



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 310 OF 2014

DIGNIFIED HOLINGS LTD.....PLAINTIFF/APPLICANT

-VERSUS-

ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

SAID B. NDEGE.....2ND DEFENDANT/RESPONDENT

RAIA A. MKUNGU.....3RD DEFENDANT/RESPONDENT

OMARI ZONGA.....4TH DEFENDANT/RESPONDENT

SAID H. KABANGI.....5TH DEFENDANT/RESPONDENT

HILMI M. AHMED.....6TH DEFENDANT/RESPONDENT

SAID MWINYIKAI TOMAS.....7TH DEFENDANT/RESPONDENT

ATHUMAN SAID RIMO.....8TH DEFENDANT/RESPONDENT

ALI JUMA NGONYO.....9TH DEFENDANT/RESPONDENT

YASMIN DUSI IMANI SHABAN.....10TH DEFENDANT/RESPONDENT

DAVID K. KANDIE.....11TH DEFENDANT/RESPONDENT

SILAS KIPTUI KIPCHILAT.....12TH DEFENDANT/RESPONDENT

KENNEDY BEGI ONKOBA.....13TH DEFENDANT/RESPONDENT

RULING

1. By an application dated 4th September 2015, filed under the provisions of Order 40 & 51 of the Civil Procedure Rules, section 13 (7), 18 (c) and 19 (2) of the Environment Land Court Act 2011 and section 68 of the Land Registration Act, the applicant moved the Court for the following orders:

1. Spent

2. Spent

3. Spent

4. That pending the hearing and determination of this suit, the defendants by themselves or through their servants or agents or through any one deriving title through them jointly and severally be restrained from alienating, selling transferring, leasing and/or charging or in any other manner whatsoever from having any dealings with all that parcel of land known as Kwale/Diani Beach Block/151.

5. That pending the hearing and determination of this suit, the registration of any dealings and/or transactions of whatsoever nature on the register of the parcel of land known as Kwale/Diani Beach Block/151 be inhibited and this order of inhibition be registered in the register of the parcel of land known as Kwale/Diani Beach Block/151.

6. That the costs of this application be provided for.

2. The motion is supported by the grounds inter alia that the applicant is the registered owner of land parcel No Kwale/Diani Beach/60 which he refers to as the suit property. Secondly that Kwale/Diani Beach 60 & 151 occupy the exact geographical position and boundaries according to the survey maps. Further that the 2nd – 13th Respondents hold separate certificate of titles to the parcel of land Kwale/Diani Beach/151.

3. The applicant stated that the 3rd – 6th defendants were charged in a criminal case No 5 of 2012 and were acquitted. As a result, the applicant fears there is every likelihood that the green card for title Kwale/Diani Beach/Block 60 will be returned to the lands registry and given multiple certificates bearing conflicting ownership details hence the necessity for the Court to issue orders to preserve the subject matter. The applicant also stated that it is in possession of the suit property having paid valuable consideration for the same.

4. The application is supported further by the affidavit deposed to by Sheba Mohamed who is described as the applicant's company secretary. Ms Mohamed gave a narrative of the background of title No Block 60 and confirming the same is registered in the name of the applicant. She deposed that Kwale/Diani Beach/151 was the new number issued to Block 60 after re – survey was done to create Diani Beach road. Ms Mohamed deposed further that the applicant attempted to register a caveat under section 76 of the Land Registration Act unsuccessfully because the records of the suit property could not be found. The applicant fears that since the criminal proceedings have been concluded, the green card will inevitable be returned to Kwale lands registry and that dealings may be made on the title thus rendering this suit nugatory.

5. The 2nd, 4th, 5th & 6th defendants filed grounds of opposition on 30th November 2015. In the grounds, they state that the application seeks to revisit matters already decided in the criminal case and which matters are also pending in Court awaiting judgement. Secondly that there is no risk of damage or prejudice that the applicants may suffer.

6. The 3rd defendant also opposed the application by filing a replying affidavit. He deposed that he together with the 2nd, 4th, 5th & 6th defendants own parcel No 151 which measures 22.5 acres. That this land before registration belonged to their late grandparent Mwachimwindi Diya who was forcefully evicted by the British colonial government without compensation. The 3rd defendant deposes that they petitioned the former President Daniel arap Moi who having heard their grievances directed the Commissioner of Lands to allocate it to them as the land was vacant and undeveloped.

7. The 3rd defendant deposed further that there is pending in Court Petition No 37 of 2011 where they are

the applicants and the plaintiff is an interested party which Petition deals with the same subject matter as in this case. That in the petition, a conservatory order was issued by a ruling delivered on July 2012. The same petition is said to be pending judgement before Mureithi J. since 2014. According to him, this application is being used to challenge the ruling of 2012 and is therefore an abuse of the Court process. The 3rd defendant thus urges the Court to dismiss the application.

8. The 11th defendant also filed grounds of opposition on 6th May 2016 to challenge the application. He stated inter alia that the application is not supported by the averments in the plaint. Secondly that the deponent has deponed tot matters not within her knowledge. That the applicant has not met the requirements for the grant of the orders sought.

