REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO.31 OF 2002

IN CONSOLIDATION WITH

CIVIL SUIT NO.30 OF 2002

KARIN ANNE CHALLIS……....PLAINTIFF

=V E R S U S=

THE HON. ATTORNEY-GENERAL……1ST DEFENDANT

THE COMMISSIONER OF LANDS……...…….2ND DEFENDANT

THE REGISTRAR OF TITLES…….3RD DEFENDANT

ISHANGU ENTERPRISES LIMITED……..4TH DEFENDANT

SWALEH A. ATHUMANI……...….5TH DEFENDANT

ABDINASIR A. MOHAMED…….....6TH DEFENDANT

ABDILAHI A. NASIR……...7TH DEFENDANT

R U L I N G

The relevant application is dated 28.3.2002 and it was filed by the Plaintiff in Civil suit No.31 of 2002, Malindi through Ben Ochieng & Company, Advocates. On 10.4.2002 this court consolidated this suit and suit No.30 of 2002, of Malindi. The application for consolidation was brought by Mr. Ochieng for the Plaintiff in Case No.31 of 2002. He had then argued that the subject matters of the two cases were similar. On 21.5.2002 these two cases were mentioned before me when Mr. Ochieng sought leave to serve pleadings upon the 4 Defendants in Civil Case No.31 of 2002 by substituted service. On the same day, Mr. Kilonzo for the 5th, 6th and 7th Defendants who had earlier filed and served Notice of Preliminary Objections against the said application of 23.3.2002, sought to argue his grounds in the presence and participation of Miss Mbiyu for the 1st, 2nd and 3rd Defendants. Since the notice had been properly filed and served upon the defendants aforesaid this court allowed the two to argue their grounds of Preliminary Objection contained in the Notice dated 17.5.2002.

Mr. Ochieng's application had sought for two main reliefs:-

a) A temporary injunction to issue to restrain the 4th, 5th, 6th and 7th defendants and their servants

and agents from trespassing into, damaging or in any manner interfering with plaintiff's quiet enjoyment of Plot No.104, Watamu. and

b) An order of injunction to prohibit the 3rd and 4th defendants from registering any dealings with the said Plot No.104, Watamu until the suit No.31 of 2002 is determined.

I have carefully examined pleadings in respect to suit No.31 of 2002 and No.30 of 2002. I have also carefully perused and compared the deponements in the affidavits in the suits from both sides. I do hereby make the following findings of fact:-

It is common ground that the applicant, Kariu Anne Challis was allocated Plot No.104, Watamu by Grant No.34486/1 dated 26.6.2001 under the Registration of Titles Act. The same plot had earlier in been allocated to Ishangu Enterprises Limited by Grant Number CR 24048/1. Ishangu Enterprises Limited is the 4th Defendant in Civil Suit No.31 of 2002. Surprisingly also Plot Number 104, Watamu, aforesaid is part of L.R. No.Kilifi/Jimba/1125 which was allocated to and therefore prima facie belongs to the 5th, 6th and 7th Defendants in the same suit. This means that the suit premises is, excluding the remaining balance of L.R. No. Kilifi/Jimba/1125 which is not in dispute, the same and common suit premises between the defendants and plaintiffs in respect to both suits. Clearly also from the record the Defendant in suit No. 30 of 2002, is sued because of his alleged trespass into Plot L.R. No. Kilifi/Jimba/1125 of which Plot No.104/Watamu forms part and which the defendant in that case was in the process of demarcating by erecting a stone-wall thereon. By trying to do so, as I have said, he found he was trespassing on Plot L.R. No.Kilifi/Jimba/1125. It may be noted also that Plot No.104, Watamu, was granted or allocated to Paul Chellis's wife Kerin Anne Challis on 26.6.2001 while the defendants Swaleh A. Athumani, Abdinasir A. Mohamed and Abdilahi A. Nasir were allocated L.R. No. Kilifi/Jimba/1125 about 9 months before that date, i.e. on 5.10.2000. The said allocation was done under Registered Land Act Cap.300 and a Title Deed issued. Careful perusal of the Applicants/Plaintiff's plaint in Civil Suit No.31 of 2002, will confirm that the main reliefs sought are:- a) An injunction to restrain the 4th, 5th, 6th and 7th Defendants and the latter's agents from trespassing into the premises shown above to be registered as Plot No.104/Watamu.

