



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 31 OF 2008**

**SUDHABEN AMRITTAL SHAH**  
**VIPINI KUMAR NAHTALAL SHAR.....PLAINTIFFS**

**-VERSUS-**

**FARUK SWALEH BAYA**  
**BAYA KADENGE**  
**JOYCE SIDI CHOME**  
**ANTIOCHIA LTD**  
**LAND REGISTRAR, KILIFI**  
**ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

The application dated 28-7-08 is by way of Notice of Motion made under section 3A and 63(e) Civil Procedure Act and section 128 of the Registration of Lands Act (Cap 300) seeking that an inhibition order be issued against the land Registrar Kilifi, inhibiting registration of any dealings in respect of Parcel no. Chembe/Kibambamshe/409 in any manner whatsoever pending hearing and determination of the suit. It is premised on grounds that:

- (a) The applicant's suit seeks for cancellation of Title in the names of 4<sup>th</sup> defendant and re-issue in the names of the applicants
- (b) The plaintiffs/applicants are the first registered owners
- (c) The suit property is at risk of being disposed off and/or transferred to a Third Party as there is nothing stopping the defendants from so doing.
- (d) The plaintiff's case has overwhelming chances of success.
- (e) It would be in the interest of justice if the subject matter is preserved pending determination of this suit and registration in favour of the 4<sup>th</sup> defendant in question and even pending police investigations.
- (f) The applicants have never signed any sale agreement, transfer and/or consent application and they are apprehensive that since the registration of the suit property herein has been fraudulently obtained, the 4<sup>th</sup> defendant may further transfer it with a purpose of defeating justice.

The application is supported by the affidavit sworn by Sudhaben Amrital Shah on her own behalf and on behalf of the 2<sup>nd</sup> applicant. She depones that the land has all along been registered in their names until

recently when they discovered that it is now registered in the names of 4<sup>th</sup> defendant. They question the transfer to the 4<sup>th</sup> defendant and it is now subject of police investigations as shown by a letter dated 4<sup>th</sup> June 2007 from CID Headquarters marked EX.SAS1.

The letter is written by R. K. Kalama (the District Land Registrar, Kilifi and Malindi Districts) to the 4<sup>th</sup> defendant stating that the parcel was erroneously registered in the names of 1<sup>st</sup> to 3<sup>rd</sup> respondent who later on transferred the same to 4<sup>th</sup> respondent. The letter further gives a background of how ownership of the land had changed and by 25<sup>th</sup> June 1980, the applicants were the registered owners.

The letter required 4<sup>th</sup> defendant to surrender the Title issued to it and to also present documents of ownership.

Copy of the title issued to respondent is annexed as Ex. SAS 3 and they say theirs was the first registration. Their fear is the likelihood of the property further changing hands and ending up with a Third Party, hence the prayer for inhibition.

The application is opposed, and in a replying affidavit sworn by the 4<sup>th</sup> respondent's managing director, it is deponed that 4<sup>th</sup> respondent is legally registered as the proprietor.

He depones that the property was transferred to the 4<sup>th</sup> respondent by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents who had been offered the plot by the Government on 28<sup>th</sup> April 2000 as per letter of offer marked UB III.

By a transfer dated 2000 and registered on 14<sup>th</sup> November 2001 as well as a discharge of the same date, the Government through the Settlement Fund Trustees transferred its interest in the said plot through the then on-going squatter resettlement programme to the 1<sup>st</sup> – 3<sup>rd</sup> respondents. He confirmed receiving the terms written by the Land Registrar Kilifi regarding the alleged irregular registration and confirms that CID did infact carry out investigations and the outcome was that police confirmed 4<sup>th</sup> respondent to be the legal owner of the plot and that no fraud had been detected. The letter marked UB (VI) is written by Gerald Wangila the then DCIO Kilifi and is dated 17<sup>th</sup> July 20007 saying nothing unusual was detected regarding 4<sup>th</sup> respondent's registration and that there were no records to support the ownership claims by the applicants.

