



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.121 OF 2018

LIMUTTI HOLDINGS LIMITED.....PLAINTIFF

VERSUS

- 1. KAHINDI CHARO.....1ST DEFENDANT**
- 2. JACKSON KLACHU.....2ND DEFENDANT**
- 3. MWANASOMO SAID.....3RD DEFENDANT**
- 4. KILIFI PLANTATIONS LIMITED.....4TH DEFENDANT**
- 5. THE DIRECTOR OF SURVEY.....5TH DEFENDANT**
- 6. LILLIAN MARY MUTTIMOS.....6TH DEFENDANT**
- 7. JOSEPH BENEAH MUTTIMOS.....7TH DEFENDANT**
- 8. ROSEMARY NG'ONGA.....8TH DEFENDANT**
- 9. NARAN KUNVERJI LAJI VEKARIA.....9TH DEFENDANT**
- 10. HARISHCHANDRA RANJI GAJIPRIA.....10TH DEFENDANT**
- 11. THE REGISTRAR OF LANDS MOMBASA.....11TH DEFENDANT**
- 12. THE ATTORNEY GENERAL.....12TH DEFENDANT**

RULING

1. By a Notice of Motion application dated 31st May 2018, Limutti Holdings Ltd (the Plaintiff) prays for an order of injunction to issue restraining the 1st, 2nd and 3rd Defendants from erecting any structures or carrying out any construction of any nature or otherwise howsoever entering upon or dealing with some 15 parcels of land listed therein.

2. The Plaintiff's application which is supported by an affidavit sworn by its Executive Director Joseph Beneah Muttimos is premised on the grounds:-

a) That the Plaintiff is the registered proprietor of a freehold interest in the suit premises as listed;

b) That the Defendants have entered into the said premises unlawfully and have erected a fence thereon which act amounts to trespass and an infringement of the Plaintiff's proprietary rights; and

c) That unless the Defendants are restrained the Plaintiff will not be able to have access to the premises and to have peaceful enjoyment thereof and it will suffer irreparable loss and damage.

3. In Grounds of Opposition dated and filed herein on 9th July 2018, the three Defendants jointly oppose the Plaintiff's application, inter alia on the grounds that:-

1. The titles held by the Plaintiffs are null and void and as a consequence the Plaintiffs who have never taken possession of the pieces of land claimed from the time they allegedly purchased them do not have possession, the right to occupation and/or use of the land.

2. The Defendants have had the leave of Kilifi Plantations Ltd who have the control of the said pieces of land to enter and carry out the developments now being carried out by them.

3. The titles held by the Plaintiff are fraudulent null and void for the following reasons.

i) Kilifi Plantations Ltd have denied selling the land to the Plaintiffs.

ii) The Deed Plan for the parcel of land known as Subdivision No. Group V 375 (Original No. 89/37), the mother title for titles No. CR 25339 to 25358 was approved by the Director of Survey on 15/6/1993.

iii) All the Deed Plans annexed to the titles No. CR 25339 to 25358 were issued on 10/6/1993.

iv) The Subdivision of Parcel No. Group V 375(Original NO. 89/37) to the title Nos. CR 25339 to 25358 could not reasonably have been done before the creation of Survey Plan No. 173946 annexed to the Certificate of Title No. CR 25252 and known as Parcel No. Group V 375 (Original No. 89/37).

4. Having never held possession of the properties in dispute, the Plaintiff is not entitled to an order of injunction or vacant possession.

5. The Plaintiffs have no locus standi over the Subject matter of this suit and their suit is a non-starter and should be struck out with costs.

4. Subsequently by a Notice of Motion application dated 25th July 2018, Kilifi Plantations Ltd (the Proposed 4th Defendant) sought to be enjoined as a Defendant herein and to be given the liberty to defend this suit and to introduce seven other parties as Defendants herein.

5. In addition, the Proposed 4th Defendant is seeking an order of injunction to restrain the Plaintiff from disposing or altering the records in respect of the 15 parcels of land that are the subject matter herein.

6. The Proposed 4th Defendant's application is supported by an Affidavit sworn by its Chief Executive Officer Christopher Denis Wilson and is premised inter alia on the grounds that:-

a) The proposed 4th Defendant is the registered proprietor of all that Portion of land measuring 775.0 Ha being a subdivision of Plot No. 89 (Original No. 39/2).

b) Pursuant to a further subdivision of the said Portion No. 89, new titles CR No. 25249 to CR No. 25253 issued in respect of Plot Nos 273, 278, 279, 375 and 374 respectively. The Registration of the Subdivisions was done on 9/3/1994.

c) The Proposed 4th Defendant collected titles for Portions Nos. 273, 278, 279 and 374 from the Lands Office in Mombasa.

d) The Proposed 4th Defendant has always had in its possession, occupation and control sub-division No. Group V 375 (Original No. 89/37) since it was excised out of Portion No. 89 aforesaid although it was unaware of the whereabouts of the title to the said portion until after the commencement of these proceedings.

e) The Proposed 4th Defendant did not at any time sell or cause to be transferred to the Plaintiff and has used the same peaceably and openly from 1922 to-date. The occupation and use of the said Portion of land by the Proposed 4th Defendant or its agents, licensees or tenants has been open, uninterrupted and without contest from anyone until sometime in June 2018 when the pleadings herein were served upon the 1st to 3rd Defendants who were fencing the portion with the consent of the Proposed 4th Defendant.

f) The alleged subdivision of the 15 parcels claimed by the Plaintiff is fraudulent and the titles issued therein are null and void. The Proposed 4th Defendant is by reason of the matters stated an interested party essential in the establishment of the legality of the titles held by the Plaintiff and the other Proposed Defendants.

7. Subsequently, by an Order issued herein on 19th September 2018, Prayer No. 2 of the Notice of Motion dated 25th July 2018 was allowed and the Proposed 4th Defendant was enjoined herein as the 4th Defendant. By virtue of the said Orders the 4th Defendant was equally allowed to defend the suit and to introduce the seven other parties mentioned in its application as Defendants in the 4th Defendant's Counterclaim. Those orders further directed that the Plaintiff's application dated 31st May 2018 and the balance of the Prayers in the 4th Defendant's application be heard together.

8. I have accordingly considered the two applications and the responses thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties.

9. As it were, both applications before me seek orders of injunction. It is the Plaintiff's case that it is the registered proprietor of some 15 parcels of land being subdivisions No. Group V 375(Original No. 89/37). According to the Plaintiff, the premises comprised in the said Certificate of title has since been sub-divided into various portions and new Certificates of title have been issued. The Plaintiff has since sold six of the Parcels being subdivision Numbers Group V/382, to Group V/386 for valuable consideration to Harischandra Ranji Gajipria and Naran Kunvernji Laji Vekaria (now the 9th and 10th Defendants in the 4th Defendant's Counterclaim).

10. The Plaintiff accuses the 1st, 2nd and 3rd Defendants of, without any colour of right or its consent, entering the suit premises and proceedings to erect a chain or link fence thereon with a view to alienating the same and thereby depriving the Plaintiff of its proprietary rights thereon.

11. On the other hand, the 4th Defendant denies that the Plaintiff owns the said parcels of land. On the contrary, the 4th Defendant asserts that it is the registered proprietor in fee simple of all that Portion of land measuring 775 Ha being subdivision of Plot No. 89 (Original No. 39/2) as delineated in Survey Plan No. 92445 and situated South of Kilifi Town.

12. The 4th Defendant further avers that it has always had in its possession, occupation and control Subdivision No. Group V 375(Original No. 89/37) claimed by the Plaintiff since the same was excised out of Portion No. 89 and has used the same peaceably and openly since 1922. It denies selling or transferring any portion of the land to the Plaintiff and avers that the 1st, 2nd and 3rd Defendants had its consent as the owner thereof to fence a Portion of the land.

13. The 4th Defendant accuses the Plaintiff as well as the 5th to 12th Defendants of fraudulently colluding to register the Plaintiff as the proprietor of the 15 sub-divisions and urges this Court to restrain the Plaintiff as well as the 9th and 10th Defendants from disposing off or in any way causing to be altered the records held by the Registrar of Lands Mombasa (the 11th Defendant) in respect of the suit properties.

14. In a brief response to the 4th Defendant's application, the Plaintiff through its Executive Director Joseph Beneah Muttimos has sworn a Replying Affidavit filed herein on 26th October 2018 in which it asserts that it purchased the suit properties for Kshs 75,000/= from the 4th Defendant and that the 4th Defendant delivered to it a transfer dated 5th April 1994 as well as the Original Certificate of title Number CR 25252.

15. As it were, the 4th Defendant, a limited liability company denies selling the said parcel of land which it asserts has been in its possession, occupation and use since 1922. It is instructive to note that while the Plaintiff, itself also a limited liability company, purports to have purchased the suit properties from the 4th Defendant, the Sale Agreement evidencing the said transaction has not been annexed to their reply.

16. Arising from the fact that the premises are presently under the control of the 4th Defendant who denies selling the same, I think it would be meet and appropriate that the properties be protected pending a verification of the circumstances under which the Plaintiff, the 9th and 10th Defendants came to acquire their titles thereto.

17. Accordingly, I am satisfied that the 4th Defendant has made out a prima facie case with a higher probability of success. Given the competing interests herein, it is hereby ordered that the status quo obtaining as at the time this suit was filed be maintained pending the hearing and determination of both the suit and the Counterclaim.

18. The costs of the two applications shall be in the suit.

Dated, signed and delivered at Malindi this 5th day of December, 2019.

J.O. OLOLA

JUDGE