REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 289 OF 2009

SATUN LIMITED…………………………………………..PLAINTIFF

-VERSUS-

THE ATTORNEY-GENERAL…………………….….1ST DEFENDANT

ROY ROD KINYALE…………………………………2ND DEFENDANT

PAPELLO INVESTMENTS LIMITED………………….3RD DEFENDANT

RULING

The plaintiff moved the Court by Chamber Summons of 24th August, 2009 brought under Order ***XXXIX,*** rules 1,2,2A,3 and 9 of the Civil Procedure Rules. The substantive prayer was expressed as follows:

"*THAT the 2nd and 3rd defendants whether by themselves or by their agents, servants, employees and/or any person claiming under them in any manner whatsoever and howsoever, be restrained from selling, transferring, charging, mortgaging, leasing, subdividing, entering on, committing waste by harvesting coral rocks therefrom or otherwise interfering and/or dealing in any way whatsoever with all that parcel of land known as L.R. No. MN/III/3348 until the hearing and final determination of this suit*".

In the general grounds, it was stated that the plaintiff is the registered proprietor of the leasehold interest in the suit land, having been issued with Grant No. C.R. 29660 dated *21st February, 1997* by the Commissioner of Lands which grant was registered on *4th March, 1997*. On *28th July, 2006* the Commissioner of Lands purported to issue another Grant No. C.R. 44357 to 2nd and 3rd defendants with respect to the suit property which grant was registered on *17th October, 2008*. It is contended that the purported issuance of another grant with respect to the suit property by the commissioner of Lands to 2nd and 3rd Defendants was "unlawful,null and void".

It is stated as one of the general grounds, that 2nd and 3rd defendants have "illegally and irregularly assumed ownership of the suit property and have put up a temporary structure and commenced the harvesting of coral rocks therefrom which harvest is causing great damage to the suit property". The applicant states that 2nd and 3rd defendants have ignored notices issued by the plaintiff, requiring them to vacate the property and stop harvesting coral rocks from that property.

The applicant is "apprehensive that the 2nd and 3rd defendants, unless prevented by this Honourable court, will continue to commit waste on the suit property and may sell, lease, mortgage, charge the same thereby causing irreparable loss to the plaintiff".

Evidence to support the application is set out in the affidavit of *Mohamedraza Sajjad Rashid*, a director of the plaintiff company, sworn on 24th August, 2009.

The 2nd defendant, in his replying affidavit of 28th September, 2009 deponed that he is the owner of L.R. No. MN/III/3348 by virtue of Grant No. 44357. The 2nd defendant further averred that "the plaintiff and/or its directors are foreigners", and that he (2nd defendant) had been in occupation of the suit property over the last 35 years. The 2nd defendant depones that the Commissioner of Lands had failed to verify the situation on the ground when he allotted the suit land to the plaintiff; but in his depositions, 2nd defendant also doubts the genuineness of the allotment letter held by the plaintiff.

The 2nd defendant depones that the plaintiff who was not in possession of the suit land between *1997* (when it says it received the Grant for the suit property) and 2006 (when Grant was issued to 2nd defendant) must have been aware that the suit land was occupied by 2nd defendant.

The 2nd defendant depones that he applied for the suit land in 1991, and a survey was conducted in 1992 and the suit property at the time bore the reference number MN/III/3348: a letter of allotment was issued in 1991 and payment of standing premium was made at the time, save that the Grant was not issued until 2006. The 2nd defendant deponed that his own application to the Commissioner of Lands had preceded that of the plaintiff, and that his grant had been lawfully registered. The 2nd defendant deponed that he had, "a long time ago" built on the suit land a permanent structure of coral stones and mortar, as well as a *makuti*-thatched store for his agricultural produce.

The 2nd defendant deponed that the latest postal searches at the Mombasa Lands Office, in October 2008 and 2009, reveal that the registered owners are 2nd and 3rd defendants.

The claims in the instant application flow from the pleadings in the main cause: the plaintiff's plaint of 24th August, 2009; the 2nd and 3rd defendants' statement of defence and counterclaim; and the plaintiff's reply to 2nd and 3rd defendant's statement of defence, and defence to counterclaim.

Learned counsel *Mr. Okong'o* submitted that on a *prima facie* basis, right was on the side of the plaintiff and that on this account, orders of injunction should be granted in favour of the plaintiff, pending the hearing and determination of the main cause lodged in the pleadings.

Counsel's submissions proceeded from the claim *common to both sides* in the suit: being a registered proprietor of the suit premises. The crucial time, for the plaintiff, is the year *1997*; Grant No. CR 29660 was issued by the President, in favour of the plaintiff; this was signed by the Commissioner of Lands on *21st February, 1997*; and the Grant was registered at the Mombasa District Land Registry on *4th March, 1997*. The Grant was issued pursuant to an allotment letter of *22nd November, 1996*. The applicant complied with the terms of the allotment by paying the requisite fees.

When did the plaintiff sense and apprehend the activities of the 2nd and 3rd defendants upon the suit property? Only on *9th June, 2009*; the plaintiff realised that 2nd and 3rd defendants were harvesting coral rocks, for sale to members of the public. When the plaintiff inquired about the commercial activities on the suit property, the 2nd and 3rd defendants met the plaintiff with another Grant relating to the suit property, purporting to be from the Commissioner of Lands, this being No. CR. 44357, issued on *28th July, 2006*.

It was counsel's contention that the legal Grant was that in the plaintiff's custody: because the

Commissioner, after signing Grant No. CR. 29660 on *21st February, 1997* was no longer in a position in law, some ten years later, to issue another Grant for the same property.

Counsel urged that under the Government Lands Act (Cap. 280, Laws of Kenya), unalienated land as defined in s.2, may be the subject of disposition by Grant, by the President; but since, as at the time of the second Grant, the suit premises had already been leased out to the plaintiff, there was no unalienated land over the suit premises which could again be the subject of a Grant to 2nd and 3rd defendants.

Mr. Okong'o also sought to draw a distinction between "letter of allotment" and "Grant", as a basis for claiming legal title to be in the hands of the plaintiff, rather than of 2nd and 3rd defendants: even though the respondents' letter of allotment was issued earlier (in *1991*), this was a "mere letter of allotment", not giving rise to "lease or title recognized in law".

Counsel invoked the Court of Appeal decision in *Dr. Joseph N. K. arap Ng'ok v. Justice Moijo Ole Keiwua & Four others*, Civil Application No. Nai 60 of 1997, in which the following passage occurs:

"*[Counsel] who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held."*

Learned counsel urged that the plaintiff was the holder of a valid title – because the plaintiff was the *first* to be issued with a legal document of title, under the Registration of Titles Act (Cap. 281, Laws of Kenya); and by s.23 of that Act, a title once issued is indefeasible, unless acquired through fraud. Counsel urged that it had not been pleaded that the plaintiff was involved in any fraud; and consequently, the plaintiff's title was indefeasible.

Learned counsel invoked the Court of Appeal decision in *George Cheyne & 20 others v. Robin Munyua Kimotho & 3 others*, Nairobi Civil Appeal No. 272 of 1998, in which the following passage occurs:

"*Section 23(1) of the Registration of Titles Act….gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party".*

On that basis counsel asked: "If it was lawful for the Commissioner to issue new titles for the same land, would indefeasibility still remain? No."

Counsel urged that he had shown a *prima facie* case with a good chance of success, and he submitted that if the orders sought were not granted, the applicant would suffer irreparable harm. Counsel prayed for orders to preserve the *status quo*, pending the determination of the suit.

Learned counsel submitted that the respondents had not denied that the plaintiff's Grant was the first in time; that they also did not deny that they were carrying out quarrying activities on the suit land; that their only case is founded on them holding letters of allotment, as well as a document of title; that they had no claim against the plaintiff based on fraud, in the acquisition of documents of title. In these circumstances, counsel urged, there were no grounds for denying the plaintiff the orders sought.

Although the real basis of the dispute is how the Commissioner of Lands could claim legality in issuing two different Grants for the same parcel of land, his representative, learned counsel from the State Law Office, opted in favour of muteness, on the ground that there were no orders against his client.

Learned counsel *Mr. Mwaboza*, for 2nd and 3rd defendants, laid emphasis on the fact that "the plaintiffs haven't been resident on the suit property"; he urged that it was undisputed, that his clients "have been on the suit property all this time, even when the letter of allotment was issued". Counsel raised the evidence

in the replying affidavit, showing that, indeed, the plaintiffs had been in possession of the suit land even in the early 1980's.

Mr. Mwaboza raised the question of *principle*, that given the fact that the 2nd and 3rd defendants had been in occupation of the suit land when Grant of title was being conferred upon the plaintiff, there had been an "abuse office by the Commissioner of Lands" who "[granted] lease without verification on the ground";and the Commissioner of Lands "granted the land to the plaintiff in what is popularly known as 'land-grabbing'."

But counsel went beyond the distinction between "legal-claim" and "abuse-behind-legal-claim", to the *evidentiary question,* as to the validity of the letter of allotment produced by the plaintiff. In this regard learned counsel thus remarked:

"*The letter of allotment [produced] by the plaintiff is highly doubtful….for the registration number appears to have been erased, and endorsed without signature. The letter of allotment is unsigned. The date is erased and unclear. On the left-hand side, Annex 2 – there is an erasure of a reference number. This is a very important document, yet the erasures are not confirmed. Did the document emanate from the Lands Office? It is not shown who is the maker of the document, and when it was issued. The Registrar is not named. The document does not look genuine".*

Such factual matters, quite obviously, belong in the domain of evidence at the hearing of the main suit. They cannot, at this interlocutory stage, be the basis for determining the outcome of the matter before the Court.

