



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 43 OF 2018

PINK PROPERTIES LTD..... PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION.....1ST DEFENDANT

CHIEF REGISTRAR.....2ND DEFENDANT

ELIZABETH MUTHONI RITHO.....3RD DEFENDANT

RULING

1. Before me for determination is a Notice of Motion Application dated 19th February 2018 and filed herein on 20th February 2018. By the said application, Pink Properties Ltd(the Plaintiff) prays :-

3. That an order of temporary injunction be issued against the Defendants to restrain them jointly and severally whether by themselves, servants, agents, employees and/or officers from vesting the property to the 3rd Defendant or any other person, revoking the title of the Plaintiff, entering, trespassing, taking possession, wasting, damaging or in any other way interfering with the Plaintiff's quiet possession of all that (Parcel of land known as) LR No. Chembe/Kibabamshe/272 including the entire improvements within the said property pending hearing and determination of this suit.

4. That the costs of this application (be paid for).

2. The said application is supported by the annexed affidavit of one Anna Catani, a Director of the Plaintiff and is premised on the grounds:-

i) That the Plaintiff is the bona fide registered Proprietor of LR No. Chembe/Kibabamshe/272(the Suit Property);

ii) That the 1st Defendant on 17th July 2017 vide Gazette Notice No. 6866 directed the 2nd Defendant to proceed and vest the Suit Property to the 3rd Defendant;

iii) That the 1st Defendant has sought to wrongly exercise its discretion and make inconsistent findings on the property in that while the very same Defendant had already indicated and written to the 2nd Defendant on 9th December 2015 to the effect that one Simon Patrick Hinzano was the original allottee of the suit property, the 1st Defendant has now instructed the same party to 'regularize' the same to the 'first allottee-now one Samuel Ritho;

iv) That in the same vein, the 1st Defendant has proceeded to act Res Judicata over the orders of the Court made on 21st December 2007 directing the 2nd Defendant to register the said Simon Patrick Hinzano as the bona fide proprietor of the land instead of Samuel Kanogo Ritho;

v) That on or about 3rd June 2011, the Plaintiff entered into an agreement of sale with the registered proprietor of the land and the same was subsequently registered in the Plaintiff's name. The Plaintiff's title has since never been under any challenge until the 1st Defendant released and Gazetted its determination as aforesaid;

vi) Before the said determination, the Plaintiff had commenced construction of a residential Twin House on the suit property where it had spent in excess of Kshs 60,000,000/- in construction costs and the cost continues to rise;

vii) That unless restrained by an order of this Court, the 2nd Defendant may proceed and revoke the Plaintiff's title as per the instructions of the 1st Defendant thereby jeopardizing the Plaintiff's investments in the suit Property.

3. Both the National Land Commission (the 1st Defendant) and the Chief Land Registrar (the 2nd Defendant) did not file any response to the application. The 1st Defendant has however filed a written Statement of Defence to the suit in general.

4. In response to the application, Elizabeth Muthoni Ritho (the 3rd Defendant) has filed a lengthy and detailed affidavit in which she contests the averments made by the Plaintiff herein. The 3rd Defendant who describes herself as the eldest biological daughter of Samuel Kanogo Ritho and the late Gladys Luhunga Ritho (whose estate she is one of the Administrators thereof) avers that her father Samuel Kanogo Ritho who currently resides in the United Kingdom is the sole legal bonafide registered owner of the suit property. Prior to her death on 14th October 2013, the 3rd Defendant's mother Gladys had been appointed as the Guardian ad Litem and Legal Administrator of all the affairs of the said Samuel Kanogo Ritho.

5. The 3rd Defendant avers that the impugned Gazette Notice No. 6866 of 12th July 2017 was published in favour of her father after the 1st Defendant received overwhelming evidence from herself and on behalf of her father after public hearings conducted at Malindi. It is therefore her case that the Plaintiff has been fully aware long before it engaged in the transfer of the property that Samuel Ritho was the owner thereof.

6. The 3rd Defendant further avers that the said Samuel Kanogo Ritho became the first registered owner of the suit property on 20th December 1978 upon the conclusion of an extensive adjudication process carried out under the Land Adjudication Act in Kilifi District. However some eight years after he occupied the land a dispute arose and the Commissioner of Lands proceeded to declare all land along the ten mile Coastal strip to be Government land. Thereafter, the Commissioner proceeded to illegally cancel hundreds of title deeds including Samuel Ritho's. The 3rd Defendant's father challenged the cancellation in Court and it is her case that the decision was quashed and the land Registrar Kilifi was ordered to reinstate the suit property to his name.

7. The 3rd Defendant further contends that even though the District Land Registrar Kilifi restored the properties to Mr. Ritho on the basis of a Court Order issued in 1994, the said Land Registrar illegally proceeded to place a Government embargo or restriction on Mr. Ritho's properties including the suit property herein which restricted him from using the same. Despite obtaining numerous orders to enforce his entitlement to his properties including the suit property herein, the said Samuel Ritho has been unable to use the same due to the actions of various government officers to-date.

