



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 222 OF 2014

SEVENTH DAY ADVENTIST CHURCH

(EAST AFRICA) T/A SOLACE LIFESTYLE AND WELNESS RESORT.....PLAINTIFF

VERSUS

- 1. MARIO RASHID**
- 2. MUSA MOHAMED**
- 3. BADI MOHAMED**
- 4. OMAR MOHAMED**
- 5. ANASTACIA KAHAMA**
- 6. NZUKI MIUNDE**
- 7. BENSON THINGU**
- 8. ALI OMAR ALI**
- 9. RUTH SYOMBUA**
- 10. VERONICA NDURU**
- 11. MUEMA KASANDUKU**
- 12. DOMITILA NDUNGE**
- 13. MWANZIA**
- 14. MBEVO**
- 15. MBITHE**
- 16. VINCENT KITUKU**
- 17. COUNTY GOVERNMENT OF KILIFI.....DEFENDANTS**

JUDGMENT

By a plaint dated 27th November 2014 the Plaintiff sued the Defendants jointly and severally seeking the following orders: -

- 1. A declaration that the Defendants' developments on the beach and shoreline adjoining and abutting the Plaintiff's plot No.***

19 Watamu and those erected on the easement of a right of way over plot No. 42 Watamu are illegal, wrongful and unlawful.

2. An order of mandatory injunction compelling the 1st Defendant to the 16th Defendants to demolish, destroy, remove and/or take out all the unauthorized developments on the beach and shoreline adjacent, abutting and adjoining the plaintiff's Plot No. 19 Watamu and those build over the Plaintiff's easements over Plot No. 42 Watamu failing to which the Plaintiff at the cost of the Defendants to be permitted to demolish and remove the same and/or alternatively the 17th Defendant be ordered by this honourable court to demolish, destroy and/or remove the said illegal structure and erections.

3. An order of perpetual prohibitory injunction be issued to the 1st defendant by themselves, their agents, servants and/or employees restraining them from further carrying on or undertaking unauthorized and illegal developments along the beach and shoreline adjacent to, adjoining and or abutting the Plaintiff's plot no. 19 Watamu or over the Plaintiff's right of easement on plot no. 42 Watamu. (Sic)

4. An order of perpetual prohibitory injunction be issued to the 1st up to the 16th Defendants restraining them by themselves, their agents, servants and/or employees from occupying, using, running and/or managing completely those illegal structures build and /or abutting the Plaintiff's Plot No. 19 watamu and those erected and/or build over the Plaintiff's easements over Plot No. 42 Watamu. (sic).

5. Costs of the suit and interest thereof at court rates.

PLAINTIFF'S CASE

PW1 Joseph Kariuki Mwangi adopted his statement and stated that the Plaintiff is the registered proprietor of Plot No. 19 CR NO 11605 since 10th August 1965 as well as proprietor of an easement over Plot No 42 CR 11608 Watamu. which abut, adjoin and/or is adjacent to the shoreline of Indian ocean in which the Plaintiff has erected thereon a touristic hotel as well as having an easement of a right of way over plot No. 42 Watamu.

PW1 further stated that sometime in the year 2012, the 1st to 16th Defendants moved into the Plaintiff's reserved easement in Plot No. 42 and erected sheds and bandas thereon of which the Plaintiff contends that this move has threatened security of the Plaintiff's customers due to drugs being sold openly and also compromised access to the sea fronting the hotel.

It was PW1's further evidence that the unauthorized developments had brought about serious environmental degradation on the shoreline and the beach adjoining the Plaintiff's land and that its development had been turned into toilets and a lot of degradable and non-degradable wastes have been littered all over the beach and shoreline courtesy of the 1st to 16th Defendants.

PW1 prayed that the illegal structures erected by the Defendants be removed and the Defendants evicted.

On cross examination, he stated that the easement is as per the transfer produced in court and that their guests had been complaining about the smell of cannabis sativa but they have neither reported the matter to the police nor any arrests made.

PW1 further stated that the beach and shoreline is public property and any structure built thereon must be authorized.

The 1st, 2nd, 3rd, 4th and 8th Defendants entered appearance through the firm of Mouko & Company Advocates while the 17th Defendant entered appearance and filed a defence through the firm of Messrs Gikera & Vadgama Advocates.

17TH DEFENDANT'S CASE

DW1 Silas Muthee adopted his statements and stated that the County Government has issued several notices to the 1st to 16th Defendants to move out of the beach and shoreline which notices have been ignored from time to time and if they still are on the land they are there illegally since the beach is for public use and the County Government gives TOL for the use of the beaches.

DW1 stated that the Plaintiff is not entitled to exclusive riparian, contiguous beach, and shoreline frontage as the same belongs to the government and cannot therefore be exclusively owned by an individual. He further stated that the Plaintiff's plot was neither adjacent, nor did it abutt the shore of the Indian Ocean. He further stated that the said property is surrounded by a perimeter wall which is intact.

It was DW1's testimony that the management of the shoreline is the mandate of the National Land Commission and not the County Government.

On cross examination he stated that the 1st to 16th Defendants had made a request to utilize the beachfront and approvals were made and that the in 2014 they gave notices to the Defendants to remove the illegal structures but they ignored the notices.

In conclusion DW1 confirmed that the Plaintiff is entitled to a clean and healthy environment.

PLAINTIFF'S SUBMISSIONS

Counsel submitted that the environment surrounding the Plaintiff's hotel premises is being threatened by the structures and the activities by the 1st to 16th Defendants contrary to Article 42, Article 70 of the Constitution of Kenya read together with Section 3 of the National Environment Management and Coordination Act 1999 and cited the cases of **John Muthui & 19 Others V County Government of Kitui & 7 Others [2020]eKLR, Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 Others [2018] eKLR.**

Counsel further submitted that the 17th Defendant has not shown that the 1st to 16th Defendant's structures are permitted or authorized to be erected by it and that the Defendants have also not shown that they were authorized by the 17th Defendant to construct or erect such structures along the beach and shoreline adjacent to the Plaintiff's establishment.

Mr. Mburu relied on Sections 30, 31 and 32 of the Physical Planning Act read together with Section 163A and 166 of the Local Government Act (now repealed) and Sections 102-115 of the County Government Act 2012, where the 17th Defendant has a legal duty in its mandate for an orderly planning to ensure that no unlawful developments are undertaken within its territory and considering that the Plaintiff variously requested for the intervention of the 17th Defendant to act on the illegal structures by the Defendants to no avail.

Counsel relied on Article 42 and 70 of the Constitution on a right to clean and healthy environment and enforcement of environmental rights and urged the court to grant the orders prayed in the plaint with costs.

17TH DEFENDANT'S SUBMISSIONS

Counsel listed the following issues for determination:

- a) Whether the Plaintiff is registered as proprietor of Plot No. 19 Watamu CR. NO. 11605 and enjoys right of way over Plot No. 42 Watamu.***
- b) Whether the Plaintiff has exclusive rights over the riparian and contiguous beach and shoreline abutting the Plot No. 19 Watamu and Plot No. 42 Watamu.***
- c) Whether the Plaintiffs grievances are properly before this Honourable Court.***
- d) Whether the 17th Defendant made efforts to remove the structures erected by the 1st-16th Defendants from the beach and shoreline and/or easement.***
- e) Whether it is the 17th Defendant's mandate to manage the beach and shoreline.***

On the first issue on whether the Plaintiff is the registered owner of the suit parcels of land. counsel submitted that a transfer is not proof of ownership of land as the Plaintiff ought to have produced the certificate to prove its interest in the property and thus the Plaintiff cannot enjoy rights over property not registered in its name.

On the second issue on whether the Plaintiff has exclusive rights over the riparian and contiguous beach and shoreline abutting Plot No. 19 Watamu and Plot No. 42 Watamu, it was counsel's submission that the shoreline and beach is public land as defined under Article 62 of the Constitution and the Plaintiff is not entitled to exclusive use thereof.

