



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 86 OF 2011**

**PIJEY INVESTMENT COMPANY.....PLAINTIFF**

**VERSUS**

**ATHMAN MOHAMED.....1<sup>ST</sup> DEFENDANT**

**CHATIA KEA SAMUEL.....2<sup>ND</sup> DEFENDANT**

**SIMON SULUBU KAINGU.....INTERESTED PARTY**

**JUDGMENT**

**BACKGROUND**

1. In their Complaint dated 30<sup>th</sup> June 2011 as filed herein on 1<sup>st</sup> July 2011, Pijey Investments Ltd (the Plaintiff) prays for Judgment against the three named Defendants-Athumani Bakari Mohamed, Samuel Chatia Kea and the Commissioner of Lands respectively for:-

*a) An order of permanent injunction to restrain them, their servants and/or agents from dealing with, selling, transferring, charging, mortgaging, entering, accessing, remaining onto or trespassing into all that parcel of land known as Chembe/Kibabamshe/691 and Chembe/Kibabamshe/692 (Original Title No. Chembe/Kibabamshe/408 and/or from destroying or otherwise injuring the hedge or fence on the boundaries thereof or from erecting or causing to be erected any structure whether temporary or permanent in nature or from in any way interfering with the Plaintiff's peaceful possession and enjoyment thereof;*

*b) A declaration that the purported Title Deed issued on 16<sup>th</sup> April 2002 and/or any other Title documents held by the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendants purporting to be in respect of the suit land is illegal and should be recalled by the Land Registrar for cancellation.*

*c) An order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do surrender to the Land Registrar the Title Deed issued on 16<sup>th</sup> April 2002 and/or any Title held by them purporting to be in respect of the suit land(s) for immediate cancellation;*

*d) General damages for trespass;*

*e) Costs of the suit; and*

*f) Any other relief the Court deems fit to grant.*

2. The Plaintiff's prayers are anchored on its averment that at all times material to this suit, it was the registered proprietor of the leasehold interest in the two suit properties and the rateable legal owner thereof having over the years paid all the legally payable land rates and rent to the relevant authorities for the suitlands.

3. The Plaintiff asserts that sometime in October 2009 the original Certificate of Lease for the two parcels were taken from its possession by the Kenya Police allegedly to facilitate an investigation of fraud relating to the same. Earlier on in the year 2002, the 3<sup>rd</sup> Defendant without any due regard to the Plaintiff's then subsisting title did issue or caused to be issued a Freehold Title Deed in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the purported registered owners of the suitlands.

4. It is therefore the Plaintiff's case that the Defendants have by themselves, their servants and/or agents colluded with a view to issue the 1<sup>st</sup>

and 2<sup>nd</sup> Defendants with the Title Deed fraudulently, illegally and without due compliance with any lawful process.

5. The Plaintiff states that on the strength of the said Title Deed, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have since attempted and/or caused the suitlands to be occupied by their agents and the Plaintiff has thereby been unable to undertake any meaningful development or investment thereon and hence the institution of this suit for appropriate redress.

6. In a brief Statement of Defence dated 25<sup>th</sup> July 2017 and filed herein on 26<sup>th</sup> July 2011, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly deny each and every allegation as contained in the Plaintiff and aver that the suit as filed is bad in law, vexatious and an abuse of the Court process.

7. In addition the 1<sup>st</sup> and 2<sup>nd</sup> Defendants assert that this suit is res judicata since similar one regarding the same subject matter and involving the same parties had been filed and dealt with earlier.

8. In another Statement of Defence filed on 7<sup>th</sup> June 2012 by the Honourable the Attorney General on behalf of the 3<sup>rd</sup> Defendant, it is denied that the Plaintiff is the registered owner of the properties herein. The 3<sup>rd</sup> Defendant particularly denies ever taking part in a fraudulent exercise as alleged by the Plaintiff or at all.

9. Subsequent to the conclusion of the pleadings and after the trial commenced with the testimony of two witnesses, one Simon Sulubu Kaingu on 1<sup>st</sup> October 2014 lodged an application herein dated 30<sup>th</sup> September 2014 seeking to be enjoined as an Interested Party on the basis that he was the registered proprietor of land parcel No. Chembe/Kibabamshe/408 which parcel had been mentioned by the Plaintiff in its pleadings as the original parcel of land giving rise to the suitlands. The said application was heard by the Deputy Registrar of this Court and was allowed on 4<sup>th</sup> August 2016.

### **The Plaintiff's Case**

10. The trial herein commenced before the Honourable Justice Angote on 3<sup>rd</sup> October 2013 when the Plaintiff called two witnesses.

11. PW1-Nuru Akasha is a director of the Plaintiff. He told the Court that the Plaintiff Company acquired the two parcels of land from one Kitsao Mashobonyaki. The vendor sold the land to them through one Yaa Baya Bumulingo to whom he had donated a Power of Attorney.

12. PW1 testified that when they bought the land, the original number was Chembe/Kibabamshe/408. The Agreement was executed in 1994 after which the Plaintiff obtained its title deed. PW1 told the Court that their intention in purchasing the land was to build a 5-Star hotel and a golf course. They sub-divided the land and created the two parcels. Two Certificates of Leases were subsequently issued.

13. PW1 further testified after they had acquired the land, the CID took their documents to conduct an investigation. They came to learn that another title deed had been issued to the Defendants on 16<sup>th</sup> April 2002. Apparently, the Government had at the time changed the tenure system from title deeds to Certificates of Leases.

14. According to PW1, due to those changes, Plot No. 408 belonging to Kitsao was surrendered as freehold and re-issued as a leasehold.

15. PW2-Corporal James Mwaniki was a Police Officer stationed at the Directorate of Criminal Investigations, Malindi. He told the Court that the CID were carrying an inquiry to establish whether there were fraudulent transactions during the transfer and acquisition of titles in respect of Chembe/Kibabamshe/691 and 692 which were formerly Plot No. 408. The investigations were still underway and PW2 was unable to state at that stage if there was any wrong-doing on the part of any of the parties.

### **The Defence Case**

16. None of the three Defendants herein called any witness in support of their respective cases.

### **Interested Party's Case**

17. Simeon Sulubu, having been joined in these proceedings as an Interested Party testified that Land Parcel No. Chembe/Kibabamshe/408 measuring 13 acres belongs to him. He told the Court that his father bought the land in 1960 although the father was not issued with any document. His father died in 1979. Before his death, his father had raised a complaint with the area Chief but was told to wait for a resolution of the matter.

18. The Interested Party told the Court that the land was later registered in the name of David Kamau who in turn sold it to the Plaintiff. He asked the Court to cancel both the Plaintiff' and the 1<sup>st</sup> Defendant's title and urged that the land be restored to him.

### **Analysis and Determination**

19. I have perused and considered the pleadings herein, the testimonies of the witnesses and the evidence placed before me. I have equally perused and considered the written submissions as filed by the Learned Advocates for the parties.

20. In its pleadings before this Court, the Plaintiff assert that it was the registered proprietor of the leasehold interest in the suit properties described as Chembe/Kibabamshe/691 and Chembe/Kibabamshe/692. The Plaintiff asserts further that it has been and remains the rateable owner of the said properties for which it has over the years paid land rates and land rent.

21. The Plaintiff accuses the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of colluding with the 3<sup>rd</sup> Defendant for purposes of fraudulently, illegally and unprocedurally dispossessing it of the suit properties. This was after the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were issued with a title deed on 16<sup>th</sup> April 2002 for the same parcel of land which the Plaintiff had acquired earlier in 1994.

22. Testifying as PW1, Nuru Akasha, a director of the Plaintiff told the Court that they purchased the property through a Sale Agreement executed between them and one Yaa Baya Bimulingo on 8<sup>th</sup> April 1994. The said Yaa Baya Bimulingo was then acting on the basis of a Power of Attorney donated by the owner of the land one Kitsao Mashobo Nyaki. PW1 produced as Pexh 1(a) and 1(b) copies of the Sale Agreement and the Power of Attorney.

23. PW1 further told the Court that as at the time of the purchase, the land was registered as Chembe/Kibabamshe/408 measuring approximately 4.0 Ha. In support of this position, he produced a copy of a Certificate of Lease issued in the Plaintiff's name on 14<sup>th</sup> March 1994(Pexh 2). The Plaintiff then caused the suitland to be sub-divided into two parcels Nos. 691 and 692. PW1 produced the two Certificates of Lease issued to them in this regard on 25<sup>th</sup> February 2000 as Exhibit 3(a) and (b).

24. According to the Plaintiff, while the land was initially held as a freehold title, under the ownership of the said Kitsao Mashobo Nyaki, the registration system for the area was subsequently changed to a leasehold under which regime the Plaintiff was registered as the owner thereof. PW1 produced as Pexh 2 a letter dated 24<sup>th</sup> April 1997 from the Ministry of Lands addressed to the Commissioner of Lands evidencing the fact that the owners of the titles initially registered as freehold were asked to return and surrender the same in exchange for registration as leasehold titles.

25. Even though they filed a joint Statement of Defence denying allegations of fraud and/or collusion with the 3<sup>rd</sup> Defendant in obtaining a title under their name in 2002, neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant appeared or called a witness to testify on their behalf. The 3<sup>rd</sup> Defendant did not also testify before the Court.

26. In their List of Documents filed herein, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had attached a Copy of a Title Deed issued in their names as the registered proprietors on 16<sup>th</sup> April 2002. That would have been some two years after the Plaintiff was issued with the Certificate of Lease over the same property. There was however no evidence that the Plaintiff which had previously acquired the land and was issued with title therefor on 14<sup>th</sup> March 1994 had either relinquished its ownership thereof and/or sold the same to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

27. Section 26(1) of the Land Registration Act provides that:-

***“The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of the proprietor shall not be subject to challenge except:-***

***a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***b) Where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

28. From the material presented before me, there was nothing to suggest that the Plaintiff's title herein was tainted by fraud or any illegality. As a matter of fact even the party joined herein as the Interested Party produced nothing to demonstrate that the Plaintiff's title was acquired in a process that was otherwise in contravention of the exemptions enumerated herein above.

29. Indeed PW2- A Police Officer attached to the Directorate of Criminal Investigations to whom the Defendant had lodged a complaint in regard to the acquisition testified herein that as at the time of the proceedings herein, they did not find any evidence of wrong-doing in the acquisition of the Certificate of Lease for parcels Nos. 691 and 692 registered under the Plaintiff's name.

30. Accordingly, I am persuaded that the Plaintiff is the rightful and absolute owner of the suit properties. In regard to the right of a registered proprietor of land, Section 24 of the Land Registration Act provides as follows:-

***“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

31. The Plaintiff told this Court that on the purport that they held the title deed issued on 16<sup>th</sup> April 2002 aforesaid, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had invaded the suitland and caused their agents and/or servants to occupy the same thereby preventing the Plaintiff from carrying on any activities thereon. In light of my findings as indicated above, such occupation without the Plaintiff's consent would be tantamount to trespass.

32. In the circumstances herein, I am satisfied that the Plaintiff's case has merit and that the same has been proved to the required standards. Judgment is accordingly entered for the Plaintiff as against the Defendants as prayed in Paragraph (a) (b) and (c) of the Plaintiff.

33. The Plaintiff will also have the costs of this suit.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of July 2019.**

J.O. OLOLA

JUDGE