8. I have considered the Plaintiff's application and the response particularly by the 3rd Defendant. I have equally considered the submissions and various authorities placed before me by the Learned Advocates acting for the parties herein.

9. In granting injunctive relief such as that sought herein, the Court will be guided by the principles laid down in the celebrated case of ***Giella –vs- Cassman Brown Company Ltd(1973)EA 358***. These principles provide that:-

i) The applicant must demonstrate a prima facie case with a probability of success;

ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage which cannot be adequately compensated in any way or by an award of damages; and

iii) If the court is in doubt, it will decide the application on a balance of convenience.

10. It is now established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially (*see Kenya Commercial Finance Company Ltd –vs- Afraha Education Society (2001) 1 EA 86*).

11. That being the case, the first question that this Court has to grapple with is whether on the facts placed before me, the Plaintiff has established a prima facie case with a probability of success. The definition of a prima facie case in a civil case such as this one was fashioned by the Court of Appeal in ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, as follows:-

“In civil cases, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

12. And in expounding on the definition of prima facie case given in *Mrao Ltd(Supra)* in the case of ***Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others(2014) eKLR***, the Court of Appeal observed as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent irreparable damage that may result from the invasion.”

13. The circumstances leading to the application before me are rather interesting. Both the Plaintiff and the 3rd Defendant separately claim to be the bona fide registered proprietors of all that Parcel of Land known as Chembe/Kibabamshe/272. According to the Plaintiff, they bought

the suit property from one Masumbuko Mwanzoya Kufanyiza, then the registered proprietor vide a Sale Agreement dated 3rd June 2011.

14. On the other hand, the 3rd Defendant contends that her father, the said Samuel Kanogo Ritho became the first registered owner of the suit property on 20th December 1978 having acquired the same by way of purchase during the adjudication process from the original allottee, one Kalume Hinzano. In support of this contention the 3rd Defendant has annexed (as annexure EMR 8) an undated Memorandum of Agreement between her father and the said Kalume Hinzano indicating that the land was bought for Kshs 6,000/- and that the Vendor was to grant immediate possession thereof.

15. From the material placed before me, the land adjudication process for Kilifi Chembe Kibabamshe, Kilifi Jimba and Kilifi Madeteni was replete with numerous controversies which, apparently rose from personal interests of specific government officers who were entrusted to carry out the exercise on the ground. While it was not clear from the 3rd Defendant's Replying Affidavit the position the said Samuel Kanogo Ritho occupied on the ground, it is apparent from annexure "EMR 7" to the 3rd Defendants Affidavit that at some point in time, the Ministry of Lands suspected him of involvement in the process which was then suspected to have converted some Government land into private use.

16. As a result of the said suspicion, one James Kihara Kinyanjui the then Director of Land Adjudication would later in **Nairobi HCCC No. 3111 of 1997 (John Dominic Obel & Another –vs- Commissioner of Lands and Others)** swear an affidavit in which he deposes at paragraph 3 thereof as follows:-

3. That I confirm that Mr. Samuel Kanogo Ritho was not an Adjudication Officer in Kilifi District or Coast provincial Adjudication Officer and I did advise the Permanent Secretary, Ministry of Lands and Settlement vide the Department of lands Adjudication Confidential Letter No. C/LA/9/3/28 dated 28th March 1985 which listed the names of Land Adjudication Officers who were the Officers of the Department of Land Adjudication who worked in Kilifi District, Coast Province as the Provincial Land Adjudication Officers and in the Department Headquarters as Senior Adjudication Officers in Charge of Land Adjudication Programmes and Mr. S.K. Ritho's name was not in the said list; Mr. S.K. Ritho did other duties such as administration and finance excluding adjudication programmes in the Department Headquarters under me."

17. Whatever was the nature of his duties it is apparent that Mr. Ritho acquired a number of properties in the area during and/or around the time the controversial adjudication process was undertaken and concluded. From a letter dated 28th May 1986 (Annexure 'EMR 10') addressed to Mr. Ritho by the Commissioner of Lands J.R Njenga, Mr. Ritho was identified to be occupying nine different parcels of land listed in the letter as Jimba Parcel Nos 431 and 435; Chembe/Kibabamshe- Parcel Nos 272 (the suit property), 363, 364, 414, 417 and 421 as well as Parcel No. 569 Madeteni. In the said letter, the Commissioner of Lands advises Mr. Ritho that his occupation of the said parcels of land had been found to be improper and not in accordance with the law. In addition, the letter advises Mr. Ritho that the Government had hence decided to cancel titles to those parcels of land, and that the Land Registrar Kilifi would cancel the same and rectify the Register as appropriate.

18. From the material placed before me, it is evident that the Government acted on the threat and cancelled in particular the registration of the Suit Property in the name of Mr. Ritho. Subsequently, the property was registered in the name of one Simeon Patrick Hinzano. By another undated agreement between the said Hinzano, and one Stanslaus Ngala Mwangandi, Hinzano surrendered his interest, "customary and historical" to the new owner for an undisclosed consideration.

