



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL SUIT 86 OF 2007

MADETENI LIMITED.....PLAINTIFF

VERSUS

**1. ATTORNEY GENERAL (*sued on behalf of the Commissioner of Lands and
Kilifi District Land Registry*).....1ST DEFENDANT**

2. ALDEHEID KAZUNGU SHAFFER.....2ND DEFENDANT

R U L I N G

By a Chamber Summons application dated 5th November 2007, pursuant to the provisions of Order XXXIX Rule 1 and 9 of the Civil Procedure Rules, Section 3A and 63 of the Civil Procedure Act (Cap. 21) Laws of Kenya, the applicant seeks orders that:

1. This application be certified as urgent and service thereof be dispensed with in the first instance.
2. This honourable court do issue an *ex parte* injunction restraining the second defendant from transferring, selling, leasing, mortgaging, charging, alienating or otherwise dealing with title number Kilifi/Madeten/368 (“the land”) pending the hearing of this application *inter partes*.
3. This honourable court do issue an *ex parte* injunction restraining the Kilifi District Land Registrar from registering any transfers, leases, mortgages, charges or other transactions involving the land pending the hearing of this application *inter partes*.
4. This honourable court do issue a temporary injunction restraining the second defendant from transferring, selling, leasing, mortgaging, charging, alienating or otherwise dealing with the land pending the hearing and determination of this suit.
5. This honourable court do issue a temporary injunction restraining the Kilifi District Land Registrar from registering any transfers, leases, mortgages, charges or other transactions involving the land pending the hearing and determination of this suit.
6. This honourable court do issue a temporary injunction restraining the second defendant whether by herself or by her agents and/or servants from trespassing onto or in any other way whatsoever interfering

with the plaintiff's property in the land pending the hearing and determination of this suit.

7. This honourable court do issue such directions as are necessary for the expedient hearing and determination of the suit herein.

8. The costs of this application be in the cause.

The application is based on the grounds that:

1. The plaintiff is the bonafide proprietor of the land and holds an original land certificate issued on 5th July 1984 in respect of the land.
2. In July 2007, the plaintiff received copies of the title deed issued on 29th May 2001, a certificate of official search dated 28th June 2007 and a letter from the Ministry of Lands and Settlement dated 22nd May 2007 which show that Aldeheid Kazungu Shaffter, ("the second defendant") is the registered proprietor of the land.
3. Since purchasing the land in 1984, the plaintiff has never transferred, leased or charged it to the second defendant or any third party or otherwise encumbered it in any way.
4. In August 2007, the plaintiff advocates prepared and lodged a caution dated 22nd August 2007 at the Kilifi District Land Registry to prevent any dealings in the land until ownership thereof is resolved but the Kilifi District Land Registrar has failed and/or refused to register the said caution.
5. The plaintiff has information to the effect that the land is currently being offered for sale; accordingly, if the second defendant and the Kilifi District Land Registrar are not restrained from dealing with or registering any dealings in the land, the land shall be transferred to a third party to the detriment of the plaintiff.
6. If the land is transferred to a third party
 - (i) The court shall be incapable of legally ordering the rectification of the Kilifi District Land Register as sought by the plaintiff in the suit herein;
 - (ii) The plaintiff's claim shall automatically expire under Section 26 of the Limitation of actions Act;
 - (iii) The suit herein shall be overtaken by events; and
 - (iv) The plaintiff shall lose its property in the land for which damages will not be an adequate remedy.
7. It is in the interest of justice that the orders sought herein are granted so that the current proprietorship of the land is preserved until the court determines the true and bona fide proprietor thereof. Further, the orders sought are necessary to prevent any third parties from acquiring an interest in the land before the determination of the suit herein.
8. On 11th October 2007, the plaintiff filed a chamber summons application dated 9th October 2007, by which it sought orders similar to the orders sought herein. Upon hearing the said application *exparte*, the honourable court granted *exparte* orders to the plaintiff, but, through no fault of the plaintiff, the same were not served as required.
9. On 25th October, 2007, the *inter partes* hearing of the chamber summons application dated 9th October 2007 did not proceed due to want of service. The said hearing was then adjourned to 19th November 2007.
10. The plaintiff makes this application after having withdrawn the chamber summons application dated

9th October, 2007.

The application is predicated upon the annexed affidavit of Kenneth Hamish Wooler Keith the plaintiff/applicant, sworn on the 5th day of November 2007.

On behalf of the applicant it was argued, that the plaintiff is the bonafide proprietor of a piece of land registered as Title Number Kilifi/Madeteni/368 and holder of original land certificate issued on 5th July 1984 and marked herein as exhibit “KHWK 1”.

