



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 22 OF 2016

SALIM BAKARI.....PETITIONER

=VERSUS=

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTORS OF LAND AJUDICATION & SETTLMENT....2ND RESPONDENT

CABINET SECRETARY FOR LAND

HOUSING & URBAN DEVELOPMENT.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

RULING

1. On 1st March 2017, the Notice of Motion herein dated 21/3/2016 came up for hearing before me. The Motion brought under Article 159 of the Constitution and Rule 23 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013 as well as Sections 1A, 1B, 3A and 63 of the Civil Procedure Act prays for orders inter alia, as follows:

i.

ii. **THAT the honourable court do grant a conservatory and/or interim order staying any further entries, transfers, subdivisions, issuance of titles by the respondents and staying any further dealings or dispositions by the respondents, interested parties or any other person in respect of:**

a. **Plot numbers Kilifi/Vipingo/169 and/or Vipingo Settlement Scheme Plot No. 169, Kilifi/Vipingo/498, Kilifi/Vipingi/499, Kilifi/Vipingo/500 and any other plot that traces its origin from Kilifi/Vipingo 169 and or Vipingo Settlement Scheme Plot No. 169 pending hearing and determination of this application.**

b. **Plot number Kilifi/Vipingo/176 and/or Vipingo Settlement Scheme Plot No. 176 and any other plot that traces its origin from Kilifi/Vipingo/176 and/or Vipingo Settlement Scheme Plot No. 176 pending hearing and determination of this application.**

iii. **THAT this honourable court do grant a conservatory and/or interim order staying any**

further entries, transfers, subdivisions, issuance of titles by the respondents and staying any further dealing or dispositions by the respondents, interested parties or any other person in respect of:

a. Plot numbers Kilifi/Vipingo/169 and/or Vipingo Settlement Scheme Plot No. 169, Kilifi/Vipingo/498, Kilifi/Vipingo/499, Kilifi/Vipingo/500 and any other plot that traces its origin from Kilifi/Vipingo/169 and/or Vipingo Settlement Scheme Plot No. 169 pending hearing and determination of the petition herein.

b. Plot number Kilifi/Vipingo/176 and/or Vipingo Settlement Scheme Plot No. 176 and any other plot that traces its origin from Kilifi/Vipingo/176 and/or Vipingo Settlement Scheme Plot No. 176 pending hearing and determination of the petition herein.

iv. THAT costs be to the petitioner.

2. The application is premised inter alia on the following grounds:

a. That on 22nd October 2010 the Petitioner obtained orders in Mombasa High Court Miscellaneous Civil Application No. 450 of 2009 prohibiting the 1st to 3rd Respondents herein from issuing of Certificate of Ownership and/or title documents in respect of Vipingo Settlement Scheme Plot Nos. 169 and 176 to anyone else except the Petitioner as well as orders of mandamus compelling the 2nd Respondent to forthwith issue the Petitioner with a Certificate of Ownership and/or title documents in respect of VIPINGO SETTLEMENT SCHEME. Plots Nos. 169 and 176;

b. That despite being served with the orders and engaging in several correspondences thereon with the Petitioner, the 1st to 3rd Respondents have not complied with the Order;

c. That instead, and in total violation of the said Orders, the respondents proceeded to register one Charo Masha posthumously as the proprietor of Vipingo Settlement Scheme Plot No. 169, subdivided it, created new plots and registered the 1st to 3rd Interested Parties as the owners of the new plots.

3. The application is further supported by the Petitioner's Affidavit sworn on 21/3/2014 which details the long history of the matters herein inclusive of the pleadings filed and various correspondence between the Petitioner and the other Parties.

4. The Honourable the Attorney General who appears for the respondents herein had on 11th October 2016 filed various Grounds of Opposition to both the Petition and the Application. However, when the application was called for hearing, Ms Munyony, holding brief for Senior State Counsel Ms Ruth Lutta for the Attorney General informed the court that they had abandoned the grounds and were no longer opposing the application.

5. While all the Interested Parties herein were not present in court, there is an Affidavit of Service sworn by one Francis Nzuki Ngomo, a Licensed Court Process server indicating that the 1st to 3rd Interested Parties herein were served with a hearing notice on 23rd February 2017. The 4th Interested Party's Advocates M/s Mwachungu Mtana & Co. Advocates were equally served on the same day as indicated in the Affidavit of Service aforesaid. Indeed, while they were not present in court on 1st March 2017 when this matter was called for hearing, the 4th Interested Party's Advocate had on the same morning apparently filed in court a Replying Affidavit sworn by two persons who identify themselves as the sons of the 4th Interested Party. Thus satisfied that the application was duly served and that there was reason to hear the Petitioner and consider the issues raised in the Replying Affidavit, I proceeded to hear the Petitioner's arguments and reserved my ruling thereon.

6. Submitting on the application, Ms Omondi Learned Counsel for the Petitioner indicated that they were

abandoning Prayers 2(b) and 3(b) of the application as the respondents had on 17/1/2017 granted the allotment letters and other documents in regard to Plot No. Kilifi/Vipingo/176. Counsel then took the court through the rather long and chequered history of the matter herein.