On the strength of the DCIO's letter the Permanent Secretary in the Ministry of Lands wrote a letter dated 9<sup>th</sup> August 2007 confirming the sanctity of 4<sup>th</sup> respondent's title. The 4<sup>th</sup> defendant's Counsel then wrote to the Land Registrar to remove the restriction which had been placed and he obtained orders of mandamus in Mombasa to effect that a search conducted shows that 4<sup>th</sup> defendant is still the owner and a letter from Ministry of Lands dated 1<sup>st</sup> March 2006 still confirmed 4<sup>th</sup> Respondent as the proprietor.

The 4<sup>th</sup> respondent avers that the orders sought are not obtainable because they are not substantive reliefs pleaded in the plaint, and are tantamount to setting aside orders made in Mombasa HCC Misc. No. 7 of 2008 which had directed the Registrar of Lands to remove the restriction. The orders sought are substantially injunctive orders which cannot issue against the 5<sup>th</sup> respondent.

The reliefs sought are unconstitutional against the proprietary rights of 4<sup>th</sup> respondent. The matter was disposed of by way of written submission by both Counsel. Mr. Angima for applicant submitted that the annexed documents show that once upon a time, the applicants valued the property, long before the 1-3<sup>rd</sup> respondents did. He urges this court to take into consideration the history of the parcel, preceding the registration of the first three respondents and on that ground alone the applicant's registration should not be defeated especially because 4<sup>th</sup> respondent's is not the first registration.

Mr. Angima submits that applicants have established a prima facie case with probability of success as they have demonstrated that they lost ownership despite having been proprietor at one time and that this was done by 5<sup>th</sup> respondent simply removing their name from the register and inserting the 1-3<sup>rd</sup> respondents.

Further that the 5<sup>th</sup> respondent had no authority to cancel the title and register new persons because that process was with the High Court under section 143(1) of the Registration of Land Act.

It is for these reasons that counsel submits applicants have a case with good chances of success. Secondly is the issue of forgery which Mr. Angima submits that the official search dated 28<sup>th</sup> March 2008 issued by Elizabeth Thoya the former land Registrar has now been established to be a forgery after the said Registrar swore an affidavit denying issuing that document. He urges this court to treat the subsequent search document with caution as it predates the discredited one and the fact that 4<sup>th</sup> respondent can dare to rely on a forged document should be reason enough to read malifides in the whole matter.

Mr. Angima further points out that all the other defendants have not opposed this suit and there is even an interlocutory judgment against 1-3<sup>rd</sup> defendants which makes possibility of the suit succeeding virtually certain.

Secondly, that the applicants would suffer irreparable loss as the property is a beach front property whose nature cannot be compensated by damages and in any event it was bought by 1<sup>st</sup> applicant's late husband so it has significant sentimental value to her.

On a balance of convenience – Mr. Angima submits that it makes sense to preserve the suit property until litigation has been concluded otherwise the court may get engaged in a futile exercise and render the whole process nugatory. He points out that 4<sup>th</sup> respondent will not suffer any prejudice as no one has developed the property yet if the property was to be transferred to a Third Party, the applicants would be greatly prejudiced. As for the prayer of inhibition not forming part of prayers in the plaint, applicant's Counsel submits that cannot be fatal as the intention is simply to preserve the suit property until the matter is heard and determined and in any case if the omission is crucial, applicant can cure it by an amendment.

As for being time barred, Mr. Angima submits that what is material for the sake of the law on Limitations of Actions is that from 2001 when the applicants were registered as proprietors to 2008 when this claim was brought, only seven years have lapsed, and the claim is within the 12 years allowed in law to claim land and that the only limitation applicable concerns public land under section 41 of the Limitations of Actions Act which this parcel isn't.

In response, Mr. Kilonzo for the respondent submits that the application is fatally defective because it offends the provisions of Order VI Rule 6(1) of the Civil Procedure Rules which states that:

***“No party may in any pleading make an allegation of fact, or raise any new ground of claims, inconsistent with a previous pleading of his in the same suit”***

It is Mr. Kilonzo's contention that the reliefs sought in the plaintiff's notice of motion dated 28-7-08 are substantive reliefs which are not pleaded in the plaint and so cannot be granted at the interlocutory stage – reference is made to the decision in ***Kinyatti v The Attorney General (1988) KLR 33***, in similar circumstances the Court of Appeal held that a grant of interlocutory relief is an interim remedy and is normally sought during the pendency of a substantive suit commenced in accordance with the Civil Procedure Rules. In this case, the plaintiffs have departed from prayers in the plaint and this is tantamount to asking for an interlocutory relief without a substantive suit and on account of this the application should be struck out.

