



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 45 OF 2009

RAND INVESTMENT LIMITED.....PLAINTIFF

VERSUS

TANZINI ARMANDO.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

DIRECTOR OF SURVEYS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated 29th April 2009 as later amended on 17th September 2014, Rand Investments Ltd (the Plaintiff) prays for Judgment against the four (4) Defendants jointly and severally for:-

a) An order compelling the 1st Defendant to surrender its title document to the 2nd Defendant for cancellation and in the alternative his title documents to be declared null and void;

b) An order for the Defendants to pay for loss and damages;

c) General damages;

d) Costs of this suit.

2. Those prayers are premised on the Plaintiff's contention that at all times material to this suit, it was the registered proprietor of all that parcel of land known as Plot No. 5782 (CR No. 225110) Malindi. Sometime in 2006, the Plaintiff discovered that another Plot No. 10593(CR No. 32056) had been created and granted to the 1st Defendant with effect from 1st November 1995. It is the Plaintiff's case that the 1st Defendant's said Plot overlaps its own.

3. The Plaintiff avers that its efforts to get the 1st, 2nd and 3rd Defendants to correct the anomaly have not borne any fruit and it has now become impossible for it to develop its property.

4. By his Statement of Defence and Counterclaim dated 23rd July 2009 as amended on 25th July 2014, Tanzini Armando (the 1st Defendant) while conceding that he is the proprietor of the said Plot No. 10593 Malindi denies any knowledge that the same overlaps the Plaintiff's parcel of land.

5. The 1st Defendant denies that his said parcel of land was created illegally and asserts that his title was properly and regularly issued after compliance with all requisite procedures save for the fact that the measurements thereof needs to be corrected from 0.1318 Ha to read 0.64 Ha.

6. By way of the Counterclaim, the 1st Defendant avers that he was issued with a Letter of Allotment on 31st January 1995 for a parcel of

land measuring 0.68 Ha. He was however only issued with a title for 0.1318 Ha. He avers that it has since come to his knowledge that a large part of his land was by mistake, intentionally, illegally or fraudulently given out to the Plaintiff and hence the overlap.

7. Accordingly the 1st Defendant prays for:-

a) A declaration that the 1st Defendant's acreage ought to be approximately 0.68 Ha and not 0.01318 Ha as indicated in his title deed;

b) A declaration that the 1st Defendant is entitled to 0.68 Ha of the suit property as shown in the allotment letter;

c) An order for cancellation of the Plaintiff's title if any or the deed plan and to have the 1st Defendant's title corrected to comprise the proper acreage;

d) Costs of the Counterclaim with interest at Court rates.

8. On their part the Commissioner of Lands, the Director of Surveys and the Honourable the Attorney General (the 2nd, 3rd and 4th Defendants) have by their Joint Statement of Defence dated 4th March 2014 denied any knowledge of the Plaintiff's proprietorship of the suit property. They deny in particular that the Plaintiff approached their offices seeking to have the alleged anomalies on its title corrected and invite the Plaintiff to strict proof thereof.

THE PLAINTIFF'S CASE

9. At the hearing hereof the Plaintiff called two witnesses in support of its case.

10. P1-Wanda Lolli is a director of the Plaintiff company. He told the Court that the Plaintiff was incorporated on 24th November 1991. Sometime in 1992, the Government leased Land Portion No. 5782 Malindi to the company for a period of 99 years.

11. PW1 testified that thereafter the Plaintiff took possession of the leased premises. However while carrying out investigations with a view to putting up apartments for sale on the land, the Plaintiff discovered that there was an overlap by Plot No. 10593 which had been granted to the 1st Defendant.

12. PW1 told the Court that they sought help from the 2nd and 3rd Defendants to correct the error but sometime in 2009, the Plaintiff discovered that the 2nd and 3rd Defendants representatives were never going to carry out any corrections.

13. PW2-Maina Chege is a Valuer by profession. He was instructed by the Plaintiff company to inspect the suit property with a view to advising on its loss of income. He prepared a Report dated 29th April 2016 putting the loss of income for non-use of Portion No. 5782 Malindi from the year 2009 to 2016 at Kshs 5,315,881/50.

THE DEFENCE CASE

14. The 1st Defendant called one witness in support of his case. The 2nd, 3rd and 4th Defendants did not call any witness at the trial.

15. DW1-Armando Tanzini is the 1st Defendant. He testified that he is the registered owner of Plot No. 10593 Malindi having been allotted the same by the Government on 31st January 1995. DW1 told the Court that he accepted the allotment and paid a sum of Kshs 74,200/- as required for the land which was said to measure approximately 0.68 Ha.

16. DW1 told the Court that he was then properly issued with a title although the acreage was wrongly indicated as 0.1318 Ha. He further told the Court that he has established a hotel known as White Elephant on his Portion of land and the part which is the subject matter of this suit is being used as a parking lot for a company known as Kenya Way Ltd.

ANALYSIS AND DETERMINATION

17. I have perused and considered the pleadings filed herein, the oral testimony of the witnesses and the evidence adduced at the trial herein. I have equally considered the Written Submissions and authorities placed before me by the Learned Advocates for the parties.