19. It is also apparent that shortly thereafter, the said Stanslaus Mwangandi sold his interest in the land to one Masumbuko Mwanzoya Kufanyiza who eventually obtained title deed in his name on 4th February 2011. Four months down the line, the Plaintiff acquired the property from the newly registered owner upon which it proceeded to transfer title to its name before commencing construction thereon.

20. While it was not very clear from the material placed before me how the said Simeon Patrick Hinzano became the registered owner of the suit property, it is apparent that the Government proceeded after the Commissioner of Land's decision aforesaid to start a fresh process of adjudication and settlement of the locals. This can be discerned from a letter dated 9th December 2015 from the 1st Defendant addressed to the Chief Land Registrar over the suit property (annexure KC3 of the Plaintiff's Affidavit) where the 1st Defendant notes at paragraph 4 thereof as follows:-

The (National Land) Commission having received the complaint, heard submissions of the parties, investigated land records and undertook comprehensive investigations to determine the proprietorship/legality of the allocation in respect of the land. The Commission has concluded its investigations and wishes to advise you as hereunder:-

1. The property measures approximately one decimal one eight (1.18 Ha).

2. The property was adjudicated to one Samuel Kanogo Ritho in 1978 and a title issued. However, the allocation and title were cancelled by the Commissioner for Lands because the allottee was not a local and could therefore not enjoy adjudication rights.

3. The property was then allocated to one Simeon Patrick Hinzano of ID No. 3906562 under the Settlement Programme. A letter of offer (LOO) was signed and Settlement Fund Trustees by A.K. Tomno in April 1997.

4. The allottee proceeded to Court against Samuel Kanogo Ritho and an order was issued in his favour to the effect that he be registered as the proprietor of the land; however, the file disappeared from the Land Registry."

21. The Court Order referred to by the 1st Defendant in the said letter arose from the Judicial Review Proceedings that were filed by the said Simeon Patrick Hinzano. It is apparent from the record that when the Chief Land Registrar and the Land Registrar Kilifi hesitated to register him as the proprietor of the title, he moved to Court in the year 2007 vide **Mombasa High Court Judicial Review Miscellaneous**

Application No. 1 of 2007 wherein he obtained orders on 21st December 2007 as follows:-

“1. That Judicial Review Orders of Certiorari do issue to remove into this Honourable Court and be quashed the Orders of the Respondents (issued) on the 25th September 2007 not to register the Applicant as the absolute proprietor of Plot No. Chembe/Kibabamshe/272 as contained on the Respondents remarks made on the face of the letter dated 25th September 2007.

2. That Judicial Review Orders of Mandamus directed against the Respondents compelling the Respondents by themselves, their servants, agents and/or employees to process and register the Transfer and Discharge of Charge and issue a Certificate of Title in favour of the Ex-Parte Applicant to Plot No. Chembe/Kibabamshe/272.”

22. From the foregoing, it was evident to me that Simeon Patrick Hinzano became the registered proprietor of the land pursuant to the new process started by the Government and the subsequent Court Order arising from Mombasa High Court JR Misc App No. 1 of 2007. Perhaps aware of the controversy surrounding the land, he moved with haste to dispose of his interests in the land to a third party who subsequently sold the land to the Plaintiff. As it were, there was nothing that was placed before me to show that there was any blemish on the title as at the time the Plaintiff purchased the same. Indeed, it was evident from Annexure AC 23 that the Plaintiff conducted an official Search on the title on 25th May 2011 and the same identified the Vendor as the absolute proprietor of the land.

23. Arising from the foregoing, I am satisfied that the Plaintiff has demonstrated that it was a reasonable purchaser who made all efforts to establish the authenticity of the title before the purchase.

24. From the material placed before me it was again apparent that the Plaintiff is currently the registered title holder of the suit property and that it has commenced the construction of a complex residential house on the land after obtaining relevant approvals from the concerned authorities. According to the Plaintiff, they have since spent sums in excess of Kshs 60,000,000/- in the said construction.

25. As it were, the 3rd Defendant has never been in occupation of the property and it is evident to me that if the Plaintiff's title is revoked as proposed by the 1st Defendant, it is the Plaintiff that stands to lose the developments it has so far done on the land.

26. In the circumstances herein I am satisfied that if the Respondents were to proceed to revoke the Plaintiff's title and the decision is later found to run afoul of the orders granted by the Court in Mombasa Judicial Review Application No. 1 of 2007 aforesaid, the Plaintiff would have been subjected to an unnecessary harm and damage. As it were, I think the Plaintiff has demonstrated a clear and unmistakable right to the suit property. That right is directly threatened by the decision to revoke the Plaintiff's title and I think it is only fair, that pending the trial herein at which some of the issues such as how the initial title was cancelled can be interrogated at length, the Plaintiff deserves protection from irreparable harm that may result from the revocation.

27. Accordingly, I find merit in the Notice of Motion Application dated 19th February 2018 and allow the same as prayed.

28. The Plaintiff shall also have the costs of the Application.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE