



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Suit 22 of 2012**

**DAVID KIPKURUI KANDIE.....PLAINTIFF**

**-VERSUS-**

**WATERFRONT HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff has sued the defendant claiming to be the rightful owner of parcel LR No. MombasaIsland/BlockXXVI/212 (suit property). The property is registered in both the plaintiff's and the defendant's names. The plaintiff filed an interlocutory application dated 14<sup>th</sup> February 2012. When the plaintiff appeared ex parte before court on 14<sup>th</sup> February 2012. The court granted interim orders in terms of prayer (b) of the application. In other words the court granted an interim injunction stopping all defendants from transferring, selling, registering, occupying, fencing, building or constructing or trespassing on the suit property. I will come back to those orders later on in this ruling.

The 1<sup>st</sup> defendant filed an application dated 7<sup>th</sup> March 2012. It is brought under sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and Order 1 Rule 14 Order 2 Rule 15(1) and Order 40 Rule 7 of the Civil Procedure Rules 2010. The 1<sup>st</sup> defendant by that application seeks for the striking out of his name from this action or in the alternative for the striking out of the plaintiff. The 1<sup>st</sup> defendant relied on the grounds; that the 1<sup>st</sup> defendant is improperly joined as a party to this suit; and that the plaintiff discloses no or any reasonable cause of action against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant by its other prayer also seeks that the interlocutory injunction granted on 14<sup>th</sup> February 2012 be discharged, varied or set aside. The 1<sup>st</sup> defendant through its manager has sworn a very detailed affidavit in support of the application. The manager by his affidavit annexed the 1<sup>st</sup> defendant's memorandum of registration of the transfer of the suit property into the 1<sup>st</sup> defendant's name. He also annexed the receipt of payment on allocation of the suit property into the 1<sup>st</sup> defendant's name and he attached a certificate of lease registered in the 1<sup>st</sup> defendant's name. It was stated in that affidavit that the 1<sup>st</sup> defendant later learnt that several duplicate titles had been issued in respect of the suit property to the following persons:

**(i) John Lemiso Ole lekakenya and;**

**(ii) David Kipkurui Kandie**

The 1<sup>st</sup> defendant relied on various documents which he alleged pointed to its true ownership of the suit property. Those documents are receipts of land rent payment and receipts of rate payments to the municipal council of Mombasa amongst others. The 1<sup>st</sup> defendant found fault with all the documents relied upon by the plaintiff as proof of ownership and termed them as forgeries. The 1<sup>st</sup> defendant also relied on correspondence which I will turn my attention to. It relied on the letter of the commissioner of lands dated 25<sup>th</sup> June 2010 addressed to the District Land Registrar and the Town Clerk of Mombasa Municipal Council. I will quote just a portion of that letter as follows:

**“.....From the foregoing, therefore, it is evident that for all intents and purposes, the lease in favour of Waterfront Holdings Limited is valid.**

**The lease in favour of one John LemisoLekakeny of P. O. Box 95 Rumuruti which is purported to have been registered on 12<sup>th</sup> May 1998 is therefore fraudulent as it does not originate from this office.”**

It also attached a letter dated 28<sup>th</sup> September 2010. That letter was written from the office of the Provincial CID Headquarters Mombasa and it was addressed to the District Land Registrar Mombasa. Again I quote just a portion of that letter as shown:

**“.....After thorough scrutiny and verification of documentation at the Registrar of companies office, it was established that water front Holdings Limited c/o Box 84873 Mombasa under C.NO. 63605 are the genuine Registered Company as per the extract from the Register of Business names.”**

Those documents have to be considered in the light of documents that the plaintiff relies on as proof of his ownership of the suit property. The first letter is dated 4<sup>th</sup> March 2010. It is in the following terms:

**“Ref: No. 186842/8                      4<sup>th</sup> March, 2010**

**M/s Links Options Ltd,**

**P. O. Box 21665 -00100,**

**NAIROBI**

**RE: MOMBASA MUNICIPALITY BLOCK XXVI/212**

**This is to confirm that according to our records the above plot belongs to one David KipkuruiKandie of P. O. Box 15699, Nairobi.**

**J. N. Osoro.**

**For: Commissioner of Lands**

**CC.**

**The Town Clerk**

**Mombasa Municipal Council,**

**Mombasa.”**

The letter dated 25<sup>th</sup> October 2010 is written by the provincial CID Headquarters Mombasa to the Commissioner of Lands Mombasa. It is important to consider its content which is as follows:

*“25<sup>th</sup> October, 2010*

*The Commissioner of Lands,*

*p. O. Box 300853,*

**NAIROBI**

**RE: INVESTIGATION INTO SUSPECTED LAND FRAUD INVOLVING LR MOMBASA ISLAND BLOCK XXVI/212.**

*This office is investigating Land fraud revolving on the above captioned land parcel.*

*It has been established that the above Land parcel has two letters of allotment in the names of Water Front Company Limited and John Lemiso*

*Lekakeny. All came through your office hence double allocation in the same. In the documents held in our Records it depicts that John Lemiso*

*was allocated earlier than Water front Company Ltd.*

*The later has changed hands to the third party in the names of David Kandie. Disregard our earlier letter to the District land Registrar*

*Mombasa.*

*Kindly advice and inform us of the true position. Since we are going on with the investigations, furnish us with the genuine allottee in the same.*

*Your co-operation is highly appreciated.*

***Sang Gilbert***

***For; provincial Criminal Investigation Officer***

***Coast Province***

Another letter relied on by the plaintiff is dated 8<sup>th</sup> April 2011. It is written by the Attorney General's Chambers to P.C.I.O Coast. It is stated in part as follows:

*“.....*

*From the documents presented by rival parties which are not controverted by any other evidence, the first allottee was JOHN LEMISO LEKAKENY, on 1<sup>st</sup> April, 1994.*

*This fact does not seem to be disputed from the documents submitted.*

*The second claimant WATERFRONT HOLDINGS LTD was supposedly allotted the property on 6<sup>th</sup> June, 1995 and was to take effect from 1<sup>st</sup> June, 1995.*

*This was after the property had already been allotted to John Lemiso on 1<sup>st</sup> April 1994.*

*A letter of allotment dated 4/4/94 signed by the current Commissioner of Lands shows that the property was allotted to John Lemiso.*

.....

***I found it also curious that a certificate of search can on 10<sup>th</sup> June, 2010, 15<sup>th</sup> June, 2010, 30<sup>th</sup> July, 2010 and 9<sup>th</sup> August 2010 show that the lawful owner is David Kandie and then suddenly on 29<sup>th</sup> July, 2010 it shows that the lawful owner is Waterfront Holdings!***

***I do not understand on what basis John WanjohiGichuki said that the signatures on the certificate of John Lemiso was a forgery when the document examiner was of the opinion that the signatures are similar, and certificate of search issued by his Senior the Chief Land Registration Officer, Mr. Geoffrey Swanya says the Green Card showed David Kandie was the registered owner.***

***It is also curious that two companies would be registered under one name. There appears to be a Waterfront Holding, Mombasa and Waterfront Holdings, Nairobi.***

***Consequently and in view of the fact that the purpose of criminal investigations is the detections of crime, there is no criminal matter revealed on the part of John Lemiso and David Kandie by the available evidence.***

***This investigation proceeded on the wrong assumption that Waterfront was the genuine owner and thus there was no investigation of the signatures appearing on its documents, when that theirs could actually be the forgery.”***

A letter dated 19<sup>th</sup> April 2011 by the provincial C.I.D headquarters Mombasa addressed to the District Land Registrar Mombasa was also attached to the plaintiff’s affidavit. I will also refer on a portion of that letter as follows:

“.....

***The two original green cards signed by KENNETH KARIUKI GITHII who was the then Land Registrar at Mombasa allocating the land to the two parties were forwarded to document examiner Nairobi for opinion. It later emerged that the two green cards were signed by the said KENNETH KARIUKI GITHII in respect of JOHN LEMISO LEKAKENY and WATER FRONT HOLDINGS LIMITED.***

***A case file was opened and evidence collected forwarded to state law office Mombasa (AG CHAMBERS) for perusal and directions. The Attorney General advised that the parties to solve their disputes in a Civil Court AND Ministry of Lands to tell who was the first allottee entitled to the land.”***

From careful consideration of all those opposing documents it becomes clear that the police, the commissioner of lands and the attorney general could not determine which of the titles held by the plaintiff and the 1<sup>st</sup> defendant were genuine. It is therefore impossible for this court through affidavit evidence to determine where the truth lies and who is the true owner of the suit property. The 1<sup>st</sup> defendant by its application in seeking the striking out of either its name or the striking out of the suit is essentially inviting this court to determine the merits of the case on affidavit evidence. At this point, I wish to refer to the case of DT DOBIE & CO. -V- MUCHINA [1982] KLR Pg 1. The court of Appeal in that case in defining cause of action stated:

***“The words ‘cause of action’ means an act on the part of the defendant which gives the plaintiff his cause of complaint.”***

The plaintiff undoubtedly has shown cause to complain. His complaint is that the 1<sup>st</sup> defendant has a title similar to his over the suit property. That in itself I believe shows that the plaintiff has a cause of action. On that ground the 1<sup>st</sup> defendant’s prayer for striking out will not be granted.

The 1<sup>st</sup> defendant’s prayer for the discharge or variation of the injunction issued ex parte did not elicit

sufficient response from the plaintiff. The defendant in support of that prayer deponed that by the time the plaintiff obtained that ex parte injunction it was in occupation of the suit property and the plaintiff used the ex parte order to evict the 1<sup>st</sup> defendant. The plaintiff did not controvert that the position. I have perused the plaintiff's application dated 14<sup>th</sup> February 2012 and I was unable to find any statement by the plaintiff that he was in possession of the suit property. I therefore accept as the correct position that the 1<sup>st</sup> defendant was in possession when the plaintiff got the ex parte injunction order. It was wrong for the plaintiff to use the order obtained to evict the 1<sup>st</sup> defendant. I therefore find that the 1<sup>st</sup> defendant's prayer for the variation of the ex-parte injunction order is merited. I grant the following orders:

- 1. The 1<sup>st</sup> defendant's prayer No. 1 of the Chamber Summons dated 7<sup>th</sup> March 2012 seeking the striking out of this suit is dismissed with costs being in the cause.***
- 2. Prayer No. 2 of the chamber summons dated 7<sup>th</sup> March 2012 which sought the striking out of the 1<sup>st</sup> defendant's name is dismissed with costs being in the cause.***
- 3. The injunction issued on 14<sup>th</sup> February, 2012 is varied to the extent that the court orders that the 1<sup>st</sup> defendant be granted possession of parcel Mombasa/Block XXVI/212 immediately. The 1<sup>st</sup> defendant shall retain possession of that parcel until the final determination of this suit.***
- 4. The 1<sup>st</sup> defendant is restrained by an order of injunction from parting possession of, transferring, selling or charging the parcel Mombasa/Block XXVI/212 until the final determination of this suit or for a period of 1 year from this date hereof whichever occurs first.***
- 5. For the avoidance of doubt, the application dated 14<sup>th</sup> February, 2012 is determine by this ruling and the costs thereof shall be in the cause.***
- 6. Parties shall immediately begin the process of obtaining pre-trial directions in this matter.***

**DATED and DELIVERED at MOMBASA this 5<sup>th</sup> day of July, 2012.**

***Mary Kasango***

**JUDGE**