That the applicant bought the subject land parcel from one **Esther Nyokabi Kamau** in July 1984. Exhibit “KHWK 2” is a bundle of copies of letter of consent (No. 245922) dated 29th November 1982 authorizing the sale, transfer dated 24th April 1984, a letter dated 23rd July 1984 from the Ministry of Lands and settlement and a certificate of search dated 4th September 1984.

That sometime in the year 1984, one **James Ponda Kazungu** [since deceased] together with his servants and/or agents unlawfully entered into the subject land without the applicant’s consent and claimed ownership.

Towards that end, the applicant/plaintiff instituted proceedings against the applicant being High Court (Mombasa) Civil Case No. 142 of 1994. In April 1997 the plaintiff obtained orders requiring the said Ponda Kazungu to deliver vacant possession of the land to the plaintiff and permanent injunctive orders restraining Ponda Kazungu together with his servants/agents from trespassing on the subject land and/or interfering with the plaintiff’s rights. A true copy of the decree emanating therefrom is marked herein as “KHWD 3”.

From the year 1997 the applicant has been unable to enforce the court’s decree by reason of the violent nature of the said Ponda Kazungu, his agents and/or servants.

Sometime in the year 2007 the applicant entered into negotiations regarding the sale of the land with one **Lynda Holf**. As part of the negotiation and ascertaining the identity of the land the said Lynda Holf visited the subject parcel and were informed by two ladies of Caucasian origin that they were the owners of the property. Later Lynda Holf was presented with a copy of a title deed issued on 29th May 2001 in support of the fact that ownership of the subject land vests with one **Aldeheid Kazungu Saffer**. The aforesaid documents are exhibited herein as “KHWK 4”.

That arising from the said disclosure an official search was undertaken by the firm of Dally, & Figgis Advocates which came to naught by reason of the refusal of the Kilifi District Land Registrar as per exhibit “KHWK 5”. Subsequent inspection of the Land Register by the said advocates disclosed that the second defendant is the registered owner of the subject land as at 29th May 2001. That the said inspection also disclosed that the applicant’s name was removed from the land register in 1986 after the title to the subject land was purportedly canceled by the Commissioner of Lands by way of Gazette Notice No. 2505 dated 30th May 1986 exhibited herein as “KHWK 6”.

The applicant then caused to be served on the Attorney General a notice dated 17th August 2001 pursuant to Section 13A of the Government Proceedings Act exhibited as “KHWK 7. Subsequently the applicant lodged a caution dated 22nd August 2007 against the said title exhibited as “KHWK 8”. Despite the lodging of the said caution on 27th August 2000 the same has not been registered to date and the Kilifi District Land Registrar has refused to offer an explanation for her refusal.

That due to failure by the Kilifi District Lands Registrar to register the caution makes the applicant apprehensive that the defendant/respondent may transfer, sell, lease, mortgage, charge, alienate or otherwise deal adversely with the subject parcel hence this application and the suit.

That the applicant’s fear is further buttressed by the knowledge that under the Registered Land Act and

Limitation of Actions Act (Cap 22) Laws of Kenya, in this event a third party acquires the subject land for valuable consideration and proceeds to take possession thereof without knowledge of the fraud, deceit and/or mistake leading to the entry of the second defendant's name in the registrar, it shall not be possible for the court to order the rectification of the register as sought herein by the applicant.

It was the applicant's case that against that background, the injunctive orders sought in the Chamber Summons application herein are merited and necessary to preserve the subject matter until such time as the court will detain the bona-fide proprietor thereof.

The application was served upon the Attorney General State Law Offices in Sheria House Nairobi as per the affidavit of Pheneas Omwala Ndengu sworn on 23rd October 2007. The Attorney General duly entered appearance on 24th October 2007.

Service on the first defendant was effected on 12th November 2007 as per affidavit of service at Alfred Ouma sworn on 13th November 2007. Service on second defendant was effected on 19th November 2001 as per the affidavit of service of Julius Otunga sworn on 9th January 2007.

At the hearing, neither the first respondent nor the second respondent attended. On application, I ordered the matter to proceed exparte by dint of the provisions of Order L Rule 16(3) of the Civil Procedure Rules.

As matters stand now, I have evidence by way of affidavit in support of the applicant's case, on the one hand. I have no evidence by way of affidavit in rebuttal of the applicant's position.

In the foregoing circumstances, the evidence of the applicant stands unchallenged. Having analyzed the evidence in support, I am persuaded that the applicant's application is merited. Accordingly, I grant the application in terms of prayer 4 of the application.

By way of direction, the applicant should move the court to hear the substantive suit within 12 months of this order. In default the respondents be at liberty to move the court to discharge the injunction. Those are the orders I am capable of making in the disclosed circumstances of this application.

DATED and delivered at Malindi this 27th day of February 2007.

N. R. O. Ombija

JUDGE