Ms Opondo relied on the cases of **Tukero Ole Kina & Another V Tahir Sheikh Said & 5 Others [2015] eKLR and Chesubwa Limited v Yew Investments Ltd t/a Dorado Cottages Mld & another [2016] eKLR** where the court held that it would be unconstitutional and contra-statute if it can be presumed by law that thousands of hectares of land along the Kenyan coastal line to belong to the owner of the dry land abutting the ocean.

On the third issue whether the Plaintiff is properly before the court, counsel submitted that the Plaintiff had an avenue for ventilating its grievances as per the Physical Planning Act which channels the Plaintiff did not exhaust and relied on the cases of **Chembe Vuko V Nelson Kilumo & 2 Others [2016] eKLR, Alice Mweru Ngai V Kenya Power & Lighting Co. Ltd [2015] eKLR, Moses Muema Mavoko v Frakash Navnital Barot & Another [2014] eKLR.**

Counsel submitted on the two issues that the 17th Defendant had issued a public notice on 6th November 2014 for the removal of the all illegal structures on public beach fronts, and that there were correspondences between the Defendants regarding removal of the structures which the Defendants ignored.

Ms Opondo also submitted that the administration and management of public land are the preserve of the National Lands Commission as created under Article 67 (2) of the constitution and not the mandate of the 17th Defendant. Counsel urged the court to dismiss the suit against the 17th defendant with costs.

ANALYSIS AND DETERMINATION

The Plaintiff sued the Defendants jointly and severally seeking for a declaration that the Defendants' development on the beach and shoreline adjoining and abutting the Plaintiff's Plot No 19 Watamu and those erected on the easement and right of way on Plot No. 42 Watamu are illegal, wrongful and unlawful.

The issues for determination are whether the 1st to 16th Defendants' structures on the beach and shoreline are illegal and whether the Plaintiff has exclusive rights over the riparian and contiguous beach and shoreline abutting Plot no. 19 Watamu and Plot No. 42 Watamu.

The 1st, 2nd, 3rd, 4th and 8th Defendants entered appearance but never filed a defence while the 17th Defendant entered appearance, filed a defence and gave evidence during the hearing to the suit. The 17th Defendant is therefore the only Defendant that defended the case.

The 17th Defendant raised an issue as to whether the Plaintiff is the owner of the suit parcel No. 19 Watamu having produced a transfer to the suit land. The issue of whether the Plaintiff had proved that it is the owner of the suit land had been determined vide an application dated 27th November 2014 where the 17th Defendant had raised the same issue of the Plaintiff's locus standi as a transfer document is not proof of ownership. The court stated in a ruling dated 20th November 2015 that: -

“The Plaintiff has annexed on the Affidavit the Transfer document of Plot Number 19 and the grant of right of way over Plot Number 42 Watamu dated 10th August, 1995. The said transfer and grant of right of way was registered on 13th August 1965 as CR 11605 and 11608 respectively.

17. Having registered the transfer in respect of Plot Number 19 Watamu and the grant of right of way over Plot Number 42, the Plaintiff's rights over the two parcels of land crystallized.

18. Unless and until the said transfer and grant of right of way are set aside by the court, the Plaintiff's rights over the two suit properties are protected by the provisions of Article 40 of the Constitution, the absence of a Certificate of Title notwithstanding.

The issue whether the Plaintiff is the owners of the suit parcel of land had already been determined hence the Defendant cannot raise it again.

From the documents produced and the evidence adduced by both the Plaintiff and the 17th Defendant, it is admitted that the 1st to 16th Defendants' structures on the beach front and the shoreline are illegal and that the 17th Defendant had issued public notices for them to remove the said structures.

