



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC 37 OF 2021.

(FORMERLY ELC NO. 126B OF 2011 MOMBASA).

MHANDISI ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

MOHAMMED SWALEHE MWAJEMBE.....1ST DEFENDANT

RAMA OMARI CHIMWEGA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR KWALE3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

MARY NDALE KAI.....5TH DEFENDANT

OMARI ATHUMANI.....6TH DEFENDANT

ATHUMANI JUMA7TH DEFENDANT

MOHAMED SWALEHE.....8TH DEFENDANT

KWALE DISTRICT SURVEY OFFICE.....9TH DEFENDANT

RULING.

Introduction.

1.1 This matter came up for hearing on 26th October 2021. The Plaintiff was represented by Mr. Wangalwa Advocate. The 1st and 2nd Defendants were represented by Mr. Gitonga Advocate, while Ms. Kiti Advocate represented the 3rd and 9th Defendants.

1.2 All the parties presented their witnesses before court and closed their cases. What was remaining was to find consensus as to whether submissions would be written or oral.

1.3 Mr. Gitonga Counsel for the 1st and 2nd Defendants made an oral application for the court to make a site visit.

Oral Submissions

2.0 The application was opposed by Counsel for the Plaintiff on the grounds that the parties had closed their cases and there was no procedure to proceed after this to visit the site. That the issues before court were on registration of titles, whose title was genuine between the Plaintiff and the 1st Defendant and had nothing to do with what was on the ground. Going to site will be a waste of the courts time.

2.1 Mr. Gitonga in response urged that there was a dispute presented before the court, parties had tendered evidence and it was important that the court should see the issue of occupation by visiting the suit property. That it was in the interest of justice that the court sees and have a 'mental picture' of the same. Moreover, it was also within the Defendants right to take the option of making a formal application to open up the proceedings. The application to visit the site was to save on court time.

2.2 Ms. Kiti did not object to the application but left the matter to the court to decide.

Analysis & Determination

2.3 I have considered Counsels submissions on the application. I have also looked at pleadings and the history of the file since inception in the year 2011. The Plaintiff in the Complaint filed on 14th November 2021 pleads that it is the registered owner of the plot Kwale/Diani Beach/653. He learnt of the existence of another title where the 1st and 2nd Defendants were registered as proprietors of the same land. The Plaintiff prays for declaration that it is the rightful owner of the suit property and also seeks for eviction of the 6th to 8th Defendants. During the hearing, leave was granted to amend this prayer by substituting the said defendants with the 1st and 2nd Defendants.

2.4 I have considered Counsels submissions on the matter. I have also looked at the pleadings and the history of the file since inception in the year 2011.

2.5 The Plaintiff in the Complaint filed on 14th November 2021 pleads that it is the registered owner of the plot Kwale/Diani Beach/653. He learnt of the existence of another title where the 1st and 2nd Defendants were registered as proprietors of the same land. The Plaintiff prays for declaration that it is the rightful owner of the suit property and also seeks for eviction of the 6th to 8th Defendants. During the hearing leave was granted to amend this prayer by substituting the said defendants with the 1st and 2nd Defendants.

2.6 The 2nd and 3rd Defendants plead that the acquisition of the title if any by the Plaintiff was done with overriding interests, that is the 2nd Defendants long occupation. That their descendants had been on the suit property for over 12 years whereupon they had put up their houses, resided in the same and planted seasonal crops. They had thus acquired prescriptive rights of the same. They also belonged to the area indigenously and had the Settlement Fund Trustees operated in the principle of fairness and proper allocation of the land, the defendants would have definitely been allocated the property

Analysis and Determination

3.0 It is important to understand the nature and purpose of a site visit at this juncture. The Court under Order 18 rule 11 of the Civil Procedure Rules 2010 may at any stage of a suit inspect any property or thing concerning which any question may arise. In the case of **Beatrice Nyongo Ndungu & Others Versus Samuel K. Kangoro, the Attorney General & the County Government of Nakuru ELC 70 of 2008**, the court observed that while from time to time it may be necessary for the court to visit a site with a view to helping it reach a just decision, it cautioned that it must be remembered that *'..all decisions of the court are based on an interpretation of facts and the law. Facts are to be presented before the court as evidence whether oral or written. Evidence is the key route through which parties introduce their version of facts before the court. In an adversarial system the burden of proof is always on he who alleges and the court never goes to seek facts on its own. It is always incumbent upon parties to adduce evidence to prove the facts which they assert..'* I'm persuaded and associate myself with this observation.

3.1 This Court is being requested to visit the locus and see the occupation. I see the key/main issue in this dispute as being duplicate registration. Both the Plaintiffs and the 1st & 2nd Defendants, each holding title on the suit property. This is the crux of this dispute. Occupation therefore is a peripheral issue despite adverse possession having been claimed. The District Land Registrar Kwale has been sued as Defendant in this suit together with the Kwale District Survey Office. They are the experts in matters registration and very critical witnesses in enabling the court make a just decision. The Registrar is the custodian of the register and has duly presented their evidence before this court. Parties through their Counsels had the opportunity to cross-examine this witness and indeed did so. I see no value that shall be added by a site visit.

3.2 If the 1st and 2nd Defendants wanted to canvass more on the issue of occupation they had had enough time and opportunity to do so given the history of this case. At one-point judgement was set aside to enable them defend their claim and they should have taken advantage of this as well as pretrial procedures to meet this objective. It is not the duty of this court to go out and look for facts on behalf of the litigants. To come at the tail end of the proceedings I find this as an afterthought on the part of Counsel for the 1st and 2nd Defendants. This matter is an old case and litigation must come to an end.

3.3 The upshot of the matter is that the application is declined.

DELIVERED VIRTUALLY, DATED AND SIGNED ON THIS 1ST DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE A.E DENA

FOR PLAINTIFFS: Mr. Wangalwa

FOR 1st & 2nd DEFENDANTS: Mr. Gitonga

3rd to 4th DEFENDANTS: N/A

COURT ASSISTANT: Mwakina.