REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 198 OF 2008

1. RAMA ALI MAZOA
2. TAWFIQ AMADI
3. JUMA SAID KENDE
……..PLAINTIFFS/APPLICANTS

[suing on their own behalf and on behalf of 2000 other residents of Ramisi Farm]

-VERSUS-

1. KWALE INTERNATIONAL SUGAR CO. LTD
2. COMMISSIONER OF LANDS
3. COUNTY COUNCIL OF KWALE
…DEFENDANTS/RESPONDENTS

RULING

The plaintiffs' application by Chamber Summons, dated ***27th February, 2009*** and filed on ***6th March, 2009*** was brought under Order **XXXIX**, Rules (1) and (2) of the Civil Procedure Rules, and ss. 3A and 63 of the Civil Procedure Act (cap. 21, Laws of Kenya). The substantive prayer for resolution at this stage, is thus set out:

"THAT the defendants by themselves, their servants and/or employees or agents be restrained by way of permanent injunction, from ploughing, clearing bushes, evicting residents, putting up notices and/or in any other way dealing with the [suit] parcel of land especially the area measuring 50 acres occupied by Nyumba Sita residents, until the suit is heard and determined".

The application is founded on the following grounds:

(a) the plaintiffs, who are residents of the Ramisi Farm village called Nyumba Sita, with their families, have no alternative home, and will suffer irreparably if 1st defendant is not restrained from evicting them;

(b) the residents of Nyumba Sita have lived in the area for more than 20 years and, even though 1st defendant has allegedly leased the said area, the residents of Nyumba Sita occupy a limited area of it which is not detrimental to 1st defendant's development agenda;

(c)the said parcel of land borders the Indian Ocean, and the main occupation of the residents is crop-farming and fishing; hence removing them to a different location would ruin their only source of livelihood.

The 1st plaintiff swore a supporting affidavit on behalf of himself and the other plaintiffs. He avers that the plaintiffs are residents of Nyumba Sita, a village covering some 50 acres on Ramisi Farm, and they have been in occupation for more than 20 years. At the inception, the Nyumba Sita community had built schools, on the disputed land, and they continued to live there. The deponent avers that, "recently", 1st defendant acting "in collusion" with 2nd and 3rd defendants, leased Ramisi Farm, acquired the whole area, and began evicting the residents; and also cut down the plaintiffs' crops and trees, without paying any compensation. The plaintiffs' houses were burnt, and so they now live in shanties which they have erected within the area of dispute.

The deponent swore a supplementary affidavit on ***21st July, 2009***, after the application herein had remained unheard from the time of its filing, on ***6th March, 2009***.

The deponent deposed that the plaintiffs had, for more than 20 years, lived on land that had previously been owned by Ramisi Sugar Company; and that they required the 50 acres which they occupied, to enable them to continue sustaining their livelihoods.

The deponent filed a further affidavit on ***30th March, 2010*** giving facts on incidents with the Police authorities which had taken place at Nyumba Sita Village, on ***20th March, 2010***, entailing injuries to the residents.

Harshil Kotecha, the Managing Director of 1st defendant, swore a replying affidavit on ***30th March, 2010***, averring that the Government of Kenya, through the Permanent Secretary to the Treasury, is the grantee and proprietor of "all that piece of land situated South of Kwale Township in Kwale measuring [6,082.6] Hectares or thereabouts being Land Reference No. 27742"; that within the said parcel of land, Nyumba Sita Village has illegally been erected; that, at all material times, 1st defendant was the holder of the said parcel of land under a 99-year lease from the Government of Kenya (as from ***20th August, 2007***); that the plaintiffs have been in illegal occupation of the property since June, 2008; that the plaintiffs are squatters who have been trespassing upon 1st defendant's land; that 1st defendant "has been actively involved in the development of a sugar [-cane] plantation, on all that parcel of land known as Land Reference Number 27742".

For 3rd defendant, ***Salim Juma Mwalim***, Deputy County Clerk, swore a replying affidavit on ***29th March, 2010***, averring as follows: there is no averment for the plaintiffs, that 3rd defendant took any action injurious to them; the plaintiffs are "self-confessed trespassers and/or squatters"; and the land in question is owned by the Republic of Kenya, and so, relevant proceedings are regulated by s.16 of the Government Proceedings Act (Cap. 40, Laws of Kenya).

M/s. Mwahunga Mtana & Co. Advocates, in their submissions for the plaintiffs/applicants, stated that the Government of Kenya had, in 1914, leased the suit parcel of land to Ramisi Sugar Factory Ltd, which

collapsed in 1988; and counsel saw as the vital question herein: "When the sugar [cane] farm collapsed, what did the Government do with such a huge chunk of land?" Counsel's answer was: "It is clear that the Government ran out of ideas and the suit area stayed idle". Counsel urged that, in 1988, "the indigenous people who were already landless, had to move [into] the farm since the sugar [-cane] farm had collapsed", and they built their houses and planted crops. This is the nub of counsel's argument:

"….it is now 22……years since the plaintiffs settled on their respective areas and have developed [the same] without interruption, until the Government got the 1st defendant as a new invester. They had developed the area by maintaining the soil in good condition……[with] full-grown trees which were bearing fruits and benefiting their families".

Counsel urged that the Government, as it negotiated with new developers, had not "adequately consulted" the plaintiffs. So in these circumstances, by counsel's submissions, certain questions arose:

(i) do the plaintiffs have any legal rights over the suit parcel of land?
(ii) was 2nd defendant aware of the plaintiffs' legal rights?
(iii) if the orders sought are granted, will that jeopardize 1st defendant's operations?
(iv) have the defendants compensated the plaintiffs?