Learned counsel next impeaches the wisdom or propriety, on the part of the plaintiff, in seeking and obtaining Grant for the suit land. Counsel says:

"*The plaintiff concedes that it was not at the [suit property]; but in all that period the defendant was living on the suit property; so the plaintiff must have known of the existence of settlement on the suit land….My client was promised grant of lease, which did not take place until 2006….."*

Counsel came to the conclusion that his clients were the owners of the suit property; he said:

"*The Commissioner [of Lands] did duly issue allotment, and then the Grant, pursuant to my client's application. My client owns the suit premises by right…..As things stand, my client has a legal title of ownership".*

Counsel contended that since the first *letter of allotment* (dated 1st April, 1991) was to his client, this means "the land had already been alienated".

Learned counsel submitted that there were, at this stage, two *competing titles* – and so the application should be disallowed, because only a full hearing should lead to a determination of the question. Counsel contended that the applicant had not shown a *prima facie* case – because "the documents of the plaintiff are in doubt". Counsel urged that the plaintiff had not shown that irreparable harm will be caused if the prayers in the application are not granted. Counsel's last words were: "This is a fit case for the full hearing, where the maker of the documents may come to Court and give evidence."

In his reply, *Mr. Okong'o* urged that if, as *Mr. Mwaboza* had proposed, "this is a fit case for full hearing", then the *status quo* should be maintained, to enable the Court to investigate the two titles and the manner in which they were issued".

Learned counsel submitted that the question whether the letter of allotment was genuine, was a question between the plaintiff and the Commissioner of Lands – and it is on this basis that the Attorney-General had been sued.

Prima facie, are the legal rights standing in favour of the plaintiff/applicant equal to those standing on the

side of the 2nd and 3rd defendants? According to counsel for the respondents, the answer is yes. According to counsel for the applicant, the answer is no. *Mr. Mwaboza* for the respondents urged that the respondents hold a legal document of title, just as does the plaintiff; and therefore the dispute should be left to be settled within the main cause.

Learned counsel went further to show apparent weaknesses in the plaintiff/applicant's claims to legal holding of title; but some of this effort cannot, in my opinion, be entertained at this stage: in particular as regards the detailed character of the plaintiff's indicia of title. That is not a question for the interlocutory stage of hearing, it is for the reception and scrutiny of evidence at the main hearing.

Then learned counsel *Mr. Mwaboza* grounded his client's case on the fact that his clients' letter of allotment had been written before the plaintiff's letter of allotment. This argument, on settled grounds of law, is to be rejected: the base-line for valid ownership is the document of title, and not the preliminary letter of allocation.

Learned counsel next sought to found his clients' case on the fact of prolonged occupancy of the suit land by 2nd and 3rd defendants. However, the fact of prolonged occupancy, as a matter of law, is only relevant when the question before the Court is *adverse possession* – which is not the case here.

The claim of prolonged occupancy was raised by counsel to demonstrate that the Commissioner of Lands, by making a grant to the plaintiff who was not in occupation, was acting in *abuse of power*. Although abuse of power is a legal category, in respect of which the Court can give redress, the kind of abuse contemplated would fall within the compass of *judicial review*, in relation to the instant application. Therefore, the fact that the Commissioner of Lands could have been in abuse of power as he made a grant of the suit land to the plaintiff, has not yet become relevant.

Counsel for the plaintiff urged that the two sides in the claim are not on the same footing: the plaintiff was the first to obtain a certificate of title for the suit property and, at that stage, the plaintiff was the single owner holding indefeasible rights of ownership under s.23 of the Registration of Titles Act (Cap. 281, Laws of Kenya). That, in law, ought to have remained the *status quo* for all time, unless and until the plaintiff disposed of the suit land to another person. The Commissioner of Lands' intervention by interposing the 2nd and 3rd defendants in the title-holding for the suit land, therefore, was wrongful, and ought not to be upheld. The plaintiff, therefore, is entitled to seek redress, on an interim basis, against 2nd and 3rd defendants. Whereas 2nd and 3rd defendants must look only to the main suit and to the Commissioner as their source of redress, the plaintiff raises a *prima facie* case which, in equity, merits protection.

Whether or not it is the case that 2nd and 3rd defendants have been in occupation of the suit land for long, the evidence at this stage shows that they are exploiting the substratum of the suit land, and could imperil any such interest as the plaintiff might be held to have in that land.

Accordingly, I hereby grant the main prayer (prayer No. 3) in the plaintiff's application of 24th August, 2009.

The costs of this application shall be paid by 1st, 2nd and 3rd respondents jointly and severally.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 27th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Plaintiff/ Applicant: *Mr. okong’o*

For 1st Defendant/Respondent: *Mr. Njoroge*

For 2nd & 3rd Defendant/Respondents*: Mr. Mwaboza*