



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Suit 87 of 2009

CHRISPUS CHENGO MASHA & 7 OTHERSPLAINTIFFS

VERSUS

DANIEL RICCIDEFENDANT

R U L I N G

By a Chamber Summons application dated 8th September 2009, the applicant seeks under Order XXXIX Rule 1 and 2 of the Civil Procedure Rules and section 3A and 63E of the Civil Procedure Act, for temporary injunction to issue restraining the defendant/respondent by himself, his agents, servants, administration, legal representatives and anyone claiming interest through the defendant, from trespassing, developing, constructing a perimeter wall, occupying, wasting and/or dealing with the plaintiff/applicants respective portions of land as clearly demarcated on the grounds in whatsoever manner, pending hearing and determination of the suit.

It is premised on grounds that:

- (1) The applicants are the registered legal and/or beneficial owners of land parcel known as Ngomeni Squatter Settlement/ 1393, 1386, 1390, 1751, 1379, 1394 and 1391 respectively
- (2) The respondent has trespassed onto those plots and has already excavated a foundation channel with an intention of putting up a

perimeter wall.

- (3) The respondent has already put down material and employed men to commence putting up the said wall.
- (4) The respondent is claiming the applicant's respective parcels where they have lived, occupied and utilized with their families for many years now, and are now having titles.
- (5) Unless the respondent is restrained from the on-going constructions, the applicants will suffer irreparably as they will lose their lives, homes and monetary compensation would not be sufficient to meet their damages.
- (6) Applicants undertake for damages in case of failing in their claim.

The application is supported by the affidavit sworn by 1st applicant on his own behalf and on behalf of the other applicants. The applicants aver that they are the registered legal owners of the parcels mentioned which titles were issued under the Registered Land Act and are annexed as CCM1. However some of the applicants are awaiting printing of title – annexed are letters of offer, plot acceptance letters and payment receipts all marked as a bundle CCM2.

They insist that respondent does not have any proprietary right or interest on the parcels and is therefore a trespasser – further that he is not even a neighbour, so as to give allowances for boundary confusion But is a total stranger out to grab the applicant's lands.

The application is opposed, and in his replying affidavit, the respondent states that he is the director of M/s Kenland Enterprises Ltd which owns several plots in Mambui area and had been erecting the perimeter wall which was stopped by a court injunction. He points out that prior to starting the construction of the wall, a sister company of Kenland Enterprises Ltd (which also owns two titles) was undertaking construction works which were submitted in January 2009 to the Malindi County Council for approval and the same were duly approved. He has annexed title documents issued to one Ali Islam Said who is to have

transferred the titles to respondent - contesting of transfer fees receipts which are annexed. He does confirm that applicants had ever challenged Ali Islam Saidi's claim to the land, by filing suit, but the cause was struck out in November 1995. Further that 3rd applicant was once a member of parliament for the area where the plots are situated, and was in 1994 sued by **Golden Sea Mambrui Ltd and Anor in Mombasa HCCC NO. 59 of 1994**, where the court upheld the sanctity of the titles in that matter and whose history is similar to the titles held by M/s Kenland (a copy of the ruling and a newspaper report is annexed).

That in 1996, the 2nd – 5th applicants were involved in a tussle with M/s Kuze Holdings Ltd who were the owners of plot No. 651 and 652 and other parties who owned plot No. 649 and 650 (which are in the neighborhood) following a wrongful allocation to them as squatters, in what was otherwise private lands and so they knew the status of ownership of the plots by M/s Kenland Enterprises Ltd in respect of which they obtained the exparte injunction.

Further that in the recent past, there has been some talk that government may have erroneously demarcated and allocated private land to squatters in Ngomeni area of Malindi, and that such allocations have since been nullified.

That the titles/plots claimed by applicants are unaffected by the recent erroneous demarcation and allocation of private lands by the government in a scheme to settle squatters and the District Land Adjudication Officer has confirmed a willingness to attend court and clarify the matter.

It is the respondent's contention that the portion on which Kenland Enterprises is erecting the wall has clear beacons and other marks and are not occupied by any of the applicants or any third party as the same is bushy and undeveloped and none of the applicants physically reside on the parcels or have homesteads

there - all have their respective residences elsewhere and respondent has annexed photographs in support of that.

Respondent also contests the credibility of the documents of title exhibited by 7th and 8th applicant saying on the face of those titles are erasures and alterations and 1-6th plaintiff/applicant currently do not have title documents.

In view of this, respondent terms the application and filing of the suit as frivolous, malicious, oppressive, and an abuse of the court process.

Prior to the hearing of the application, on request by the applicants, the court, counsel for both parties and their respective clients visited the locus in quo. The court made observations which I will include in this ruling.

Mr. Otara submitted on behalf of the applicants that all the parcels in question are currently registered under the Registered Lands Act and since the defendant/respondent has not filed a counterclaim, then the applicant's claims to the parcels remain unchallenged.

He referred to the annexures by respondent and pointed out that, there are indications that Title Deed was issued erroneously and that annexures CCM – copies of certificate of official search issued the Lands Registrar on 9-11-07 and 25-4-08 are different from the annexure to the supplementary affidavit by the respondent, and it is Mr. Otara's connection that the document NM3 has been prepared for purposes of this application and all the proceedings. He also points out to erasures in documents purportedly preferred by Ngomeni Settlement Scheme (NM5) referring to the area list (Pg 22-63) and that these have erasures which are countersigned by the District Land Adjudication Officer instead of the Land Registrar and that the genuine undoctored list is the

one marked CCM from page 1-42, so NM5 should be disregarded.

He pokes holes at the certificates of title relied on by respondent saying no one knows whether these titles have any relationship with the parcels registered under Cap 300.

In reply, Mr. Maosa for the respondent submitted that applicants had failed to establish a prima facie case so as to be entitled to an injunction. He pointed out the claims by applicants that they had occupied and built on the parcels, yet when the court visited the locus in quo, there was not a single homestead or family living to the land and claims of losing their homesteads were not genuine.

As regards the official search which the applicants seem to rely on, Mr. Maosa pointed out that the search was done in the year 2007 and more recent searches by the respondent in 2009 clearly shows that the titles given to plaintiffs/applicant were given erroneously and the applicants have not countered this with another search, so the court ought to find that the titles have no proprietary value and in any event they were issued erroneously. To support this claim about erroneous issuance, Mr. Maosa relies on NM5, a letter by the Land Registrar Kilifi giving a copy of area list containing all the persons who were given plots and persons who were removed from the list because their titles covered parcels belonging to other people. He argues that all the titles brought before this court have been cancelled as they are not contained in the map sheet No. 19. Mr. Maosa submits that applicants knew that their titles had a problem and it's not surprising that they cannot lay before court searches done in 2009 – which is why they choose to rely on searches done in 2007.

Mr. Maosa asks the court to consider that for instance the 1st applicant Chrispinus Chengo was involved in HCCC 646 of 1992(Msa) where he sued

Ali Islam & Commissioner of Lands. Ali Islam (Ali Islam is said to be the one who sold land to the respondent) and the matter was heard and struck out by Wambilliangah J.

Further in another case **CC 59 of 1992 Golar C. Mambrui v Casina Yeri** the 3rd plaintiff participated in the matter yet he did not disclose this to court. The question posed then is that – what is the applicant’s case, when they have no valid title, are not in possession and conceded at the locus in quo that they have homesteads elsewhere it is further argued, that the respondent’s titles are as old as 1992 and no evidence has been led to show that they are bad in law.

In reply Mr. Otara insists that applicants have title which has been issued under the Registration of Lands Act and no suit has been filed in court to challenge those titles. Further that titles issued under Registration of Lands Act cannot just be cancelled by deleting on the area list.

As for past suits referred to, Mr. Otara points out that none of those suits involved the respondent and those were different matters altogether. So applicants have established a prima facie case.

The principles to be considered in grant of an injunction are well laid down in the celebrated case of **Giella v Cassman Brown 1973 EA** and are as follows:

- (1) Have the applicants established a prima facie case with probability of success

Thomas Hinzano Ngonya has a title deed dated 27-7-07 issued under the Registration of Lands Act in respect of parcel No. Ngomeni Squatter Scheme 1393. Yeri Fredrick Changawa has a title deed issued under the Registration of Lands Act dated 27-7-07 for parcel No. 13986 – they are 7 and 8th applicants.

The other applicants do not have title documents yet, but have annexed letters

dated 10th May 2007 written to the Director of Land Adjudication and Settlement accepting the plots – these are:

- (a) Joseph Mbavu Mwadime (applicant No.) for plot 1392
- (b) George Katana Yeri (Applicant No. 6) has a letter dated 14-4-08 for accepting plot No. 1390 and he has annexed payment receipts made in respect of that acceptance.
- (c) Charo Mwadime Tunje (applicant No. 2) by letter dated 8-11-07 and payment receipts confirming acceptance of plot 1394.
- (d) Wanje Mwadime Finyange letter dated 8-1-07 and receipts accepting plot 1395
- (e) Chrispus Chengo Masha, letter dated 8-11-07, and receipt accepting plot 1391.

The letter of offer had directed that they make payments so as to be shown the plot boundaries before documentation of these acceptances and payments were later channeled, then no consent to that effect was made to the applicants, instead what respondent seeks to rely on is an area list showing certain cancellations – the prelude to these cancellation is not disclosed and little wonder that applicants still lay claim to those plots. I concur with Mr. Otara that for 7th and 8th applicant then titles were issued under Registration of Lands Act and remains absolute and can only be cancelled on grounds of mistake, fraud on misrepresentation – I suppose this is what respondent would seek to demonstrate at the hearing of the suit.

Respondent says the parcels were transferred to him by Ali Islam Said – there is no sale agreement, just transfer receipts and the approval for development by Malindi County Council does not transform into documents of title or confer title on respondent.

What clearly comes out is that there appears to either be a double allocation (hence the term erroneous issuance of title) to both the applicants and the respondent – who is the proper title holder? That has to be determined at a full hearing and not interim stage.

I am persuaded that applicants have sufficiently demonstrated their interest in the land and established a prima facie case – all other considerations such as what the latest search shows, the validity of certain documents, the erasures – all these are matters to be argued in the substantive suit.

Then there is the question of whether they are in occupation and would suffer irreparable loss – the court visited the locus in quo – certainly there was no homestead or family living on the land and to that extent the applicants were not honest and the loss they alluded to was not genuine so they would not satisfy the second limb in **Giella's** case.

The third prima relates to the balance of convenience – which I need not look at as it would be pegged on whether there is some doubt on the 1st and 2nd principle – the 1st has been satisfied. I therefore issue orders of injunction restraining the respondent from trespassing, developing, constructing a perimeter wall, wasting or in any other manner dealing with the said parcels until the matter is heard and determined.

Since respondent had already begun building a perimeter wall, I direct that the applicants jointly deposit the sum of Kshs. 500,000/- (five hundred thousands only) as an undertaking for damages within 21 (twenty one) days from today in default of which the injunctive order will stand discharged.

I further direct that parties do take hearing date for the substantive suit, within 1 (one) month from today's date.

Costs of this application shall be borne by the respondent.

Delivered and dated this **23rd February 2010** at Malindi.

H. A. Omondi

JUDGE

Mr. Otara for applicant

No appearance for respondent