



THE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUNDPLAINTIFF

VERSUS

DOUGLAS NGALA & 4 OTHERSDEFENDANTS

JUDGEMENT

The Board of Trustees National Social Security Fund (plaintiff), has filed this claim against Douglas Ngala, Mr. Abdalla, George Chai Kazungu, Joginda Chai and Moses Mtepe Kidangi (defendants) seeking for:

- a) A declaration that the plaintiff is the legal and rightful owner of the property known as Kikambala L.R. No. 1088/III/MN/ and Kikambala L. R. No. 1089/III/MN in Kilifi District and that the defendants and/or any other party's action of entering into, possessing, occupying, developing, renting out, excavating and/or harvesting coral blocks, leasing, handing over possession and/or dealing in any way with the said property are unconstitutional, unlawful, unprocedural and null and void, and any purported agreement, lease, document, letter, deed plan and/or any other interested deed issued by and/or entered between the defendant and/or any other party should be revoked, cancelled and annulled as the same is ineffective and un-operative as regards the said freehold property which is not subject to any powers exercisable by the defendants and/or any other party and to restore the condition of the said property to its original state and to revert the title to the plaintiff who is the rightful and legal owner of the property.
- b) An order restraining the defendants and any third parties and/or any other party whether by themselves as their servants, agents, employees and/or others from further excavating and/or harvesting coral blocks, possessing, occupying, trespassing, developing, renting/leasing out the property, handing over possession and/or otherwise from dealing with and/or interfering in any other way with the plaintiff's title and property known as Plot No. LR No. 1088 and LR No. 1089/III/MN – Kikambala.
- c) An eviction and/or vacant possession order against defendants unlawfully occupying and harvesting coral blocks therefrom.

In the statement of defence, the 4th defendant deny the allegations or that they have illegally entered and occupied the suit premises.

It is further pleaded on without prejudice basis, that the plaintiff bought the said plots from persons who had grabbed them, notwithstanding that the 4th defendant and others were already living on the said plot. This he says is evidenced by the memorandum of Commission of inquiry into illegal/irregular allocation of public land – Kijipwa settlement Scheme.

4th defendant prays that they (along with those who are living on the said land), be declared the owners as the plaintiffs bought the same without first consulting and/or confirmation whether the land sold was free from any encumbrance and whether the sellers were the rightful owner. He urges the court not to issue any restricting orders against them or to restraining orders against them or to evict them and pray that the plaintiff's suit be dismissed with costs.

The written statement of defence is dated 17-8-09 and date stamped as received at Malindi High Court registry on 22-8-07.

The 1st, 2nd, 3rd and 5th defendants did not file any statement of defence although they had entered appearance through the firm of Kamoti Advocate interlocutory judgment was thus entered in favour of plaintiff against them on 27-8-07 and case proceeded for formal proof.

The matter proceed for hearing on 8-7-09, on an exparte basis after it was demonstrated to this court that all the parties had been served.

Margaret Osolika (PW1) the plaintiff's legal officer in the legal department testified that it came to her knowledge that NSSF had purchased land being LR No. MN/III/1088 situated in Kikambala in 1994 from Suntrack Beach Hotel Ltd for Kshs. 250,000,000/- (two hundred and fifty million) the sale was on 16-5-94 and the sale agreement signed by the purchaser and seller has been produced as exhibit.

Thereafter, NSSF obtained Title documents produced as Ex 1A and 1B showing date of registration for parcel No. 1088 as 17th may 1994 and a Deed Plan issued.

With regard to parcel No. MN/III/1089 also situated in Kikambala, NSSF entered into an agreement with Seaview Investments Ltd on 16-5-94 as per the sale agreement produced as Ex 2. The sale price was Kshs. 225,000,000(two hundred and twenty five million). Consequently a Title Deed issued for the same (produced as Ex 3A). The Title was registered in 1994 and transferred to NSSF's Board of Trustees on 17th May 1994. A Deed Plan also issued and is produced as Ex 3B. The two plots are next to each other. The plaintiff's officers discovered the presence of the defendants on the said property and carried out a search to establish whether there was a change of property.

The search certificate in respect of plot no. 1089 dated 7-7-09 showed NSSF as the owner – it is produced as Ex4. so instructions were given to NSSF lawyer to issue eviction notices on the defendants – the same is produced as Ex 5 plus a demand notice dated 2-4-05. The defendants did not vacate the property and so this suit was filed. Thereafter, one of the defendants visited the NSSF offices but PW1 did not meet him. It is her evidence that NSSF had not issued defendants with any lease, consent or consent to remain on the land and were therefore on the land illegal and were trespassers.

A postal search Ex 7A and B showed the parcels were 99 year leases and the registered owners were the Board of Trustees NSSF and there were no encumbrances on both properties. Subsequently plaintiff's filed an application in court, for interim orders against the defendants which orders were granted, but defendants continued using the land, hence the present prayers.

The plaintiff's Coast Region property manager, Martin Mutua Mbuvi testified that defendants are still on the property and are carrying out quarrying activities which activities he discovered in the year 2005 when he was posted to the Coast as NSSF property manager.

He explained that when they wanted to put beacons on the property and erect a fence, they were met with hostility from the quarry workers who were violent.

He stresses that at the time of purchase of the property, there were no encumbrances on it at all and that all allegations of defendants being on the land even before purchase are not true. He also draws to this court's attention the title documents which do not show joint ownership and that NSSF is the rightful owner of the property.

No evidence has been tendered to controvert or dent the evidence presented to this court in favour of the plaintiffs. Miss Chesaro submits that the Title Documents and Deed Plans confirm ownership by plaintiffs. She points out that the statement of defence purportedly filed by 4th defendant really ought to have been by the 5th defendant and as such it has no legal basis.

Actually that statement of defence is filed by Moses Mtepe Kidanga – (the 5th defendant) the names are correct, only that he has described himself as the 4th defendant instead of 5th defendant. The 4th defendant had Kamoti and Co. Advocate on record for him and never filed defence. I don't think that misdescription goes to the root of the suit and did not occasion any prejudice to the plaintiff whose counsel apparently understood very well that the intention of that statement of defence was with respect to 5th defendant. I decline to strike it out.

The plaintiff has demonstrated that it is the registered owner of the two parcels and is entitled to them without any unwarranted interference by defendants or other third parties.

I therefore declare that plaintiffs are the bona fide registered owners of LR 1088/III/MN and LR MN 1089/III/MN both situated in Kikambala and measuring 8.758 and 8.754 respectively.

The defendants are restrained by themselves and their agents, employees, servants from further excavating and/or harvesting coral blocks, possessing, occupying, trespassing, developing, renting, leasing out, or otherwise dealing with the property.

The defendants do give vacant possession of the said properties within 30 (thirty) days from the date of this order and in default they shall be evicted therefrom.

I award costs of this suit to plaintiffs.

Delivered and dated this 26th day of **October 2009** at Malindi.

H. A. Omondi

JUDGE