



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 76-80 OF 2007 (Consolidated)

MELINA LIMITED

OPATA LIMITED

SILOPHAN LIMITED

GWANJA HOLDINGS LTD

VANLOM LIMITED.....PLAINTIFFS

VERSUS

FOUR ISLAND BAY LIMITED.....DEFENDANT

JUDGMENT

BACKGROUND

1. Messrs Melina Ltd, Opata Ltd, Silophan Ltd, Gwanja Holdings Ltd and Vanlom Ltd (the Plaintiffs) filed separate but similar suits against Four Island Bay Ltd (the Defendant) on 9th October 2007 praying for:-

a) A perpetual injunction to restrain the Defendant through its agents/servants/workmen or any other persons whomsoever from entering into and/or carrying out any activities upon the Plaintiff's properties (being LR Nos. 114, 115, 116, 117 and 118) situated in Watamu Township as to occasion wastage and/or interference with the Plaintiffs proprietary right of access to and quiet possession, use and enjoyment of the same;

b) Costs of the suit and interests thereon.

2. Those prayers arose from the Plaintiffs' contention that at all material times they were respectively the owners of the suit properties. On or about 29th September 2007, the Defendant had without any colour of right entered into the said properties and erected a wall thereon. The Plaintiff companies which are related in their shareholding and directorship assert that the Defendant's said action was in breach of their proprietary rights and interests over the suit properties and amounted to an unwarranted impediment to the Plaintiffs' access to, quiet possession and use of the same.

3. In various Statement of Defence filed separately on 18th October 2007, the Defendant denied the averments made by the Plaintiff. It was instead the Defendant's position that it was the registered proprietor of all that parcel of land known as Kilifi/Jimba/1146 where it had completed the erection of a perimeter wall to safeguard the same upon encroachment and trespass.

4. The Defendant further asserted that the Plaintiffs plots do not fall within Kilifi/Jimba Adjudication Section but are within Kilifi Township. It further avers that the said plots were issued erroneously to the Plaintiffs as a result of which the Registrar of Titles had placed a caveat restricting any dealings therewith under Section 65(1) (f) of the Registration of Titles Act.

5. On or about 26th February 2009, the five matters were consolidated for hearing.

The Plaintiffs' Case

6. At the trial herein, the Plaintiffs called two witnesses who testified on their behalf.

7. PW1-Andrea Lolli is a director of the five Plaintiff companies. He told the Court that the dispute related to plot numbers 114, 115, 116, 117 and 118 situated in Watamu. He produced the Certificate of Incorporation for the various companies and testified that they owned the parcels and had title deeds as below:-

i) Siphon Ltd-Plot No. 114

ii) Melina Ltd-Plot No. 115

iii) Vanlon Ltd- Plot No. 116

iv) Gwanja Ltd-Plot No. 117

v) O pate Ltd-Plot No. 118

8. PW1 told the Court that the companies separately made resolutions authorizing him to file the suits. When they received the Certificates of titles in 1993, they instructed a Company to do a survey to identify the beacons in order to fence the plots. The Surveyor however encountered some difficulties on the ground as there were squatters. It was later established that the squatters were members of one family and through the Area Chief, they were summoned and paid money to leave.

9. PW1 told the Court that they paid a total of Kshs 180,000/- after which they were able to fence all the plots in 1997. Sometime in 2007 however, the Defendant brought down all the fences claiming the land to be their own.

10. PW2-Salim Zuma Dindia is a Government Land Surveyor serving at the Survey Office Malindi. He told the Court that he was instructed by Andrea Lolli and Elio Lolli-the Directors of the Plaintiff companies to obtain the Original Survey Map in their Nairobi Office and to go to the suit plots in Watamu to check whether the beacons were still intact.

11. PW2 testified that he obtained the Survey Map of the area where Plot Nos. 114 to 118 Watamu are located. The Map produced in Court as evidence was prepared on 28th April 1976. It shows the said Plots in Watamu were part of the Crown Lands and as per the then existing land law, the title that could be issued therefor were under the Registration of Titles Act. He told the Court that Kilifi Jimba Settlement Scheme is located far away from the said Plots and that Plot Nos. 114-118 Watamu are not part of the Scheme.

The Defence Case

12. The Defendant did not participate at the trial herein having left the Court on the date for hearing when their application for adjournment was declined by the Court.

Analysis and Determination

13. I have perused and considered the pleadings filed by the parties herein as well as the testimony of the Plaintiffs' two witnesses. This Court also had the opportunity to visit the locus in quo in Watamu on 17th October 2018. I have accordingly perused the notes made on that day as well as the written submissions filed herein by Ms Aoko Otieno, Learned Counsel for the Plaintiffs.

14. The five Plaintiffs pray for a perpetual injunction restraining the Defendant from entering into and/or carrying out any activities upon the suit properties. According to the Plaintiffs, they had acquired the suit properties situated in Watamu Township way back between 1992 and 1993.

