**") number. He seeks that the Defendant be restrained from tampering with his land.
6. The application is opposed vide the Defendants' Grounds of Opposition. The grounds are that the application is misconceived, scandalous, vexatious and an abuse of the court process. That it does not merit muster for grant of an injunction under the **Giella vs Cassman Brown** principles. That the 1st Defendant's title is absolute and indefeasible under Section 23 and 24 of the Registration of Titles Act. That the purported letter of Allotment does not confer superior or any right or title over the suit property. That the allegations of forgery cannot stand and the suit is fatally defective for non-joinder of the Commissioner of Lands.
7. Parties filed written submissions, which essentially repeated the grounds in support of their positions.
8. The Plaintiff relied on **Jospeh Waweru Muiruri & Another vs the Principal, Maai Mahiu Secondary School & Another** [2006] E KLR . There, the Plaintiff was the undisputed owner of Kijabe/Kijabe Block 1/4060 and the dispute concerned "grabbing" of some of the school land. There the location of the disputed land was in issue. The court granted a temporary injunction, but declined to grant a mandatory injunction.
9. The 1st Defendant cited **Parkview Arcade vs Kangethe & Others KLR** (E & L) 1 591 asserting that the 1st Defendant's rights as the first registered owner cannot be interfered with. He pointed out that the land allotted to the Plaintiff was an "**Unsurveyed Plot Number 58 – Nyali, Mombasa.**" This was not demonstrated to be the same plot to which the Plaintiff's title was issued. In any event, counsel argues, the acceptance by Plaintiff of the relevant the Letter of Offer was required to be within Thirty (30) days from the date of its allotment, yet the Plaintiff accepted it and payed 20 years later, after it had long lapsed.
10. I have considered the parties' submissions and the documents availed by them. The first notable point is that the question of who is in current possession of the suit land was not broached by any of the parties. This contest revolves around their respective documents. The second notable point is that in neither the grounds of opposition nor in their submissions, does the 1st Defendant acknowledge "JKK4" the Grant Number IR 49410 as belonging to it. That notwithstanding the 1st Defendant repeatedly stated and submitted that it had received a title which was indefeasible.
11. I find these observations curious. No one is in possession of the alleged suit land, and the title alleged by the Plaintiff to have been issued is an Inland Registry Title, whilst the 1st Defendant has not clearly and unequivocally embraced it.
12. I agree with the Plaintiff that no linkage is demonstrated between the Plaintiff's Letter of Allotment relating to Plot Number 58 and the title issued. That notwithstanding I am left in a conundrum in relation to title Number MN/1/6564 Nyali which inexplicably bears an Inland (Nairobi) Registry Number.
13. The upshot is that the Applicant has not satisfied me on any of the grounds in **Giella vs Cassman Brown**, [1973] EA and his application is hereby dismissed with costs.
14. However, and in exercise of the court's powers under Section 3A, I consider that the just and

proper Orders to issue are as follows:

- 1) a conservatory order restricting all developments and transactions whatsoever on and in respect of MN/1/6564 Nyali, the suit property, until determination of the suit herein.
- 2) an order requiring the Plaintiff to enjoin the Commissioner of Lands in the suit.
- 3) An order that the suit do proceed to trial without undue delay.

Orders accordingly.

Dated, signed and delivered this 20th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)