As for the orders sought to be effected by the 5<sup>th</sup> defendant, Mr. Kilonzo argues that they are injunctive by nature which therefore make it tantamount to seeking injunction orders against the Government, and this is not possible under section 16 (1) of the Government Proceedings Act which states that:

***“where in any proceedings against the Government, any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance but may in lieu thereof, make an order declaratory of the rights of the parties”***

The argument is further fortified by the decision in **HCCC No. 133 of 2006 Chogi’s Garage Ltd v AG** which held that it was not possible to issue injunction orders against the Government. In any event the plaintiffs did not follow the procedure set down under section 13A (1) of the Government Proceedings Act which provides that:

***“No proceedings against the Government shall be or be instituted until after the expiry of thirty days after a notice in writing has been served on the Government in relation to those proceedings”***

Mr. Kilonzo takes issue with the purported notice of institution of suit to the Attorney General marked SAS 5 using the same does not bear a stamp to confirm it was received by the Attorney General, nor does it show the officer who received it so it should not be deemed as valid.

It is further argued that since the land in dispute is registered under the Registered Lands Act (Cap 300) then the action ought to have been filed by way of Originating Summons as stated under Order XXXVI Rule 3F which reads:

***“An application under the Registration of Lands Act other than section 120, 28, 133, 138, 143 and 150 thereof, shall be made by an Originating Summons unless there is pending a suit involving the same lands when the application may be made by summons in chambers in that suit.”***

Mr. Kilonzo’s contention is that this suit does not lie in the exceptions set out, yet it was instituted by way of plaint.

It is further submitted that the provisions of section 143(1) of the Registered Land Act restricts the court from rectifying the register in the case of a first registration regardless of whether Title was obtained by fraud as 4<sup>th</sup> defendant has demonstrated that the 1-3<sup>rd</sup> defendant acquired a valid Title through the right process. Mr. Kilonzo submits that 4<sup>th</sup> respondent is a purchaser for value without notice of any fraud or impropriety of the title nor was he a party to any fraud, so it has a good indefeasible title.

It is also argued that the suit is time barred because the claim accrued way back in 1986, twelve years elapsed way back and this suit is a non starter under section 7 of the statute of Limitations.

It is also submitted that the applicants seek orders of mandamus which cannot be obtained by way of plaint and applicant should have moved court by way of Judicial Review because section 8(1) of the Law Reform Act clearly provides that:

***“The High Court shall not, whether in the exercise of its civil jurisdiction, issue any of the prerogative***

## ***writs of mandamus, prohibition or certiorari”***

It is pointed out that although applicants claim to own the parcel of land, they have failed to produce even a single document of ownership and the Title Deed annexed as SAS 3 in support of their application is issued in the names of the 4<sup>th</sup> defendant and their claims remain substantiated.

In considering this application the court has been urged to address procedural law which is that:

- 1) The fact that the prayers contained in the application are not included in the plaint
- 2) The procedure adopted in seeking orders against 5<sup>th</sup> respondent offends provisions of the Government Proceedings Act (Cap 40).
- 3) The procedure adopted in filing the action offends provisions of the Registration of Lands Act as the claim ought to have been filed by way of Originating Summons (OS) and not Plaint.
- 4) Proof of ownership of the property by applicants.

An order of inhibition is one which stops for a particular time or until the occurrence of a particular event, the registration of any dealing with any land, lease or charge. It is really some form of restraining order but specific to registration of land. The prayer is not contained in the plaint dated 15<sup>th</sup> May 2008. I have addressed my mind to the provisions of Order VI Rule 6 of the Civil Procedure Rules and indeed the prayers in that application are not in harmony with the prayers in the plaint and I concur with Mr. Kilonzo that the application does not offend Order VI Rule 6.

