



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 181 OF 2019

MKAMENYI FARMERS COOPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

THE MINISTRY OF LANDS & PHYSICAL PLANNING & 9 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be considered; plaintiff claiming that the suit land was illegally transferred to the current owners; plaintiff contending that the land was public land that was to be allocated to its members; no evidence tendered of any such illegal transfer; no prima facie case established; application dismissed with costs)

1. This ruling is in respect of an application dated 11 October 2019 filed by the plaintiff contemporaneously with the suit. The principal order sought in the application is in prayers (2) and (3) of the application drawn similarly as follows :-

This Honourable Court do grant the plaintiff/applicant an injunction restraining the 6th, 7th and 8th defendants/respondents either by themselves or by their agents, employees, servants or any person authorized by them from harassing its members or interfering in any manner whatsoever with their occupation of the suit property pending the hearing and determination of this application.

2. The application is opposed.

3. By way of background, the plaintiff avers to be a cooperative society registered under the Co-Operative Societies Act, Cap 490, Laws of Kenya. It avers to be comprising of more than three thousand members who are residents of Mkamenyi Village, which is situated in the South West part of Voi Town in Taita Taveta County, which village is within the area of the Voi sisal plantation. It is averred that the members of the plaintiff have always resided in Mkamenyi Village which is situated within the 1953 hectares of the land parcel LR No. 28683 (the suit property or suit land). It is contended that prior to the establishment of the Kenya Colony in 1920, the suit land was owned by the forefathers of the plaintiff's members. It is pleaded in the plaint that the colonial government subsequently alienated the suit land to a white settler identified as Major Lezen. It is contended that the interest of Major Lezen was a leasehold of 99 years from 1920 which period was to end in the year 2019. It is further claimed that before the end of the lease, Major Lezen (or Lazen) surrendered the lease to the Government, sometimes in the 1980s, and that the suit land thus became public land. The plaintiff alleges that the land was then wrongly and illegally allocated to Voi Sisal Estates Limited (the 6th defendant), and insinuate that, instead, it ought to have been allocated to them, to correct the wrongs committed against their forefathers.

4. They aver that contrary to the terms of the lease, the 6th defendant transferred the lease to Voi Plantation Limited (the 7th defendant) sometimes on 23 February 2012. It is contended that in further breach of the lease, the 7th defendant charged the suit land to Diamond Trust Bank of Kenya Limited (the 9th defendant). A discharge was undertaken on 13 February 2019 and the property transferred to Voi Point Limited (8th defendant) and again charged to the 9th defendant. The plaintiff avers that in the meantime, the 6th, 7th and 8th defendants have continued harassing members of the plaintiff who are on the suit land causing their arrest and prosecution in court. They contend that they should have been settled on the suit land and that the 2nd defendant (National Land Commission) ought to have initiated investigations into the injustices relating to the suit land.

5. In the suit, the plaintiff has sought the following orders :-

(i) A declaration that the grant of lease of the suit property to the 6th defendant was illegal and or wrong and therefore null and void.

(ii) Upon grant of prayer 1 above, a declaration that the transfer of the suit property by the 6th defendant to the 7th defendant and

that of the 7th defendant to the 8th defendant were also illegal and or wrong and therefore null and void.

(iii) In the alternative to prayer (ii) above and upon this court upholding the grant of the lease of the suit property to the 6th defendant, a declaration that the transfer of the suit property by the 6th defendant to the 7th defendant and that of the 7th defendant to the 8th defendant is illegal and or wrong for breach of the terms of the lease.

(iv) A declaration that the 8th defendant's subdivision of the suit property is illegal and or wrong and therefore null and void.

(v) A declaration that the 9th defendant's act of accepting a charge of the suit property by the 6th, 7th and 8th defendants is illegal and or wrong as it was contrary to the conditions of the lease.

(vi) A permanent injunction against the 8th defendant, its employees, agents or people authorized by it from subdividing the suit property.

(vii) An order rectifying the register and cancelling the grant of the lease to the 6th, 7th and 8th defendants.

(viii) An order rectifying the register and register the plaintiff as the lessee of the suit property.

(ix) Costs of this suit.

6. I have mentioned that together with the suit, this application for injunction was filed. The application is supported by the affidavit of George Reuben Abdalla Mwanjala, who has more or less reiterated what is pleaded in the plaint and has annexed some documents including the extract of the title in issue.

7. The 8th defendant opposed the application through the replying affidavit of Mohamed Ali Kassamali Madhani, its director. He deposed that the 8th defendant purchased the suit land from the 7th defendant on 13 December 2018. When conducting due diligence the 8th defendant obtained the records of previous ownership of the land. He deposed that the original title was LR No. 4637 consisting of 5006 acres issued in the year 1923 for a term of 99 years from 01.01.1923 to 01.01.2022. The land was transferred to the 6th defendant on 6 August 1947 and the company remained owner until 23 February 2012. In the meantime, this lease was surrendered to the Government to pave way for an extension. This was done in the year 2011. The property was thereafter transferred to the 7th defendant on 23 February 2012 and charged to the 9th defendant. He has thus pointed out that the history of the land as given by the plaintiff is false. At the time that the 8th defendant purchased the land from the 7th defendant, a precondition was given that in order to obtain consent (to transfer), the company was to cede 35 acres to the Mkamenyi Squatters Committee, a group of 28 families whom he contends are those recognized as legitimate squatters. He has annexed a map showing the approximate area occupied by the squatters confirmed by the chief. He has stated that the 8th defendant sought and was granted approval to subdivide the land partly so as to satisfy the promise made to the Mkamenyi Squatters Committee. He has deposed that upon purchase, the 8th defendant took possession of the land and they have invested a substantial amount of money and that currently there is a fully operational sisal and citrus fruit plantation. He believes that this is a case of historical injustices which this court lacks jurisdiction.

