



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 100 OF 2007

BAJABER LIMITED.....PLAINTIFF

VERSUS

ABDULWAHID ABDULRAHAH

MOHAMED BUTEDEFENDANTS

JUDGMENT

1. The Plaintiff, a limited liability company brings this suit in its capacity as the registered owner of a land parcel known as LR NO. 26781 LAMU which measures approximately 1674ha (the suit property). Two key prayers are contained in the plaint filed on 27th November, 2007, namely:

“a) A permanent injunction restraining the defendants either by themselves, their employees, agents and or servants or otherwise howsoever from trespassing on the plaintiff's suit property, destroying perpetrating abetting or inciting acts of malicious destruction or acts of violence against the plaintiff's suit property known as Land Reference No. 26781 Lamu and the contents thereon and or in any other way interfering with the plaintiff's peaceful and quiet occupation and enjoyment of the same.

b) A declaration that the leasehold interest in the said suit property having been registered in favour of the plaintiff belongs exclusively to the plaintiff subject however and only to the terms and conditions contained in the instrument granting the same to the plaintiff”

2. From the pleadings, evidence and submissions, the crux of the Plaintiff's complaint against the Defendants their servants and or agents is that they have:-

a) persistently interfered with the Plaintiff's quiet enjoyment of the suit land through acts of violence, malicious damage to property thereby preventing the Plaintiff from developing its property and using it for intended purposes, namely salt mining

b) Committed acts of trespass

c) Committed several violent acts against the Plaintiff's servants

Consequent to these acts, the Plaintiff's heavy investment on the suit property stands the risk of destruction, occasioning irreparable damage to the Plaintiff.

3. In the defence statement filed on 23rd January, 2009 and in the course of the trial, the Defendants take issue with the Plaintiff's asserted proprietary or possessory rights to the suit property. The

claim of trespass they assert, is not therefore tenable. They dispute the Plaintiff's averment that it has invested in the suit property and that the Defendants have in any way interfered with the Plaintiff through acts of violence or malicious damage to property. The Defendants however, did not adduce evidence during the trial as they failed to procure the attendance of witnesses despite being given an opportunity to do so.

4. However, at the mention on 30th September, 2013, for purposes of receiving submissions, Mr. Mouko for the Defendants appeared and was allowed to file his submissions within 14 days. These submissions were not filed until the 6th November, 2013. Therein the Defendants attack the quality of the Plaintiff's evidence in addition to raising objections concerning the institution of the suit.
5. Two broad issues require determination, in seeking answers to the question whether the Plaintiff has established its case on a balance of probabilities. The first question relates to the ownership of the suit land by the Plaintiff, and the second, proof of the unlawful acts attributed to the Defendants by the Plaintiff.
6. On the first issue, it is beyond dispute that the Plaintiff holds in its favor a grant in respect of the suit land, issued on 1st March, 1999. The defendants by their pleadings and cross-examination challenge the bona fides of that title. Evidently, in 2005, a caveat was registered in terms of Section 65(1) of the Registration of Titles Act based on complaints allegedly made by the 1st Defendant (see P.Exh.12). It is the Plaintiff's case that the caveat was subsequently lifted in the year 2006. Perhaps this is the reason why the Plaintiff is silent on this particular aspect of the Defendants alleged interference. The complaint was raised during the trial.
7. Considering that the land in question was previously government land, the caveat by the 1st Defendant cannot be viewed as a form of interference. It must be shown, which is not in this case, that the caveat was maliciously lodged. Besides, lifting of the caveat on the face of it upheld the legitimacy of the plaintiff's title. Inexplicably, the Plaintiff's opted not to produce an official postal search on the suit property.
8. Be that as it may, it is the Plaintiff's evidence with regard to the alleged acts of violence, trespass and malicious damage that presents a greater difficulty. At paragraph 4 of the Plaintiff it is pleaded that the Defendants "persistently interfered" with the enjoyment by the plaintiff through such acts.
9. Swaleh Abubakar Ahmed Bajaber (PW1) the key witness in the case admitted that he had not personally witnessed the perpetration of the cited acts by the Defendants. The closest he came to this was a statement to the effect that on one occasion the Defendants had followed him outside the site and told him "not to carry out any work there". He maintained however, that his manager Ahmed Salim Al Maheri had been physically assaulted by the Defendants.
10. He also referred to incitement of locals by the Defendants and produced records in Lamu criminal case No. 374/05 R vs Mohamed Sawen wherein one such person was charged with Malicious Damage to property contrary to section 339(1) of the Penal Code. True, in that case, the court found that the said accused was an employee of the 2nd Defendant, but the evidence leading to his conviction for damaging the barbed wire surrounding the suit land, is dubious to say the least. Besides, the 2nd Defendant had employed the accused therein to herd his cattle. There was no evidence that he had instructed him to go cut into the Plaintiff's fence, or even herd the cattle on the suit land in particular.
11. Ahmed Salim Al Maheri the Plaintiff's manager allegedly "physically assaulted" by the Defendants did not testify. Instead one Mohamed Hassan Mbara (PW2) claiming to have been the manager of the Plaintiff around 2004 testified that he was "attacked" by the Defendants jointly with another by the name Dokota.
12. During cross-examination PW2 retracted his evidence-in-chief, denied he was physically attacked

