



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 126 OF 2011

MHANDISHI ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS-

MOHAMMED SWALEHE MWAJEMBE.....1ST DEFENDANT

RAMA OMARI CHIMWEGA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR KWALE.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

MARY NDALE KAI.....5TH DEFENDANT

OMAR ATHUMANI.....6TH DEFENDANT

ATHUMANI JUMA.....7TH DEFENDANT

MUHAMED SWALLEHE.....8TH DEFENDANT

KWALE DISTRICT SURVEY OFFICE.....9TH DEFENDANT

JUDGEMENT

1. The plaintiff brought this claim against the 9 defendants in his plaint dated 10th November 2011 seeking the following reliefs:

a) An order of permanent injunction restraining the defendant from in any way interfering, surveying, taking possession, developing, constructing, cultivating, subdividing, alienating, encumbering, disposing off, transferring, charging or in any manner so dealing with the parcel of land known as KWALE/DIANI BEACH BLK 653.

b) An order of eviction order against the 6th, 7th and 8th defendants, their agents, servants, relatives or any other person claiming under them from the suit parcel of land.

c) Declaration that the plaintiff is the registered proprietor of parcel of land known as L.R. NO. KWALE/DIANI BLK 653.

d) General damages.

e) Special damages.

f) Costs of the suit.

g) Interest at Court rates on (c), (d) & (e)

h) Any other order this Honourable Court may deem fit to grant.

2. Together with his plaint, he also filed a witness statement and copies of 14 documents in the list dated 10th November 2011 in support of the claim.

3. The 1st, 2nd, & 8th defendants filed a joint statement of defence dated 23rd December 2011. These defendants denied the plaintiff's claim pleading that the 1st & 2nd defendants have been in the suit land for more than 12 years and were thus entitled to the suit land by virtue of the provisions of the Limitation of Actions Act. The other defendants did not file any defences.

4. Mr John Morison Aswani Litondo gave evidence in support of the plaintiff's case on 29th July 2015. During the hearing the plaintiff was represented by Mr Wanglawa & Mrs Wachira while Mr Gikandi appeared for the 1st, 2nd & 8th defendants with Ms Kiti appearing for the 3rd, 4th, & 9th defendants. The plaintiff's witness gave a background on how they acquired the suit land Kwale/Diani Beach Block 5/653 and that they had the original title deed which he produced as Pex 1. He also produced certificate of Outright Purchase from the Settlement Fund Scheme as Pex 3, Msambweni Land Control Board Consent Pex 4 and photographs showing developments on the land as Pex 5. PW 1 further produced receipts of rate payments to the County Council of Kwale.

5. It is the plaintiff's case that the defendants have denied it access to the land as they were also claiming ownership rights. The plaintiff then closed its case and urged the Court to grant the orders sought.

6. When it was the turn for the defendants to give evidence in support of their case, there was no appearance for 1st, 2nd, 5th – 8th defendants. Ms Kiti was present for 3rd, 4th & 9th defendants. The plaintiff and the State Counsel then entered a consent allowing the plaintiff's claim in terms of prayers (a), (b) & (c) of the plaint. Since the remainder of the defendants have never appeared in Court to present contrary evidence why the same judgment should not be entered in favour of the plaintiff as against them, this Court therefore enters judgment for the plaintiff as against all the defendants jointly and severally in terms of prayers (a), (b) and (c) of the plaint.

7. What remains for my determination is whether the plaintiff is entitled to any award of damages and who should pay costs of this suit. The plaintiff has submitted that it be awarded Kshs 43,200,000 for the 9 years the 1st & 2nd defendants have been in possession of the land. I note from the plaintiff's documents that the 1st & 2nd defendants were issued with title on 11th December 2006. The plaintiff was registered as owner on 26th November 1992. The plaintiff claims that the trespass by the defendants denied it opportunity to develop the land. However the plaintiff did not present any approved plans of the intended development to indicate when such intention was to be executed. The plaintiff did also not demonstrate to the Court that it was doing anything on the land prior to 2006 which was income generating and which was subsequently disrupted by the defendants entry on the land other than issuance of parallel titles.

8. The plaintiff under paragraph 23 of the plaint pleaded particulars of loss including the cost of rectifying title. His title was not cancelled thus there is no costs to be incurred in rectifying it other than this Court issuing an order directed at the Land Registrar (3rd defendant) to cancel the title and expunge records held in the name of the 1st & 2nd defendants. Under paragraph 23 (b) and (c), the plaintiff informed this Court that the invaders had voluntarily moved out of the land. The plaintiff proceeded to withdraw the claim as against the 6th, 7th & 8th defendants. I cannot therefore penalise them by awarding damages where the suit as against them has been withdrawn. Paragraph (d) is not proved for failing to annex approved plans. The loss under paragraph 23 (e) & (f) is catered for under award of costs which I hereby award by allowing the suit in terms of prayers (a), (b), (c) and (f) of the plaint. No special damage was pleaded and none was proved.

9. In conclusion, I find no merit in the claim for general & special damages. The plaintiff's suit succeeds in terms of prayers (a), (b), (c) and (f) jointly & severally as against the 1st, 2nd, 3rd, 4th, 6th & 9th defendants. These shall be the orders of the Court.

Dated, signed & delivered at Mombasa this 20th September 2018

A. OMOLLO

JUDGE