b) Orders of Mandamus and Prohibition against the 1st, 2nd and 3rd Defendants either to compel them to register a caveat in favour of the Plaintiff/Applicant or to revoke the registration of L.R. No.Kilifi/Jimba/1125.

c) Order for general and special damages. A further perusal of the plaint indicates that the defendant Paul Chellis in Civil Case No.30 of 2002, is, effectively defending his wife's interests arising from the latter's ownership of Plot No.104/Watamu which interest is similarly being pursued in Civil Suit No.31 of 2002. It is also noted that in both suits the Plaintiff in suit No.31 of 2002 is struggling to establish his title through a trespass suit and not directly by a declaration or a substantive direct ownership claim. It would therefore, in my view, be correct to conclude that even if the suit were to succeed, direct ownership of Plot No.104/Watamu would only be a side issue not directly sought in the pleadings.

These, in my view, are the facts finding in the record before this court and which influenced or persuaded the Applicant herein through Mr. Odera & Company, to file the application dated 28th March, 2002, under which Mr. Kilonzo and Miss Mbiyu preliminarily raised objections on points of law.

I now turn to consider and determine the preliminary objections.

Mr. Kilonzo's first objection is that in so far as the Applicant/Plaintiff in civil suit No.31 of 2002 sought for the Judicial Review Orders of Mandamus and Prohibition, he was totally wrong in law; first, in seeking the same by means of a Plaint instead of by Notice of motion under Order 53 of the Civil Procedure Rules; and secondly, in failing to first obtain leave of this court to apply for the Orders before filing the necessary Motion seeking the substantive orders; and thirdly, in seeking injunction orders against the Government or a Government Department.

I have carefully considered these arguments. It is trite law that an application for Orders of Mandamus, certiorari and Prohibition or any of them can only be made after this court has granted leave

to that end. It is also trite law that such application will only be brought under Order 53 of the Civil Procedure Rules. This means that it cannot be brought by a plaint as was done in this case. Nor can it be brought under any other law exceptOrder 53 aforementioned. In view of the fact that the said provisions are mandatory and they were not complied with, I do hold that the pleadings herein seeking for the said orders otherwise than is provided for under the said Order 53, are incurably bad in law and liable to be struck out. The third issue is also answered in favour of the defendants in Civil Suit No.31 of 2002. By express provisions orders of injunction cannot be made against the Government. Mr. Ochieng admitted this position and proceeded to abandon prayer 3 in his application. However, in this court's opinion, he was in no position to do so since the matter before the court was really not the Plaintiff-driven application but defendant-originated and driven. Under the circumstances, this court proceeds to hold that application for an injunction against the Attorney-General, the Commissioner of Lands and Registrar of Titles is bad in law and one also liable for striking out.

Mr. Kilonzo further argued that the Plaintiff's suit No.31 of 2002 is not sustainable and is a nullity ab innitio. He argued that the Plaintiff cannot challenge the validity of the Title No. Kilifi/Jimba/1125 unless through independent proceedings specifically brought for that purpose. He cited S.143 of the Registered Land Act, Cap.300. He argued that registration that led to the above title cannot be challenged except as provided under S.143 aforesaid. Mr. Ochieng however countered this argument by stating that the registration which resulted in Kilifi/Jimba/1125 was not a first registration. He further argued that it was not necessary to file a specific suit to challenge the registration. I have considered the arguments put forward by both parties. Before making a finding over the issue, I find it important to examine S.143 in detail. The Section provides as follows:-

> *"1) Subject to sub -section (2) the court may order rectification of a*
>
> *register by directing that any registration be cancelled, or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake.*
>
> *2) The registration shall not be rectified so as t o affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission or mistake in consequence of which the rectification is sought, or caused su ch omission, fraud or mistake or substantially contributed to it by his act, neglect or default."*

It is a cardinal principle of the court that it will only grant reliefs sought by a party. Indeed where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs. Using the same principle, I do hold that in a case where a party requires a cancellation or rectification or an amendment of a title, such a party must specifically plead such relief before a court of law can grant it.

In the present case the tile issued under Registered Land Act, which can be challenged in accordance with the provisions of Section 143 of the Act, is Kilifi/Jumba/1125. The Plaintiff in suit No.31 of 2002 has not specifically sought to challenge the above title. Instead she has only filed a trespass case, pleading that the defendants therein have trespassed into Plot No.104/Watamu. Can this court by making a final determination over such pleadings have jurisdiction to annul or amend the title aforementioned. My answer is in the negative. I would hold that the plaint as it stands does not go far enough to raise the issue as to whether or not the title L.R. No. Killifi/Jimba/1125 is being challenged considering the admissions made by her in the plaint. For example in paragraph 7 of the Plaintiff's plaint, she states that Plot No.104, Watamu, was granted to her by Grant No.CR 34486/1 on 26.6.2002. Not only does she admit in the same plaint in paragraph 9 that the same plot had earlier been granted to Defendant No.4, Ishangu Enterprises Ltd., under Grant CR 24048/1, but she goes further to admit in paragraph 10 that the plot so granted was part of Kilifi/Jimba/1125 which as above noted had been already allocated to the 5th, 6th and 7th Defendants. It is also in the affidavit evidence, i.e. on the Official Search No.77/2002, dated 3.4.2002, annexture "SAA 3", that the 5th, 6th and 7th Defendants in suit No.31 of 2002, were allocated and registered as owners of the said L.R. No.Kilifi/Jimba/1125 on 5/10.2000, a period of about nine months

before the Plaintiff was given a Grant of part of the same plot later named Plot No.104, Watamu. These are facts deponed or pleaded by the Plaintiff herself. They are therefore facts which this court accepts as written admissions, facts that will where necessary be held against her interest.

Having held as I have done above, I find no difficulty in concluding that the registration of title L.R. No. Kilifi/Jimba/1125 was done earlier and clearly appears to be first registration within S.143 of Registered Land Act as confirmed onExhibit "SAA 3" herein. It cannot therefore in my opinion be challenged except in accordance with the said section and by specific pleadings challenging the validity of the registration. The fact that the plaintiff 's title of Plot No.104, Watamu, was obtained 9 months after the final registration of L.R. No.Kilifi/Jimba/1125, in my view, goes a long way, indeed an infallible distance, to confirm the unchallengeableness of the latter title. Furthermore, I hold that no successful challenge to a title under the Registered land Act can succeed unless the challenger proves that the owner of the title knowingly participated in or contributed to the fraudulent or mistaken registration. The material before the court do not suggest any such complicity on the part of the registered Defendants Nos.5, 6 or 7.Furthermore, the latter are holding possession of the plot. If there could be a possible suspicion of complicity the same might, in my view be found at the Plaintiff's door since she is the one who, acquired the title known as plot No.104, Watamu nine months later while at the same time and worse still the plot she got is part of L.R. No.Kilifi/Jimba/1125 belonging to defendants 5, 6 and 7 aforementioned. In addition the material before me at this stage, which include the pleadings and affidavit evidence, prima facie, establish that the 5th, 6th and 7th defendants are the registered owners of L.R.Kilifi/Jimba/1125. The latter title as earlier stated encompasses Plot No.104 was allocated to the Plaintiff in Civil Case No.31 of 2002, nine months after L.R. No.Kilifi/Jimba/1125 had been allocated. That such a title is not challengeable, if properly issued, under Section 143 of the Registered Land Act Cap.300 under which it was issued, is already decided. Can this court then on these facts, pleadings and affidavit evidence allow the sanctity of such a title to be questioned or challenged using pleadings that aver nothing more than an action of trespass only? I think, not. Trespass as a cause of action, in my opinion, is based on existence of lawful title which alone would give the owner the proprietory rights in the title. In conclusion, a trespass action against a person who holds a prima facie good title, will not be sustainable and would be bad in law. Applying the above finding to this case, I hold that the 5th, 6th and 7th Defendants have an otherwise unchallengeable title to the land the subject matter of this case. The Land Certificate was issued under the Registered Land Act, Cap.300. The pleadings in the two cases are not challenging the said title under Section 143 of the Act which alone provides the possible manner under which such a title could successfully be challenged.