- or that the defendants were involved. He stated that a group of ten people issued threats against him on a date he could not recall in the year 2004.
13. PW3 Abdalla Ali Said who said he was an elder at Mkunubi, a settled area close to the suit property, asserted that he was not aware of any differences between the Defendants and the Plaintiffs. Describing himself as an uncle to the 1st Defendant he went on to state that the latter organized meetings to raise opposition to the Plaintiff's ownership of the suit land which the said Defendant claimed to be ancestral land.
 14. The witness was at pains to cast doubt on assertions that the 1st Defendant's ancestry is traceable to Mkunubi. Like PW1 he asserted that the village called Koreni lying next to the suit land was a creation of politician who "imported" Orma clansmen from Garsen to build voting blocks in 2002. This was also the evidence of Ali Mohamed (PW4). He too asserted that the two Defendants had organized meetings with the aim of raising opposition against the Plaintiff for allegedly "grabbing" the suit land.
 14. The evidence of the Plaintiff's witnesses was vague contradictory, and unconvincing, even with respect to the isolated incidents described. Even if believed, such incidents do not by any stretch of imagination amount to persistent interference through acts of violence, malicious damage or trespass. The Plaintiff's pleadings allude to a sustained campaign of unlawful actions by the Defendants. But the evidence tendered is definitely wanting.
 15. What is apparent is that the two Defendants spearheaded efforts to agitate against the Plaintiff's acquisition of the suit land. There were claims on the land, rightly or wrongly, by the Koreni community. It is not illegal to call meetings for such a purpose unless such meetings themselves constitute or lead to unlawful acts. To hold otherwise would be a denial of the Defendants' right to free expression and right to assemble under Article 33 and 36 of the Constitution.
 16. PW1 has consistently attempted to deny that this dispute is between the Plaintiff and a native community called Koreni community, whose most visible advocates appear to be the Defendants. At the same time the Plaintiff was eager to show through PW3 and PW4 that the Koreni Community or village did not exist before 2002, or at least when the Plaintiff acquired the suit land. According to the Plaintiff the Koreni Community was planted in 2002 through importation of Orma people from Garsen, and later people of Somali extraction.
 17. Notwithstanding, the disclaimers of PW1 it does seem to the court that this dispute involves more persons than the parties herein. I also take judicial notice of the fact that in November, 2012, five plaintiffs who might include some of the Defendants herein filed a land case in Mombasa, namely No. HCC 253 of 2012 Hussein Ali & 4 Others vs the Commissioner of Lands and six others, including the present Plaintiff. They claim that the suit was brought by them on behalf of the Koreni Community. In that suit it is alleged that the Defendant's title to the suit land is fraudulent and ought to be revoked. The suit is now registered as Malindi HCC No. 47 of 2012 and is currently before Angote J.
 18. The Defendants have also argued in their submissions that the present suit was brought without a resolution of the Board of Directors of the Plaintiff company and is therefore a nullity. They relied on **Kabundu vs Kabundu HCC 649 of 1996**. This objection ought to have been raised at the earliest opportunity by the Defendants, and contrary to their submissions, the issue is not expressly pleaded in the defence. However the objection may have substance.
 19. Reviewing the evidence before me, I am not satisfied that the Plaintiffs have tendered credible evidence in support of their allegations against the Defendants. Secondly, there is no evidence whatsoever that the Plaintiffs have invested "heavily" in the suit land and or stand to suffer irreparable damage. If I understood the Plaintiff's case, it is that they have been unable to carry out any work on the suit land: the business about salt mining was still under the process of approvals through various government agencies. For the foregoing reasons, I find no merit in the

Plaintiff's case and will dismiss it accordingly. Costs are awarded to the Defendants.

Delivered and signed at Malindi this **7th** day of **November, 2013** in the presence of Mr. Otieno for Plaintiff, Mr. Mouko holding brief for Mr. Mosi & Co. Advocates who have come on record.

C.W.Meoli

JUDGE

MR. SHUJAA

I apply for copies of proceedings and judgment.

**C.
Meoli**

W.

JUDGE

COURT – Proceedings and judgment be supplied to the parties.

**C.
Meoli**

W.

JUDGE