7. I have perused the application and the Affidavit in Support thereof. I have also considered Learned Counsel's submissions and it is my finding that, the application rests on these grounds that:

a. The Recorder of titles in a Judgment dated 20/6/72 delivered at the Land Registration Court at Kilifi, decreed that certificates of ownership under the Land Titles Act, for the suit Plots, be issued to the heir of the estate of Idi Bin Mohamed, then One Bakari Omari;

b. The applicant Salim Bakari is the lawful proprietor of Vipingo Settlement Scheme Plots No. 169 and 176, the same having been awarded to Bakari Omari (now deceased) pursuant to the aforesaid Judgment and in respect of whose estate the applicant herein is the duly-appointed co-administrator;

c. The decision of the recorder of Titles is, by its very nature, and pursuant to the Land Titles Act, final and conclusive proof of ownership;

d. The 2nd Respondent herein, without any lawful cause and/or due regard to the decision of the said Recorder of titles Vipingo Settlement Scheme Plot No. 169 to one Charo Masha and Vipingo Settlement Scheme Plot No. 176 to one Kenga Randu (names herein as the 4th Interested Party);

e. Subsequently the Petitioner filed Mombasa High Court Miscellaneous Civil Application No. 450 of 2009 wherein on 22/10/2010, the court issued orders prohibiting the 1st to 3rd Respondents herein from issuing certificates of ownership and/or title documents in respect of Vipingo Settlement Scheme Plot Nos. 169 and 176 to anyone else except the Petitioner. In addition, the court issued orders of Mandamus compelling the 2nd Respondent to forthwith issue the Petitioner with a Certificate of Ownership and/or title documents for the two plots in accordance with the decision of the Recorder of Titles dated 2/6/1972.

f. Despite being served and in total violation of the aforesaid court orders, the Respondents proceeded in respect of Plot No. 169 Vipingo Settlement Scheme and then did the following:

i. Discharged the charges in favour of settlement Fund trustees on 30/9/2014

ii. Registered one Charo Masha posthumously as the Proprietor of the plot and issued a title deed in his name on 30/9/2014

iii. Registered 1st to 3rd Interested Parties as registered proprietors of the plot and issued a title deed in their names on 10/10/2014.

iv. Closed the title upon subdivision vide mutation No. 04131265 and created new parcel numbers 498, 499 and 500.

8. Arising from the foregoing, the Petitioner is apprehensive that the plots in issue may be sub-divided and/or transferred further unless a conservatory order is issued herein staying any further entries, transfers, sub-divisions, issuance of titles and/or dealings or dispositions by the respondents, the interested Parties or any other person acting on their behalf.

9. As already indicated, when the matter came up for hearing, the Honourable the Attorney General abandoned the grounds of opposition earlier filed on 11th October 2016 and chose not to oppose the application seeking for Conservatory Orders. There is however a Replying Affidavit sworn jointly by Jonathan Kenga Kiti and Katana Kiti Randu on 28th February 2017 and filed in court on 1st March 2017. The two individuals who identify themselves as the sons of Kenga Randu the 4th Interested Party herein

depone that the entire Petition is totally misplaced and (amounts to) an abuse of the court process because it seeks to arrest a situation already overtaken by events. In addition, they state that the 4th Interested party died “a long time ago” and they will be seeking leave of the court to file succession proceedings to enable them to represent the deceased’s interest. It is their view that the parcel of land was regularly issued to their father and it would be in the interest of justice that they be given time to petition for letters of administration before this matter proceeds.

10. A perusal of the bundle of documents filed herein reveals that the issue of the death of the 4th Interested Party first came up before Ojwang J (as he then was) on 8th June 2010 when Mombasa High Court Miscellaneous Civil Application No 450 of 2009 came up for hearing before him. That was almost 7 years ago. I was therefore not persuaded that this application was an ambush on the estate of the 4th Interested Party and/or that delaying the same to give the sons of the late Kenga Randu time to petition for letters of administration would be in the interests of justice. As at the time of his death, there was in existence a court order prohibiting the issuance of certificates of ownership and/or title documents in respect of Vipingo Settlement Scheme Plot No. 176 to anyone else except the Petitioner. As Was observed by Justice Ojwang in the Mombasa case, the proceedings herein concern themselves only with the matter of public decision making, rather than with the merits of the decision made. The motion before this court seeks to question the basis upon which the respondents continued making certain decisions in spite of the existence of a court order. As was stated in Mombasa High Court Miscellaneous Civil Application No 41 of 2006; Republic versus Chief Magistrate Mombasa & others, ex-parte Aljiza Ltd, the court order in question will always remain whether the beneficiary is dead or alive in such cases. In any event, the two deponents have had notice of this case and the orders for the past 7 years and have not moved to obtain letters of administration to deal with this matter. Besides, the Petitioner at hearing hereof clearly indicated that they were nolonger pursuing orders in terms of prayers 2(b), and 3(b) which would touch on the 4th Interested Party’s interests if any. Accordingly, I do not find any valid objection to the application on the side of the 4th Interested Party.

11. In this Court’s view, the Petitioner has demonstrated through the detailed pleadings herein that the Petition stands a great chance of success. It is evident that the respondents have consistently failed to perform their statutory duty to translate the decisions of the Recorder of titles dated 20/6/1972 and the subsequent decision made in Mombasa High Court Miscellaneous Civil Application No 450 of 2009. The application dated 21/3/2016 will therefore in my opinion, succeed on the basis of the balance of probability. Accordingly, I allow the application in terms of prayers 2(a) and 3(a) thereof. The costs of this application to the Petitioner in any event.

Dated, signed and delivered in Malindi on 17th day of March 2017.

J. O. OLOLA

JUDGE