9. To contest the issues raised by the 3rd defendant, the applicant filed a further affidavit denying the land was unoccupied and undeveloped. She annexed photographs showing a perimeter wall & a gate. The applicant also denied the averment that the joint survey report stated that plot No Kwale/Diani/60 ceased to exist after the re – survey in 1974. The applicant deposed further that the plot was not available for alienation the same having been alienated to the plaintiff and/or the previous owners. The applicant also denies that this matter is similar to the subject matter in Petition No 37 of 2011. Lastly that it is clear there is a dispute between the plaintiff and the defendants as regards the ownership and lawful proprietary rights to the suit property. Therefore it is just that there should be no dealings on the suit property however described pending determination of the suit.

10. The parties filed written submissions with the applicant citing several authorities. I have read & considered the pleadings and the submission and the issues I find for determination at this stage are the following:

i. Whether the orders sought herein will result to a challenge of the ruling delivered in July 2012 in Petition No 37 of 2011 or;

ii. Whether the applicant has satisfied the set principles for grant of the orders sought in the application.

11. While this application was pending for hearing, the judgement in Petition No 37 of 2011 was delivered on 13th May 2016 a copy of which was availed to this court by the applicant as an annexure in her supplementary affidavit. The judgement dispensed with the orders given in the ruling delivered in July 2012 as the matter was concluded. Further, Mureithi J. did not grant prayers no. 2 & 3 of the Petition. In concluding the judgement he stated thus:

“The Petitioners are at liberty, if so advised by their legal advisers to file a civil suit for determination of the ownership of the suit property in view of the multiplicity of titles on the same property. In the meantime the Court is not able to hold that the Petitioners are the bonafide registered owners of the suit property therefore entitled to protection of their right to property under article 40 of the Constitution.”

12. In view of the above finding, either of the parties in the Petition No 37 of 2011 was set at liberty to commence civil process in order to determine the true owners of the suit property as the Judge said he was unable to do so through a Petition. Consequently the objection raised by the defendants that this suit and the application is an abuse of the Court process by virtue of the pending Petition is overtaken by events and has no basis. The present application cannot thus be said to challenge the ruling delivered on July 2012. My answer to the first issue is therefore in the negative.

13. I have read the judgement in Petition No 37 of 2011 and agree with the defendants that some of the issues raised in this suit were subject for determination in the Petition. At page 18 of the judgement, Mureithi J noted that there were four titles to the suit land No Kwale/Diani Beach Block/151. In paragraph 27 of the judgement at page 20, he stated that in cases where there was multiplicity of titles, there was need to prove under sections 107 & 108 of the Evidence Act that the other titles are fake or fraudulent. This is the reason the judge reached the conclusion quoted in paragraph 11 above.

14. In this instance, the applicant is argues that the suitland is hers on the basis that Block 60 which changed to Block 151 after resurvey was already alienated to her therefore was not available for allocation to the 2nd – 6th defendants later on as happened. On this basis and on the fact that the 2nd -6th Defendants hold title to no 151; she fears that unless the subject matter is preserved the defendants may dispose of the suit property to unsuspecting purchasers thus render her suit nugatory. She therefore urged the Court to grant the orders.

15. The 11th defendant submits that the plaintiff's case has not met the threshold set in **Giella vs Cassman Brown** since she can be compensated by money damages. He also raised the issue that the suit is defective as there was no company resolution annexed authorising the filing of this suit. The 2nd, 4th, 5th & 6th defendants on their part also submitted that Block 60 ceased to exist upon the acquisition and subdivision in 1974. That the applicant came into the picture in 1992 by way of a transfer of leasehold of Block 60 which had ceased to exist.

16. From the pleadings, it is not in dispute that Block 60 was resurveyed to create Diani Beach road. That after the re –survey, the new numbers given was 151 for the remainder of the plot and 152 for the road. It follows therefore that plot 151 occupies the same geographical position of what was originally Diani Beach Block/60. The applicant avers that since this plot was already alienated to her, it was not now available for alienation to the defendants. This is an issue which can only be determined by evidence in a full trial. To this extent, I am satisfied that there is a prima facie case shown.

17. It appears both parties each have title deed in respect of Block 60 & 151. One of which will have to be cancelled to stop the confusion. In light of this fact also it is imperative that the title to Block 151 be restricted pending determination of the suit to give each party an opportunity to present its case in defense of their respective titles. In order to do that, I shall grant prayer 5 of the motion inhibiting any dealings on the suit title pending hearing and determination of the suit. The consequence of the inhibition is that the defendants are restrained from selling and or transferring and or charging the suit property pending determination of the case.

18. On the issue of the objection raised by the 11th defendant on the suit being defective for lack of company resolution, I opine that this is a defect that can be cured by amendment. As was held in the decision of **D. T Dobie vs Muchina (1982) KLR I** that suits should only be struck out in cases where the same cannot be cured by amendment as striking out is a drastic measure. For this reason, I decline to strike out the pleadings.

19. In conclusion, the application is allowed in terms of paragraph 17 above with an order that each party to bear their respective costs of the application.

Dated and signed `this 22nd day of March 2017

A. OMOLLO

JDUGE

Delivered at Mombasa this 24th day of March 2017 by

C. YANO

JUDGE