



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 59 of 1994

GOLDEN SEA MAMBRUI LTD. PLAINTIFF

GOLDEN BEACH MAMBRUI LTD..... PLAINTIFF

-VERSUS-

JOSEPH KASENA YERI..... DEFENDANT

RULING

This litigation concerns plots No. 641 Mambui Kilifi and Plot No. 642 Mambui Kilifi. Currently they are registered in

the names of the plaintiffs having been purchased for valuable consideration from the original owners. The defendant contends that he had for a long time occupied these plots and that the Government should have allotted them to him instead of the original owners. He also alleges that the law governing the sale transaction involving agricultural land between the original owners and the current registered owners was ignored or contravened and that this aspect renders those sale transactions null and void. To this later effect he has annexed the purported copy of minutes of the Kilifi Land Control Board with a view of demonstrating that this sale transaction was never presented to the Board and that the failure to do so plainly constituted a breach of the imperative provisions of the Land Control Act which applied to these particular parcels of land.

In order to put the issue of original ownership of the plots in some perspective I find it eminently pertinent to reproduce here parts of the submissions made by Mrs. Khaminwain in the course of arguing in this application. She said the following in reference to tracts of land such as the one in this case:

"The land is just there. It is just there.' It is vacant. If anyone has an interest he has to make an application to the court of the recorder. The recorder adjudicates the land. So this was not Government land. It was just there. The respondent was using the land as other squatters were visiting. The defendant, then started acquiring the land. The land was vacant until this transaction started."

It is also relevant to notice that the documents filed by the defendant reveal that he was once a member of parliament for the area where the plots are situated. It should thus be assumed that his level of understanding the procedure to be followed in this matter was superior to that of most of the other squatters. One therefore expects him to invoke the right procedure to which his advocate has referred' in his bid to acquire the plots. But in paragraph 8 of his reply affidavit in this application he deposed:

"I have always occupied these plots when I was a member of Parliament in this constituency and have carried out development over the period."

It is difficult to understand why a man of his high calibre would embark on developing a piece of land over which he had not yet acquired any proprietary rights.

His documents reveal a further point namely, that in 1992 he initiated a process of acquiring the plots by obtaining a recommendation in his favour from the Chief of Magarini Location.

He proceeds on to show in the statement filed in the case No.641 of 1992 paragraph (g) that he applied to the Commissioner of Lands to be issued with titles in respect of the plots on which he occupied." He says that he made this application by his letter dated 25th of February 1992. So it is clear that even he himself did not channel his application to a recorder contemplated by the Land Titles Act Cap.282. He clearly also addressed his application to the Commissioner of Lands. I am certain that if his application to the Commissioner of Lands had been successful, he would not have turned round and contended that after all his own application had been defective. That would have been a bizarre situation. The question is whether he is now entitled to challenge the allotment in favour of the original owners on the ground of want of proper procedure in acquiring the titles. It is clear that he has attacked the alleged non-compliance of the provisions of the Land Titles Act, which he himself had deliberately also ignored, solely because his similar application to the Commissioner of Lands was unsuccessful. Therefore this is not a bona-fide application. It is actuated by evident malice: the defendant's reasoning is that since he failed to get the land allocated to him then nobody else should get it.

The next ground of the defendant's challenge, as I have said, relates to the provisions of the Land Control Act. He argues that the sale between the original owners and the plaintiffs was never consented to by the local Divisional Land Control Board.

It is true that a transaction of sale involving agricultural land must be consented to by the local Divisional Land Control Board; otherwise the sale transaction is null and void. See S.6 of the Act. The defendant has herein exhibited what he purports to be a copy of the minutes of the Board and points out that the sale transaction by which the plaintiffs became the registered owners of these suit plots does not feature anywhere. His advocate argued that it should thus be inferred from the document that the transactions were not presented before the land control Board, and that the letters of consent with which the transfers were registered must have been forged.

In the first place I have no means of knowing the authenticity of the alleged minutes of the Board which have been exhibited in these proceedings. They are unsigned and undated. The document is not even certified to be the true copy of the original. I therefore do not derive any useful information from this dubious document; it is not of any evidential value.

Moreover, at any rate, the allegation is of such a serious nature that I would have expected more concrete information about it. Secondly, I hold that the defendant does not have the right in law to complain on this particular aspect. It has to be borne in mind that the sale between the original owners and the plaintiffs was concluded after the defendant's effort to acquire the plots had ended in vain. He had thus ceased to have legal interest in them. For reasons which I have already discussed it is inconceivable that he would succeed in his efforts to have the allotment of the land to the original owners annulled.

But the most important aspect of this case is that the plaintiffs are purchasers of the plot for valuable consideration. Having perused the plaintiff's pleadings in the two cases I am unable to discover any pointer to the suggestion that they (the plaintiffs) knew or had reason to know that the titles of the original owners were defective nor that they were guilty accomplices to a fraudulent scheme. It is settled law that such a purchaser's title can not be challenged. In this regard it is relevant to refer to S. 23(1) of the Registration of Titles Act Cap 281 which provides:

23(1). The certificate of title issued by the Registrar to the purchaser of land upon transfer or transmission by proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein is proprietor of the land is the absolute and indefeasible owner thereof subject to encumbrances, easements, restrictions and conditions contained therein and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party". This provision

clearly applies to the facts of this case. If the plaintiffs had been a party to fraud or misrepresentation leading to their being issued with the certificates of title, then the same has not been pleaded within the terms of Order VI rule 8(1) which requires the particulars of misrepresentation or fraud to be pleaded.

In the ultimate analyses, I hold that the defendant's claims over the suit properties are totally misconceived. His assertions in both cases as I have endeavoured to show are merely frivolous and vexatious. His case is thus a non-starter. It can not amount to a prima facie case with probability of success. The plaintiffs intend to develop their properties. They have a huge sum of money at their disposal for the projects. In matters of injunctions the balance of convenience favours a registered owner. I have already adverted to the defendant's lack of bona fides in the entire matter. He would only be too happy to cause the plaintiffs all sorts of inconvenience and loss.

Upon all the foregoing reasons I grant a mandatory injunction against the defendant as sought in the Chamber Summons dated the 1st February 1994.

Dated and Delivered on the 28th April 1994

I.C.C. WAMBILYANGAH

JUDGE