



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

**CIVIL CASE NO 255 OF 1993**

**ANGELS BAY LTD..... APPLICANTS**

**VERSUS**

**CHARO RUWA JOHNSON & 5 OTHERS.....RESPONDENT**

**RULING**

The applicant Angels Bay Limited is the registered proprietor of certain properties in Mambui Town. In this application it seeks orders restraining the respondents from, *inter alia*, interfering, trespassing or in any other manner prohibiting the applicant from developing and quietly and peacefully using its property, pending the hearing of the suit the applicant has filed against the respondents.

The application is supported by an affidavit sworn on 3rd May, 1993 by Julio Bianchi one of the directors of the applicant Company. Basically what the affidavit reveals is that the applicant is the registered proprietor of certain plots in Mambui which it purchased from the original allottee one Ali Islam Said.

Mr Bianchi depones that since 30th March, 1993 the respondents have obstructed and prevented the Company from developing and carrying on construction work on the said plots under the pretext that they, the respondents, had obtained a court order restraining the applicant from developing or carrying on any construction on the plots. It is further deponed by Mr Bianchi that the applicant was not a party to the suit resulting in the said injunction nor was it named therein as a defendant and *ip so facto* the injunction is unenforceable against the applicant.

In opposing the application the respondents have asserted that the plots on which the applicant is carrying on the development is part of plot number 624 which is subject to the injunction issued by Wambilyangah J on 11th December, 1992 in HCCC No 646 of 1992. And in an affidavit sworn by Harrison Kombe, one of the respondents, on his own behalf and on behalf of all the other respondents, it is claimed that the land on which the developments are being carried on is the property of some of the respondents and that the applicant has occupied it illegally. It is further alleged that the applicant has in the process cut down crops and fruit trees and has destroyed other developments in the plots without paying any compensation to the owners of the plots.

It is finally deponed that the applicants were aware of the respondents interest in the land as well as in HCCC No 646 of 1992. But in an apparent twist, it is acknowledged on behalf of the respondents that the applicant has built a hotel in the area which none amongst the respondents has interfered with and, apparently, what the respondents do object to, is the expansion of the development and construction near areas which they think are their property.

In his submissions before me Mr Asige for the applicants made strenuous efforts to show that the applicant's plots were different from plot number 624, but, it is more than clear from the letter annexed to

an affidavit sworn by the original allottee of the plot and marked "A 1S 2" that the plots in dispute were indeed carved out of plot number 624.

It is, I think, common ground that plot number 624 was originally allotted by the Government of Kenya through the Commissioner of Lands to a person known as Ali Islam Said. It is also obvious that when the respondents realized that the land had been allotted to someone other than themselves they became aggrieved and started to campaign for the allotment of the land claiming that, as occupiers of the land, they had the right over and above the said Ali Islam Said to be allotted the land. They aired their grievances through the local provincial administration and KANU officials to the highest office in the land. Later they filed a suit, namely HCCC No 646/92, which resulted in the injunction referred to above. That suit is still pending in this Court.

I cannot of course go into the merits of the respective parties' claims to the land in that other suit save to repeat the observations which my learned brother made when issuing the injunction namely that the respondents do have an arguable claim over plot No 624 which they should be given an opportunity to prosecute in the Courts.

The position in the instant case is however slightly different. Although, as I have endeavoured to show, the plots registered in the applicant's name were subdivisions of plot No 624 the certificates of title in respect thereof were issued in August 1992 about two months before HCCC No 646/92 was filed and a clear 5 months before the injunction referred to above was issued. The applicants were not party to the proceedings leading to the injunction; neither were their plots part of plot 624 by the time of the injunction they having been excised from the said plot before the injunction. Upon those premises, these can be no doubt that the injunction did not cover and is therefore not enforceable over the said plots.

Where does the above lead us in so far as the present application is concerned. I think the position is as follows.

The applicants being the registered proprietors of the plots, the larger portion of which they are in actual physical possession and over which they have built a fairly large hotel expending tens, if not hundreds, of millions of shillings, are surely entitled to protection by injunction from interference by outsiders. Why do I say this? Firstly because by virtue of section 23 of the Registration of Titles Act, their rights are indefeasible. The section provides:

"The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, 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."

Secondly the position taken by the respondents with respect to the applicant's rights to the disputed plots is demonstrably ambivalent. In the replying affidavit filed on their behalf, the respondents state in paragraphs 8 and 9 as follows:-

"8. That Angels Bay is a hotel and nobody interfered with the hotel.

9. That the plaintiff started building Angels Bay Hotel in or about the year 1991."

The above facts clearly show that the respondents do not seriously profess to have any claim over that part of the applicant's property over which the applicant's hotel is standing. It is to be noted that that part of the property covers the larger portion of all the applicant's plots combined. However what the respondents do not wish to happen is the extension of construction work to the undeveloped part of the property. Over this part I saw, during my visit to the place, scattered coconut and cashewnut trees, the rest of the ground being covered by sand and some bushes.

Given those circumstances, are the respondents entitled to select, so to speak, for the applicant, what part of the property it can develop and which it should not touch? I think the answer to this question is NO. The respondents concede that the applicant has in fact been enjoying quiet possession of the property since 1991 without any interference by any of them. There is no reason why they should now interfere.

On the basis of the foregoing I think the applicants have satisfied the first condition for the grant of an injunction as stated in the famous case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358) which is that:-

“an applicant must show a *prima facie* case with a probability of success.”

As to whether the applicant will suffer irreparable damage if the injunction is not granted, it is clear that if the massive developments which the applicant is undertaking is stalled by the respondents interference then the damages that will result will be colossal and that the respondents will not be in a position to raise even a penny toward their payment. And of course considering that the applicant has undertaken substantial development at great cost on the said property with the knowledge of the respondents but without interference from them, the balance of convenience favours a grant of injunction to maintain the status quo.

For the above reasons an injunction will issue in terms of the prayers contained in the chamber summons dated 3rd May, 1993. The respondents will pay the applicants costs of this application.

Dated and Delivered at Mombasa this 18<sup>th</sup> day of June, 1993

**T. MBALUTO**

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**JUDGE**