



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 25 OF 2015

MOHAMED AKBARALI ESMAIL.....PLAINTIFF

=VERSUS=

CORRUGATED SHEETS LIMITED.....RESPONDENT

R U L I N G

Introduction:

1. The Notice of Motion before me is the one dated 19th February, 2015 by the Plaintiff seeking for the following orders:-

(a) THAT this Honourable court do grant temporary injunction restraining the Defendant, its agents, and/or in any other way dealing with all that parcel of land known as L.R NO. 28584 MARIAKANI (CR 50409) pending the hearing and determination of this Application interpartes.

(b) That costs be provided for.

The Applicant's case:

2. The Application is premised on the grounds that the Plaintiff is the registered proprietor of L.R. NO 28584 Mariakani; that the Defendant has committed acts of trespass on the land and that the Plaintiff is apprehensive that the Defendant will proceed to construct permanent structures thereby depriving he Plaintiff of his right to possession of the land.

3. According to the plaintiff, the Defendant showed him an alleged sale agreement between Nuru Ndadzua Lwanbi and itself; that the said Nuru is a stranger to him and that it is not true that the suit property is unregistered.

The Defendant's/Respondent's case:

4. The Defendant's Administration Manager deponed that the property the Defendant purchased is part of an adjudication section being Jimba/Kelia Ng'ombe/1453; that the Defendant obtained confirmation from the Chief of Rabai Location that the suit property belonged to the family of Dena Benyae and that upon the demise of Fondo Kirimo Mwakomba, his widow, Nuru Nyadzua Lwambi entered into an agreement of sale with the Respondent.

5. According to the Respondent's Manager, the Applicant's title is shrouded in mysteries because the process of setting apart Trust land was conducted without any ground report being filed.

Further Affidavit:

6. In his Further Affidavit, the Applicant deponed that the suit property is no longer an adjudication scheme because there was a process for setting apart and that he purchased the land from the registered proprietor of the same.

Submissions:

7. The Plaintiff's advocate submitted that Nuru Nyadzua had no good title which she could pass on to the Respondent; that section 26 of the Land Registration Act provides that the certificate of title issued by the registrar shall be taken as prima facie evidence that the person named therein is the absolute and indefeasible owner. On the basis that the Plaintiff was the registered proprietor of the suit property, counsel submitted that the Plaintiff is entitled to the order of injunction.

8. Counsel submitted that if the Defendant is allowed to carry out developments on the suit property, it will occasion an injury that cannot be compensated to the Plaintiff.

9. The Defendant's counsel submitted that none of the people purporting to have attended the setting apart meeting of 6th July, 2001 were from the family of which the Respondent purchased the suit property from; that the Respondent bought the suit property from one Nuru Nyadzua Lwambi, a family representative of Deya Benyae and that the land in question belonged to Deya Benyae's family.

10. The Defendant's advocate submitted that the Respondent and the seller's families have been in possession of the suit land for many years.

Analysis and findings:

11. The Plaintiff's Application is principally premised on the fact that he is the registered proprietor of L.R.NO. 28584, Mariakani.

12. It is the Plaintiff's case that he bought the suit property for value from Akberali Abdulhussein Khanbai & Sons who held a valid title to the suit property which was issued to them after the process of setting apart was concluded.

13. Other than the title documents, the Plaintiff has annexed on the Supporting Affidavit the minutes of the full council meeting of 6th July 2001 which approved the setting apart of land measuring 2.0 acres in Kokoloni, Mariakani to Mr. Akberali.

14. On the other hand, the Defendant's case is that it bought an unsurveyed parcel of land at Kalia Ng'ombe village, Kalia Ngombe sub location, Rabai location in Kaloleni District.

15. According to the Defendant, the suit property is part of an adjudication section, being Jimba/Kalia Ng'ombe 1453.

16. It is the Defendant's case that Jimba/Kalia Ng'ombe 1453 was originally occupied by the family of Dena Binyae and that no ground report was prepared before the land was set apart and allocated to the Plaintiff.

17. The Plaintiff has not denied that the suit property is Trust land.

18. Under the repealed Constitution and the Trust Lands Act, trust lands are neither owned by the Government nor by the County Councils within whose area the land falls. The County Councils simply held such land on behalf of the local inhabitants of the area.

19. For as long as Trust land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land is transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.

20. Section 117(1) of the repealed Constitution allowed, through an Act of Parliament, County Councils to *set apart* any area of Trust land vested in a County Council for use and occupation by a public body; or for purpose of the prospecting for or for the extraction of minerals or by any person for a purpose which in the opinion of the County Council is likely to benefit the people ordinarily resident in that area or any other area of Trust land vested in that County Council either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof.

21. Section 117 (4) of the repealed Constitution provided that when land is set apart and allocated to a person, the setting apart shall have no effect unless prompt payment of full compensation is made to any resident of the land set apart who had a right to occupy the land under the African customary law for the time being in force.

22. If it is true, as claimed by the Defendant, that the suit property was set apart before establishing the people or community that had a right to occupy the said land and compensating them for the land, then the Plaintiff's title can be impugned.

23. However, the validity of the Plaintiff's title can only be challenged on those grounds at trial.

24. In the meantime, status quo prevailing should be maintained to await the trial. The Defendant will have to keep off the suit property considering that the Plaintiff is in possession of the title document which has not been declared a nullity yet.

25. In the circumstances, I allow the Application dated 19th February 2015 as prayed.

Dated and delivered in Malindi this **3rd** day of **July** 2015.

O. A. Angote

Judge