18. The dispute before me is essentially one between the Plaintiff and the 1st Defendant. The Plaintiff is the registered Proprietor of Plot No. 5782 (CR No. 225110) Malindi. The Plaintiff company was issued with a Certificate of Title for the said parcel of land measuring 0.7000 Ha on 10th April 1992.

19. It is the Plaintiff's case that sometime in the year 2006, the company made a decision to develop some apartments for sale on its parcel of land. To their surprise, they discovered that another Plot No. 10593 (CR No. 32056) Malindi had been created overlapping the company's parcel of land and that there existed a title deed therefor in the name of the 1st Defendant.

20. It is further the Plaintiff's case that due to the said overlap, the company was unable to carry out the intended developments on its parcel of land. They therefore brought the anomaly to the attention of the 1st, 2nd and 3rd Defendants and sought a correction thereof. The Plaintiff

accuses the Defendants jointly and severally of refusing and/or neglecting to correct the overlap and thereby necessitating this suit.

21. While the 2nd, 3rd and 4th Defendants denied any knowledge of the overlap, the 1st Defendant conceded that he is the registered proprietor of all that parcel of land known as Plot No. 10593 Malindi. The 1st Defendant told this Court that his parcel of land was lawfully and regularly created before being allotted to him vide a letter dated 13th January 1995.

22. By way of his Counterclaim however, the 1st Defendant asserts that while he was issued with a Letter of Allotment for a parcel of land measuring 0.68 Ha, the Title Deed issued to him was only for a parcel measuring 0.1318 Ha and not what he had paid for. He later came to learn that a large portion of the land due to him was by mistake or fraud allocated to the Plaintiff and hence the overlap.

23. From the material placed before me, it was evident that the Plaintiff is the registered owner of Plot No. 5782 whose Grant was registered at the Coast Land Registry as CR 22510 for a term of 99 years effective 1st March 1992. The particulars of this Plot are contained in the Land Survey Plan No. 161451 as indicated on the Grant, a copy whereof was produced herein as Plaintiff Exhibit 1.

24. The 1st Defendant on the other hand is the registered owner of Plot No. 10593 Malindi whose Grant was registered at the same Coast Land Registry as CR 32056 also for a term of 99 years effective 1st November 1995.

25. The dispute herein arises from the Plaintiff's contention that the 1st Defendant's title issued some three years (3) after the Plaintiff's title overlaps its title. Following the institution of the suit herein, the Plaintiff filed a Chamber Summons application dated 22nd June 2010 seeking orders of injunction to restrain the 1st Defendant from continuing with development and construction on the disputed premises.

26. While granting the injunction in a Ruling delivered herein on 2nd March 2011, the Honourable Justice H.A. Omondi then seized of the matter directed the Malindi District Surveyor to visit the disputed portion of the land and to consider whether indeed there was an overlap.

27. In his Report dated and filed herein on 22nd March 2011, the said Surveyor found out that indeed there was an overlap of 0.0906 Ha on the Plaintiff's parcel of land. That report was produced by the consent of the parties herein as Plaintiff Exhibit No. 4.

28. According to the 1st Defendant, he had been regularly allocated his parcel of land after he applied and complied with all the requirements pertaining to the allotment. From his own List of Documents, it is apparent that the 1st Defendant who runs an establishment known as the White Elephant in the parcel of land adjacent to the disputed portion of land had been using the disputed portion as a tennis Court and Parking lot.

29. Following his application dated 20th January 1995 to be allocated the disputed Portion of land, the Commissioner of Lands (the 2nd Defendant) wrote to the Chief Land Registrar as follows on 26th January 1995:-

"RE: Armando Tanzini

I am forwarding this application of the above mentioned applicant together with a sketch-map edged red with my approval for the applicant to be issued with a Letter of Allotment.

However before the Letter of Allotment is issued to the Applicant for the allocation of lands Portions lying vacant in a Sub-Divided area within Plots Nos. 653, 654 and 655, you are directed to make a comprehensive inquiry as to whether these portions falling under Government lands have earlier been allocated to other persons or not....."

30. It was interesting to note that even as the Commissioner of Lands Wilson Gacanja signed the above letter on 26th January 1995, one E.M. Kiara had purportedly acting on his behalf issued the 1st Defendant with a Letter of Allotment some two (2) weeks earlier on 13th January 1995 for a parcel of land purportedly measuring 0.68 Ha.

31. As per the findings of the District Surveyor, this land allotted in haste to the 1st Defendant overlapped private land already belonging to the Plaintiff by a margin 0.0906 Ha. The portion of land belonging to the Plaintiff could not by any stretch of imagination be construed as unalienated Government land and the Commissioner of Lands had no power to alienate the same in the manner that was done herein.

32. Accordingly I was persuaded that the Plaintiff had proved its case to the required standard and that the 1st Defendants Counterclaim had no merit. I was however not persuaded that the Plaintiff had suffered any loss and damage as claimed.

33. In the premises, the 1st Defendant's Counterclaim is dismissed. Judgment is hereby entered for the Plaintiff as prayed at Paragraph 'a' of the Plaintiff.

34. The Plaintiff shall have the costs of its suit and the Counterclaim.

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

J.O. OLOLA

JUDGE