The 1st 2nd 3rd 4th and 8th Defendants participated during the application for injunction and submitted through their lawyer that they do not deny putting up structures fronting Plot No. 19 Watamu and blocking the Plaintiff's easement rights over plot No. 42 Watamu. Their contention was that the developments were authorized but they did not prove such authorization. The only body that has the mandate to authorize or approve such developments is the 17th Defendant who has admitted to court that they had issued notices for the Defendants to remove the illegal structures.

I notice that the 17th Defendant was blowing hot and cold on this issue, on one side it states that the Defendants' structures are illegal and should be removed as per the notices issued, that the Plaintiff is entitled to a clean and healthy environment, on the other side it states that the Plaintiff's suit should be dismissed with costs to the 17th Defendant.

On the issue whether the Plaintiff has exclusive rights over the riparian and contiguous beach and shoreline abutting Plot No. 19 Watamu and Plot No. 42 Watamu, it is not disputed that there are illegal structures on the beach and the shoreline as stated by the Plaintiff and the 17th Defendant. The structures are surrounding the Plaintiff's premises and threaten the safe environment of the Plaintiff which was confirmed by the 17th Defendant who gave notices for the structures to be removed.

The evidence on record confirms that the structures are illegal, the elephant in the room is whether the Plaintiff has exclusive right over riparian and contiguous beach shoreline abutting plot No. 19 Watamu. The Plaintiff's plot is said to abutt the ocean, and in view of the fact that the plot was registered pursuant to the provisions of the Land Titles Act and the Government Lands Act, its boundaries are “*ager limitatus*” as opposed to “*ager non limitatus*” In the case of **Tukero Ole Kina & Another Vs Tahir Sheikh Said & 5 Others (2015) eKLR, (supra)** the court held as follows: -

“The totality of the above provisions of the law shows that in Kenya, the law requires that all parcels of land registered under the Land Title Act and the Registration of Titles Act are ager limitatus as opposed to ager non limitatus.....The Land Titles Act, under which plot number 785 was registered, and the Registration of Titles Act only allows the registration of plots that are ager limitatus, that is a plot land enclosed on all side by artificial boundaries and demarcated as such.”

The court further held that:

“...the issue of the Plaintiffs having an exclusive right to the beach front under the current constitutional dispensation does not arise. The beach front belongs to the public at all times and is subject use and allocation pursuant to the provisions of the Constitution and the Land Act.”

The beach front and the shoreline is public land as defined under Article 62 (1) (l) of the constitution as all land between the high and low water marks. The Land Act and Land Registration Act define public land as having the meaning assigned to it under Article 62 of the constitution and includes Coast foreshore, rivers, dam, lake reserves and other reserves as provided under the Survey Act, Cap 299 or any written law.

It is evident that the 1st to 16th Defendants have built illegal structures on the beach front and the shoreline which is public land. Such encroachment is an infringement of the rights of the members of the public and any person including the Plaintiff whose right to a clean and healthy environment has been affected.

Riparian rights are the allocation of water among those who own land along it. Riparian rights are generally reserved for land abutting a natural watercourse, therefore it means that an ocean, lake or sea would not classify as riparian rights but as littoral rights. Littoral water rights are given to owners of property that share boundaries with non-flowing water bodies while Riparian water rights are rights accrued to the owner of property adjacent to flowing water bodies such as streams and rivers.

Riparian rights are not capable of being exclusively owned by an individual. In this case we are dealing with littoral rights. The Plaintiff had been granted easement rights over plot No. 42 Watamu which has been acknowledged by the 17th Defendant. For the Plaintiff to enjoy its property and the easement, they have to be accorded an opportunity to do so in a clean and healthy environment.

Even though the structures complained off are on the beach and shoreline which is public land, impunity should not be allowed to reign to the detriment of Kenyans who want a structured management of public land for the benefit of the public. The beaches and shorelines should be managed in a sustainable manner for current and future generations, Kenya being a country that depends on tourism.

I therefore find that the structures erected by the Defendants are illegal hence should be removed within a period of 60 days from the date of this Judgment. The 1st to 16th Defendants to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.