Another argument raised by the Plaintiff in Civil Case No.31 of 2002 is that there was an issue of double registration which should be determined. The opposite parties could not deny such double registration. But as clearly shown hereinabove, the registration of Plot No.104, Watamu came 9 months after the registration of L.R. Kilifi/Jimba/1125. Even if this court were to assume that both titles are prima facie right, at a glance the registration of Plot No.104, Watamu related to a section of land cut off from L.R. No.Kilfi/Jimba/1125. Such would logically be the one to automatically attract a frown, especially after taking into account my earlier holding in relation to the provisions of Section 143 of the Registered Land Act, Cap.300.

It may be argued also that all the defects pointed out in this ruling are those that can be amended to introduce the proper causes of action and the really issues between the parties. I would accept such an argument, but proceed to find that it was the choice of the parties from both sides to argue the preliminary points at the stage they did. It is not for the court to anticipate what course of action a party wishes to take. This ruling is based on the pleadings as they are in the file and in the manner the application was brought and argued. In a different set of circumstances, where possible amendments might have been brought on the record, a different conclusion might have possibly been reached. No such amendment were on the record here however.

Mr. Kilonzo and Miss Mbiyu in raising the preliminary points of law canvassed in this Ruling, sought to persuade this court to terminate the suits HCCC No.30 of 2002 and 31 of 2002 at this stage on points of law by striking out the Plaintiff's plaint in suit No.31 of 2002. In view of the fact that the two suits had been consolidated by the consent of the parties, it was implied in the objections that if the Plaint in Suit

no.31 of 2002 were struck out, the defence in suit No.30 of 2002 would also have to be struck out since the consolidation was sought and achieved on the grounds that the issues in both suits are similar. That is the cause. I will find right to take if I hold the Ruling in favour of the objectors.

The principle to guide this court in the issue as to whether or not a party has successfully raised a preliminary objection on a point of law is that one stated in the case of **MUKISA BISCUITS CO. vs WESTEND DISTRIBUTORS, [**1969] E.A., 701. Such points of preliminary objection were said by Sir Charles Newbold, J.A., to:-

"….raise a pure point of law which is argued on the assumption

that all the facts pleaded by the other side are correct. It cannot

be raised if any fact has to be ascertained or if what is sought is

the exercise of judicial discretion."

In the same case it was held on page 700, by LAW, J.A. as follows:-

"So far as I am aware, preliminary objection consists of a point of law which

has been pleaded, or which arises by clear implication out of the pleadings,

and which if argued as a preliminary point may dispose of the suit."

He gave such examples as objections on jurisdiction of the court or a plea of limitation or provisions in contract that remove jurisdiction of the court to arbitral authorities.

Looking at the suit before me, the jurisdiction of this court is taken away from the court because the Plaintiff in the suit being objected to was brought by Plaint as if it was a normal suit instead of it being brought by a Notice of Motion under Order 53 of Civil Procedure Rules and in no other way. Furthermore, this court is denied jurisdiction because such a suit cannot be ordinarily filed without leave of the court as provided. Secondly, on an issue of jurisdiction but of a different kind, the pleader sought for remedies of injunction which this court has no jurisdiction to grant under the provision of Section 16(1) proviso (1) of the Government Proceedings Act, Cap.26. Mr. Ochieng admitted on the record the double-pronged jurisdiction issues. Under the circumstances, and applying the principle pronounced by the Court of Appeal in **Mukisa Distributors** case, I hold that on each objection aforementioned, and on each independent finding of the court above, the defendant's defence in Suit No.30 of 2002 and the Plaintiff's plaint in Suit No.31 of 2002 should be struck out. I accordingly ORDER THAT:-

1. The Defendant's defence in Civil Suit No.30 of 2002 is hereby struck out with costs to the Plaintiffs.

2. The Plaintiff's plaint in Civil Suit No.31 of 2002 is hereby also struck out and the suit dismissed with costs to the Defendant. 3. The Plaintiff in suit No.30 of 2002 to fix the case for court's directions.

Dated and delivered at Malindi on the 23rd day of September, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:

…….for the Plaintiff

…….for the Defendant