Counsel advance the argument of general principle, that "the land is still the property of the citizens but held in trust by the Government"; and that "the suit parcel of land is a plantation and the occupancy of some 50 acres by the plaintiffs will not in any way prevent 1st defendant from going on with its normal operations".

Counsel urged that 1st defendant had taken high-handed actions against the plaintiffs and their habitations: and that, on this account, it was proper to grant injunctive orders.

In their reply, on behalf of 1st defendant, M/s. Rachier & Amollo, Advocates submitted that the application is "misconceived, ……bad in law, and an abuse of the process of the Court". For the fifty-acre swathe of land occupied by Nyumba Sita Village is part of Government land which has been leased to 1st defendant; and by clause 3(i) of the lease, the 1st defendant was required "to use the entire premises for the purpose of undertaking sugar-cane farming or installing a sugar-cane processing mill, or undertaking other auxiliary activities related to sugar-cane farming". Thus, counsel urged, the applicants "have continued to perpetrate…..trespass by constructing temporary structures on the said portion of the …..property".

Counsel submitted that the applicants had no legal rights to the suit property, quite apart from the fact that their contention that they have nowhere to go, "can never be the basis for an order of injunction".

Learned counsel took up the applicants' contention that "they are occupying only a small portion of the area leased to 1st defendant": "this is an admission…..that they are indeed trespassers and/or squatters whose interests in respect of the said property can never be superior to those of 1st defendant who is a long-term lessee from the Government of Kenya". Counsel urged that the fact the property was granted to the Permanent Secretary to the Treasury, and that the said Permanent Secretary to the Treasury created a long-term lease in favour of 1st defendant, remained wholly unchallenged by the applicants; and so it followed that 1st defendant has proprietory interest over the said property, over and above any interest claimed by the plaintiffs. The pertinent law is set out in the Registration of Titles Act (Cap. 281, Laws of Kenya), s. 23 (1):

"The certificate of title issued by the Registrar to a purchaser of land upon a transfer of land or transmission by the proprietor thereof shall be taken by all [persons] as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or [endorsed] thereon

and the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party".

From the foregoing provision, counsel submitted, the title issued by the Registrar remains absolute and indefeasible: and the proprietory interest of 1st defendant flows from a title whose registered proprietor is the Government of Kenya.

To the plea that the applicants have been living on the suit land for a long time, counsel urged that this was not a relevant point: the said longevity of occupancy confers upon the plaintiffs no proprietory interest. The Court of Appeal, in ***Kimotho v. Mugo*** [1995] LLR 376 (CAK), had thus held:

"If the appellant had been in occupation of the suit land as a squatter without any right or title…., he was obviously in no position to resist the respondent's claim. Though the appellant had for a long time been in occupation of the suit land which was Government land before it was allocated to the respondent, this could not have helped him in resisting the respondent's claim where the latter is registered as owner of the land. Similarly if he the appellant had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument's sake the suit land had been erroneously allocated to the respondent, the appellant as a squatter in the suit land had no *locus standi* ***and the so-called erroneous allocation could not be an answer to the respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land".***

Counsel urged that the plaintiffs' application is ill-conceived, and bad in law. Thus, the applicants had not met the test in the precedent-setting case, ***Giella v. Cassman Brown and Co. Ltd*** [1973] E.A. 358, for the grant of interlocutory injunctions.

Counsel for 3rd defendant made submissions contesting the application: on the ground that the applicants have failed to show they have a ***prima facie*** case with a probability of success, nor demonstrated any substantial loss which they would suffer if not granted injunctive orders and which is not compensable by an award of damages. Counsel urged that the plaintiffs' interest in the suit property cannot override the proprietory interest of 1st defendant over the suit property; and that there is no rationale in the plaintiff's refusal to accept 1st defendant's offer to relocate them to another place which is not next to Msambweni Town.

The applicants have not invoked any recognized principle of law which entitled them to the 50 acres of land which falls within the wider suit land; but they have stated that they have been in occupation of the 50 acres of land for more than 20 years, that their village is located next to Msambweni Town and by the sea which is their source of livelihood, that they are committed to that livelihood and are reluctant to relocate elsewhere, that they have over the years planted trees and crops on the said 50 acres, that 1st defendant has taken high-handed action to dislodge them from the said 50 acres of land, that the Government when negotiating leasehold arrangements with 1st defendant did not consult them, that since the said 50 acres is only a limited portion of the suit land, they should be left to continue in occupation.

It is clear from the documentary evidence that the proprietor of the suit land, L.R. no. 27742, is the Permanent Secretary to the Treasury of Kenya, holding it for the Government; and the title-holder has created a lease in favour of 1st defendant. There is no legal basis upon which the applicants can stake a claim to the suit land, and all the grounds forming the basis of their application are of a purely charitable nature.

While taking judicial notice that the Kenyan socio-economic system is still at an embryonic stage, and many people such as the applicants have livelihood - hardships and so, need constant assistance, this Court notes, from the evidence on record, that 1st defendant is not averse to helping to secure for them resettlement arrangements; and it is prudent that the parties should, in good faith, pursue such a recourse.

The plaintiffs' application by Chamber Summons dated ***27th February, 2009*** is disallowed. Costs in the cause.

DATED and **DELIVERED** at **MOMBASA** this ***15th day of April, 2011*.**

……
J. B. OJWANG
JUDGE