What would be the remedy? Mr. Angima says a cure can be found by an amendment – yet as matters stand no amendment has been made or sought. The **Kinyatti case** cited by Mr. Kilonzo provides that the remedy would be to strike out the offending paragraphs – in which case this application would collapse because that is the only prayer in the application. I make a finding that the application offends provisions of Order VI Rule 1.

The second issue to consider is whether the application offends section 16(1) and 13 A (1) of the Government Proceedings Act. The 5<sup>th</sup> defendant is a public servant under the department of Ministry of Lands – that would require that before the proceedings are instituted a notice in writing be served on the Attorney General – the purported notice is contested due to certain omissions – it is not stamped as received nor does it indicate which officer received it. Counsel for applicant did not address these omissions on the face of the notice and I make a finding that the requirement was not satisfied. However of greater significance is the nature of the prayer – is it one which cannot issue against the 5<sup>th</sup> defendant?

An inhibition, although having more or less same effect as an injunction to the extent that both restrain certain action, is not the same as an injunction. An inhibition is a notice of prohibition and under the Registered Lands Act it is with regard to restraining or forbidding registration of land, change or lease.

An injunction on the other hand is defined in Black’s Law Dictionary (Eighth Edition) as a document framed according to the circumstances of the case, commencing an act or restraining an act. In my understanding inhibition is an order which may issue against a Government Department Employee such is the Land Registrar to forbid certain action – so I do not agree with Mr. Kilonzo on that limb and his case is easily distinguishable from **Choge’s case** where the relief sought was an INJUNCTION against the Government.

As to whether the action should have commenced by way of an Originating Summons on plaint – I can do better than to refer to Order XXXVI Rule 37 which clearly provides that an application under Registered Lands Act, other than under specific sections shall be made by way of Originating Summons.

This application is made under section 128 which is not included in the pleadings – the pleadings seek for declaration and cancellation of Title which fall within what is contemplated under section 143 of the Registered Lands Act and which is one of the exceptions set out under Order XXXVI Rule 3F, so the applicant has not offended the provisions.

Then there is the question of substantive law i.e proof of ownership – Mr. Angima submitted that applicants demonstrated that they once owned the land and therefore established a prima facie case with probability of success. Further that 4<sup>th</sup> respondent's acquisition of Title is tainted with illegality and the matter is under police investigation.

There isn't a single document of ownership produced by the applicants – not even an allotment letter and the correspondence by the Land Registrar Kilifi (one Kalama), that the land belonged to the applicants has nothing whatsoever to support it, not even a letter of offer from the Government. The allegation that the matter is under police investigation is deflated by correspondence annexed by the 4<sup>th</sup> respondent, from none other than the DCIO Kilifi who carried out investigations and gave 4<sup>th</sup> respondent a clean bill of health by his letter dated 17<sup>th</sup> July 2007. This was then followed by a letter from the Permanent Secretary, Ministry of Lands confirming the Respondent's Title. The purported certificate of search disowned by one Elizabeth Thoya is NOT established as a forgery and I think I made a ruling on 16-6-10 on the issue – her disowning it does not prove forgery and I will not revisit the matter.

The upshot is that all the annexures referred to when considered along with the respondent's annexures in fact show that applicants do not have a prima facie case with probability of success – the fact that interlocutory judgment was entered does not prove that upon formal proof the matter will be a walk in the park – especially because the person affected directly is not 1-3<sup>rd</sup> defendants but 4<sup>th</sup> and 5<sup>th</sup> defendants.

Since ownership has not been proved then the question of whether damages would be adequate compensation does not arise – one cannot lose what he or she does not even have a scintilla of evidence of ownership on.

The balance of convenience tilts away from the applicant who has failed to show what real stake they have on the property and savings heavily in favour of the respondent who has demonstrated how he came to acquire the property.

I decline to grant the order sought and the application is dismissed with costs to respondent.

Read, dated and delivered on this 9<sup>th</sup> day of **December 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr. Kilonzo for 4<sup>th</sup> defendant  
Miss Chepkwony holding brief for Mr. Angima for plaintiff  
No appearance for defendants