15. The Plaintiffs told the Court that upon receipt of their Certificates of titles, they instructed a Surveyor to identify the beacons in order to enable them fence off the plots. As it turned out, the Surveyor encountered some difficulty on the ground as there were some members of a family that were squatting on some of the plots. According to Andrea Lolli (PW1) who happened to be a director of all the five Plaintiff companies, the Plaintiffs were forced to pay some compensation to the members of that family.

16. Thereafter the family moved out and the Plaintiffs were able to fence all the plots in 1997. Sometime in 2007 however, the Plaintiffs were surprised when the Defendant herein moved into the suit plots claiming the land to be their own and brought down all the fences.

17. While the Defendant did not testify and/or adduce evidence at the trial herein, they filed Statements of Defence in which they asserted their own claim to the title. In a Replying Affidavit filed herein on 18th October 2007 by one of its Directors Isaac Mwaura Rodrot, the Defendant appeared to confirm bringing down the fences erected by the Plaintiff.

18. At paragraph 5 to 9 of the said Replying Affidavit the Defendant's Director lays out the basis of their Defence herein as follows:-

“5. That I have read and understood the Plaintiffs' Chamber Summons amended on 9th October 2007 as well as the Plaint dated 9th October 2007 and in response thereof wish to state as follows:-

6. That the Defendant is the absolute owner of all that parcel of land known as Kilifi/Jimba/1146 since 24th August 2007. I annex as IMR (i) A copy of the Title Deed for the Defendant's plot and as IMR (ii) a copy of the Transfer;

7. That immediately the Defendant became the registered proprietor thereof it embarked on erecting a block perimeter fence to secure its property and pulled down the old barbed wire fence that was securing the property to ward off any trespassers thereon. The said perimeter wall is now complete;

8. That the Defendant has not trespassed into the Plaintiffs' alleged plot and its activities are confined within Kilifi/Jimba/1146 whose delineates and beacons are identified. I annex as IMR (iii) a copy of the Mutation Form showing the location of the Defendant's plot and as IMR (iv) the District Surveyor's letter to the Director of Land Adjudication and Settlement forwarding the said Mutation; and

9. That before the Defendant purchased the said plot, the same was registered in the name of Kalumass Company Ltd which in turn had acquired the same from the first registered proprietor, Emmanuel Charo Tinga who as the squatter thereon was allocated the same by the Settlement Fund Trustees. I annex as IMR (v) a copy of the Title and search for Kalumass Company Ltd, IMR (iv) a copy of the Consent to Transfer to Kalumass Company Ltd and as IMR (vii) a copy of letter of offer to Emmanuel Charo Tinga for the said plot and as IMR (viii) and IMR (ix) correspondences to confirm the said allocation."

19. The Plaintiffs' second witness Salim Zuma Dindia (PW2) was a Land Survey Assistant serving at the Survey Office, Malindi. He told the Court that on the instructions of the Plaintiffs, he was able to obtain the Original Survey Map from their Nairobi Office for the said plots. He also visited the suit properties in Watamu.

20. PW2 presented the Original Survey Map to Court and confirmed that it was prepared by the Department of Survey on 28th April 1976. It was registered in the Department on 16th August 1976. PW2 told the Court that the Map shows that Plot Nos. 114, 115, 116, 117 and 118 Watamu were previously part of the Crown Lands. The Map also indicates the location of the Gede/Jimba/Registration Scheme which was carved out for the Kilifi/Jimba Settlement Scheme.

21. I have perused the said Original Survey Map (Pexh 4 (a)-(d)), the Plaintiff's Certificate of title as well as the title deed issued to the Defendant for the said LR No. Kilifi/Jimba/1146. While the Certificate of titles for the suit properties (Plot Nos. 114, 115, 116, 117 and 118) are registered under the Registration of Titles Act, the Defendant's title was registered under the Registered Land Act.

22. In my view and as confirmed by PW2, given that the suit plots originated from what was formerly the Crown (Government) Lands, the only titles that could validly be issued therein were those under the Registration of Titles Act (now repealed) and not the Registered Land Act (also repealed).

23. In any event, the Plaintiffs' title over the suit plots were registered first in time on 1st February 1991 before the Defendant's title was registered on 29th August 2001. The Plaintiffs titles were not cancelled by the Defendant's later title and were as such protected under Section 23 (1) of the Registration of Titles Act which gave an absolute and indefeasible title to the owner of the property.

24. As the Court of Appeal observed in *Dr. Joseph Arap Ngok –vs- Justice Moijo Ole Keiwua & 5 Others, Civil App No. Nai 60 of 1997* (unreported):-

“The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

25. For the reasons outlined hereinabove, this Court was satisfied that the Plaintiffs consolidated suits herein had merit and that the Plaintiffs had proved the same to the required standard.

26. Judgment is accordingly hereby entered for the Plaintiffs jointly and severally against the Defendant as prayed in the Consolidated Suits with costs.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE