



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 141 of 2011

CANON AUTOMOBILE LTD PLAINTIFF

VERSUS

KWALE INTERNATIONAL SUGAR CO. LTD DEFENDANT

RULING

1) The Plaintiff who claims to be the registered proprietor of parcel of land Kwale/Shirazi Bodo/754, the suit property herein, seeks an injunction to restrain the Defendant, its servants or agents from interfering with the Plaintiff's quiet enjoyment thereof pending the hearing and determination of the suit. The Plaintiff alleges that it purchased the suit property from Messrs. Suleiman Abadalla Machafu, Hamisi Omar Ndar, Abdalla Mohamed Sarai, Hassan Ali Mkungu and Hamisi Ali Mkungu by a sale agreement therefor dated 15th April 2011. Being the registered proprietor of the suit property, the Plaintiff sought to invoke the rights under sections 27 and 28 of the Registered Land Act which give the registered proprietor an indefeasible title to the property. The Plaintiff, which claims to be in physical possession of the suit property, traces its cause of action to the 6th November 2011 when the Defendant's employee allegedly visited the suit property and demanded that the Plaintiff produces its documents of ownership to the suit property and on the following day the 7th November 2011, unlawfully entered the suit property and brought down a perimeter fence which the Plaintiff had put up.

2) The Defendant denies the existence of the parcel of land Kwale/Shirazi Bodo/754 registered in the name of the Plaintiff and contends that the alleged suit property is **“in fact located inside and or within and forms part of all that parcel of land originally known as LR No. 27742 and measuring 6082.6 hectares or thereabouts”**, of which **“the Government of the Republic of Kenya through the Permanent Secretary to the Treasury of Kenya is the Grantee and proprietor respectively of the parcel of land”** LR No. 27742. The Defendant claims to have obtained proprietary rights over the parcel of land LR No. 27742 as follows:

“That at all material times, the Respondent herein has always been the bona fide proprietor of the said property known as Land Reference number 27742 after the Government of the Republic of Kenya through the Permanent Secretary to the Treasury of Kenya, as the grantee and proprietor of the suit property pursuant to a 99 year lease which commenced on 1st June 2007.”

The Defendant claims that the registration and issuance of a certificate of title on the suit property was fraudulent in view of the Defendant's prior acquisition of a proprietary interest thereon by way of the 99-year lease. It was further claimed for the Defendant that the Plaintiff could not be described as a bona fide purchaser for value without notice and **“that even if, which is denied the Applicant obtained land without knowing that the so called “original owners” had fraudulently registered the suit land in their names, they subsequently contributed in it by the manner in which they casually, negligently and indolently handled the transaction and the speed with which the transfer was registered.”**

3) The advocates for the parties made their respective oral submissions citing case law authorities in support of their contentions, and ruling was reserved. The issue for determination is simply whether the interlocutory injunction sought will be made to restrain the Defendant from “**interfering with the Plaintiff’s quiet enjoyment of the premises known as Kwale/Shirazi Bodo/754**” pending the hearing of the suit.

4) I consider that there is considerable doubt as to the existence of the parcel of Land LR Kwale/Shirazi Bodo/754, the suit property herein. The Defendant’s assertion that the parcel of Land LR No. 27742 was Government Land vested in the Permanent Secretary to the Treasury who had granted the Defendant a lease for 99 years from 1st June 2007 also raises a triable issue, which, in my view, makes the Government a necessary party to enable the full consideration of the issue of existence and ownership of the parcel of land in dispute, and the alleged fraudulent disposition thereof to the Plaintiff.

5) Applying the balance of convenience test for the grant of interlocutory injunction and being mindful of the court’s duty to render substantial justice in accordance with the overriding objective principle for the resolution of disputes, I would make the following orders with a view to preserving the property pending determination of the ownership dispute:

- a) The plaintiff’s Notice of Motion dated 28th November 2011 is dismissed.
- b) The Government of Kenya through the Hon. Attorney General is joined to the suit as a necessary party pursuant to Order 1 rule 10 of the Civil Procedure Rules.
- c) The Government of Kenya will file its Statement of Defence as such a necessary party within 15 days from the date of service by the Plaintiff upon the Attorney General of the pleadings and order of the Court herein.
- d) The suit will proceed to hearing on priority basis on a date to be fixed in consultation with parties.
- e) In the meantime, a temporary injunction will issue to restrain both the Plaintiff and the Defendant, which order will be registered in the relevant registers for the parcels of land the subject of this suit, from disposing or dealing with the said suit property Kwale/Shirazi Bodo/754 and LR 27742 until the hearing and determination of the suit.
- f) For avoidance of doubt, none of the parties will put up any construction on the disputed portion of land identified as Kwale/Shirazi Bodo/754 until the determination of the suit or further orders of the court.
- g) Costs in the cause.

Orders accordingly.

Dated and delivered on this 10th day of October 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Gikandi for the Plaintiff

Miss Latifa for the Defendant

Miss Linda - Court Clerk