8. The 8th defendant filed a further affidavit sworn by Hassan Kiboko, the Chairman of Mkamenyi Squatters Committee which he has averred consists of 28 families of squatters who have lived on the suit land. He has stated that he is familiar with the plaintiff which alleges to be comprising of 3,000 families. He has averred that in 2016, a group of individuals approached their Committee with a view to form a community based organization to advocate for squatter rights, and they formed Mkamenyi Community Development Project. This organisation then started collecting money from the public promising that they would receive part of the suit land on the basis that the lease had lapsed and not renewed. Owing to this, the actual squatters fell out with the other members who then proceeded to convert the community based organisation into a cooperative society excluding the original squatters. He has contended that the plaintiff has falsely lured members of the public to purchase property on the suit land alleging that they have capacity to sell and have even put up posters in Voi town. He annexed a copy of such a poster. Acting on this misinformation, members of the public invaded the suit land and put up illegal structures which were subsequently torn down and several people arrested and charged with forcible detainer. He has asserted that the members of the plaintiff are not the original squatters from Mkamenyi and consist of outsiders with the intent of benefiting from the portion promised to the Mkamenyi Squatters Committee.

9. There is also another affidavit filed by the 8th defendant sworn by Joseph Mwachugha, the Secretary of Mkamenyi Squatters Committee. He has affirmed what is deposed by Hassan Kiboko.

10. The 9th defendant filed a replying affidavit sworn by Amaan Kassam, its legal manager. He deposed inter alia that they financed the 7th defendant to purchase the suit land from the 6th defendant and a charge registered. Subsequently, in the year 2018, the 8th defendant approached the 9th defendant for finance, which the 9th defendant granted, and again charged the property. He has thus averred that this is private land and that the 8th defendant is a bona fide purchaser for value. He believes that the plaintiff wishes to reap where it has not sown.

11. I invited counsel to file written submissions and I have seen the submissions of counsel for the plaintiff and 8th defendant. I have taken note of these submissions before arriving at my decision.

12. Although the application as drawn, appears to only wish for an injunction pending the hearing of the application, all parties appear to appreciate that this is an application for an interlocutory injunction pending hearing of the suit. The principles upon which such applications are considered were set out in the case of *Giella vs Cassman Brown (1973) EA 358* where the court held that firstly, an applicant needs to

demonstrate a prima facie case with a probability of success and further demonstrate irreparable loss that may not be made good by an award of damages if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

13. I have carefully studied the documents presented by the parties herein. Whereas the plaintiff contends that the suit land was previously owned by one Major Lezen, I have not seen any such evidence. The plaintiff has not presented anything to show that the suit land was ever owned by a person called Major Lezen. The plaintiff also claims that Major Lezen held a leasehold title of 99 years from the year 1920. Again I have no such evidence. The historical background as provided by the plaintiff, to me, appears completely unsupported. What the plaintiff has displayed is a title to the suit land, LR No. 28683, showing the first grantee as Voi Sisal Estates Limited, pursuant to a surrender registered as CR No. 8841/37. I must say that I have not seen this surrender for none of the parties displayed it to me. Although the 8th defendant averred that this land was originally LR No. 4637, I have also not seen anything to connect this land to LR No. 4637. Those could be issues for trial but what is important to me is that the factual background given by the plaintiff is doubtful and I also have no evidence of any connection that the plaintiff and/or its members may have to the suit land. What I can see is that the suit land is privately owned and I have not seen any interest registered by the plaintiff. Neither have I been presented with any tangible evidence of occupation by the members of the plaintiff. What I can see is that the 8th defendant has been asserting its exclusive right to the property by having members of the plaintiff charged in court for forcible detainer or suing them for trespass. I otherwise have no evidence of any historical or long occupation by members of the plaintiff on the suit land. I have seen a copy of the Chief's letter dated 30 October 2018, but this only confirms the claim that there are only 28 families as squatters, and these must comprise of the Mkamenyi Squatters Committee and not any member of the plaintiff.

14. I have also not seen any of the breaches of the terms of lease as claimed by the plaintiff. Neither have I any evidence of the land being public land that was wrongly granted to the 8th defendant's predecessors in title.

15. In short, the plaintiff has hopelessly failed to demonstrate any prima facie case with a probability of success. Having failed to demonstrate such case, this application must fail and it is hereby dismissed with costs.

16. The result is that the plaintiff will need to prove its case without the benefit of any order of injunction.

17. Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA