



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE 6 OF 2012

SALIM MOHAMED MWAWENDE..... 1ST PLAINTIFF
JUMA MOHAMED MWACHIHI.....2ND PLAINTIFF
OMARI MOHAMED SAGU..... 3RD PLAINTIFF
ATHUMANI MOHAMED MWAKIDUDU.....4TH PLAINTIFF
ABDALLA MOHAMED JUNGU.....5TH PLAINTIFF
OMAR J. MOHAMED.....6TH PLAINTIFF
MOHAMED J. MOHAMED.....7TH PLAINTIFF
FATUMA SALIM MWAKIDUDU.....8TH PLAINTIFF
MWANAMTAMU SHEE..... 9 PLAINTIFF
MWANAPILI ABDALLA10TH PLAINTIFF

V E R S U S

EDGAR-GEAR INVESTMENTS 1ST DEFENDANT
SHEARS (KENYA) LIMITED 2ND DEFENDANT
THE REGISTRAR OF LANDS, KWALE 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1) The two Applicants in the application dated 14th February 2012 are Edgar-Gear Investments Limited (the 1st Defendant) and Shears (Kenya) Limited (the 2nd Defendant). Separately they bought Kwale/Diani Complex/267 (hereinafter Parcel 267) and Kwale/Diani Complex/269 (hereinafter Parcel 269). The 1st Defendant is the registered proprietor of Plot 267 while Plot 269 is registered in the name of the 2nd Defendant. In that application the 1st and 2nd Defendants, in the main, seek an order of injunction to restrain the Plaintiffs from interfering, entering, disposing of or alienating Parcels 267 and 269.

2) In a plaint dated 18th January 2012 the Plaintiffs (who are the Respondents here) sued the Applicants alongside The Registrar of Lands, Kwale and The Attorney General. The claim by the Plaintiffs is that they are owners of Plot No. 267 and 269 and have used the land from time immemorial. They claim an ancestral connection to the land and were surprised to learn that the two Defendants are registered as owners thereof.

3) The 1st and 2nd Defendants not only defended their position as registered owners but also mounted a counterclaim dated 15th February 2012 in which they requested the following orders-

(a) ***A declaration that the 1st and 2nd Defendants are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as PLOT Nos. KWALE/DIANI COMPLEX/267 & 269.***

(b) ***A declaration that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the 1st and 2nd Defendants' properties and are accordingly trespassers on the same.***

(c) ***A permanent injunction restraining the Plaintiffs whether by themselves, their servants or agents and/or otherwise howsoever from interfering with the 1st and 2nd Defendants' quiet possession of the above plots.***

(d) ***Vacant possession of the 1st and 2nd Defendants' properties.***

4) Briefly the 1st Defendant bought Plot No. 267 from Swaleh Khalfani Mwajihi. That land was subsequently transferred to it on 26th February 1993. While Plot No. 269 is now registered in the name of the 2nd Defendant having bought it from one Jotham Ngugi Mungai. Ownership was transferred to the 2nd Defendant on 15th September 1993. Copies of Green Cards and Certificates of Official Search show that Plot No. 267 is registered in the name of the 1st Defendant while Plot No. 269 in the name of the 2nd Defendant.

5) It is the contention of the Defendants that they have occupied and used their respective portions of land peacefully until sometime in September 2010 when the Plaintiffs invaded the plots and forcefully cultivated them. The Defendants sought the intervention of the Provincial Administration but the Plaintiffs continued to forcibly use the land. The situation turned volatile and two of the Plaintiffs were charged with Criminal offences in **Kwale Criminal Case No. 218 of 2011**.

6) The Plaintiffs claim the suit properties as ancestral land. It is their case that members of their clan have used and occupied the said from time immemorial. They contend that it was irregular for their interests to be bypassed during the Land Adjudication Process.

7) The 1st and 2nd Defendants are the registered owners of the suit properties. That land was registered under The Registered Land Act (Cap 300) (now repealed). Section 27 of that Act conferred upon the 1st and 2nd Defendants absolute ownership of the suitland. By dint of Section 104 and 105 read together with Section 24 of The Land Registration Act, 2012 that absolute ownership is recognized and maintained. This is the interest that the Plaintiffs must defeat. They will have an opportunity at the main hearing to displace this interest. As things stand the interests of the 1st and 2nd Defendants cannot be dismissed offhand as they hold valid titles. They in fact hold strong credentials to the land. The titles assist them in establishing a prima facie case.

8) There would then be the issue of the status on the ground. In support of their application a Mr. Wilson K. Tangus swore an affidavit on 24th February 2012. He is said to be the District Officer (DO), Matuga. He says this in paragraph 3 of that affidavit-

“3. That I have today, 24th February 2012, visited the two plots and hereby confirm that the same are vacant and there are neither people nor crops, buildings or structures on the same.”

I must compare this averment with what was said in the affidavit of Salim Mohamed Mawende (the 1st Plaintiff) sworn on 27th April 2012 in respect to status;

“8. That the status quo is that the Plaintiff then be left to cultivate, till and harvest the suit properties pending hearing and determination of this suit, as injuncting them amount to determination of the entire suit as the Plaintiff would have been evicted technically by being prevented entry and/or exit on the suit properties.”

I have to find that this statement is not unequivocal. It does not categorically state that the Plaintiffs were at the time it was made in actual possession and user of the suit properties.

9) On the evidence presented this Court is inclined to give some protection to the registered owners by way of an injunction. The result is that I allow the application of 14th February 2012 with costs. Orders accordingly.

Dated and delivered at Mombasa this 16th day of October,2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

No appearance for the Plaintiffs

Mbatia for the 1st and 2nd Defendants

No appearance for the 3rd and 4th Defendants

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**