



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC SUIT NO.258 OF 2016

MARTIN MUTHAMA.....1ST PLAINTIFF

JOSEPH MUTUA KAINDI.....2ND PLAINTIFF

GEORGE KIOGORA.....3RD PLAINTIFF

VERSUS

KENYA WOOL INVESTMENT COMPANY LIMITED....1ST RESPONDENT

DOPP INVESTMENTS.....2ND RESPONDENT

NATIONAL LANDS COMMISSION.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Plaintiffs moved this court under Sections 1A, 1B, 2, 3, 3A and 63 of the Civil Procedure Act and Orders 40 and 51 of the Civil Procedure Rules seeking orders:

1. Spent

2. Spent

3. To constraint the Respondents jointly and severally by themselves and/or agents, employees, servants from selling/paying/interfering/developing/constructing and/or from any further dealing/transacting/interfering with the suit property being Land Reference No.1040/2 CR.21749 located South of Mazeras Township in Kwale County pending hearing and determination of the suit.

4. THAT the 3rd and 4th Respondents jointly and severally by themselves/agents/employees be restrained from making any compensation to the 2nd Respondent pending hearing and determination of the Application and the suit.

5. THAT the Land Registrar Mombasa be and/or is hereby directed and/or restrained from registering any transaction in respect of the Land Reference No.1040/2 CR.No.21759 pending hearing and determination of the Application and the suit.

6. THAT the court to declare the Plaintiff to have acquired proprietary interests in the property known as L.R No.1040/2 CR.21749 located at South of Mazeras Township in Kwale County.

7. THAT the Land Registrar be and/or is hereby directed/ordered to cancel the title deed registered in the names of Dopp Investments Limited and in the alternative the Plaintiff's names be substituted in the land records as the owners of the property.

8. THAT the recommendations made by the 3rd Respondent to compensate the 2nd Respondent as the owner of the property be declared as null and void ab initio and in the alternative the Plaintiffs be adopted as the true parties to be compensated for the property by the 3rd Respondent.

9. THAT the 3rd Respondent be and/or is hereby directed/ordered to compensate the Plaintiffs for their property accordingly.

10. THAT the court be at liberty to grant any other order (s) it may deem fit in the circumstances.

11. THAT the costs of the Application be in the cause.

2. The Application is supported by the 9 grounds listed on the face of the Notice of Motion and the Affidavit Martin Muthama sworn on 13th September 2016. The Applicants aver that they are the legal and/or beneficial owners of the property known as Plot No.1040/2 CR.21749 situated in Mazeras Township, Kwale County, having purchased it from the 1st Respondent on 15th February 2002. The Applicants depose that sometime in the year 2016, they realized that the 2nd Respondent was claiming the same property. That the 3rd Respondent has acquired the said property for the construction of the Standard Gauge Railway project and has recommended payment of the sum of Kshs.667,903,887.00 to the 2nd Respondent. It is the Plaintiffs' contention that any compensation by the 3rd Respondent should go to them.

3. The Application is opposed by the Respondents. The 2nd Respondent filed a Replying Affidavit sworn by Harish Patel on 22nd November 2016. The 2nd Respondent avers that it is the registered proprietor of the suit property having acquired a lawful and indefeasible title to it by virtue of a Grant issued on 4th July 1991. The 2nd Respondent deposes that by a Gazette Notice No.1991 issued and published by the 3rd Respondent on 27th March 2015, it formally learned that a portion comprising 13.5 hectares of the said land was earmarked for compulsory acquisition to facilitate the construction of the Standard Gauge Railway project. That public meetings were convened by the 3rd Defendant to consider all representations from all interested persons concerning the propriety and legality of the title to the said land and finally the 3rd Defendant arrived at a decision upholding the 2nd Respondent's rights and interest in the said land. The 2nd Respondent faulted the Plaintiff for relying on an alleged agreement for sale which was between them and a company known as Kenya Wool Limited which is not a party to this suit. The 2nd Respondent denied that the Plaintiffs are in possession of the said land and have given a list of the persons who are actually resident on the land. The 2nd Respondent has deposed that as the lawful owner of the said land, it is entitled to be paid by the 3rd Respondent for that portion that has been compulsorily acquired.

4. The 3rd Defendant/Respondent filed a Replying Affidavit sworn by Brian Ikol on 2nd November 2016 in which it deposes, inter alia, that it first established the legality of the title held by the 2nd Defendant over the suit property and after public hearings concluded that the 2nd Respondent had acquired the property in a lawful manner. The 3rd Respondent has further deposed that the 13.5 hectares subject of compulsory acquisition constitute vacant uncultivated land with no development thereon and were not in

use or physical occupation by the Plaintiffs or any other local resident. It is the 3rd Respondent's case that having held inquiries as to compensation and having determined the 2nd Respondent as the rightful person to receive the award of compensation in the exercise of quasi-judicial function, it follows that the issue of compensation are now sub judice and the only remedy for challenging the award lies in an appeal to the Environment and Land Court, hence this court has no original jurisdiction to entertain the current Application and the suit. They also faulted the alleged agreement between the Plaintiffs and Kenya Wool Limited because the said Kenya Wool Limited is not a party to this suit, there is no proof that Kenya Wool Limited had any interest in the property on 15th February 2002 which it could convey to the Plaintiffs by way of sale, and no evidence that the parties to the alleged agreement for sale complied with the provisions of the Land Control Act.

5. The parties were granted time within which to file written submissions. Only the 2nd Respondent filed written submissions. In his oral submissions, the Applicants' counsel relied on the contents of the Supporting Affidavit and the annexures thereto. The 2nd Respondent's counsel in her oral submissions relied on the Replying Affidavit and the written submissions filed. Counsel emphasized that the 2nd Respondent is the proprietor of the suit property and that the Plaintiffs have not given sufficient evidence to warrant the issuance of the orders. It was also submitted on behalf of the 2nd Respondent that the Plaintiffs' claim if any, is time barred by virtue of the provisions of the Limitation of Actions Act. Learned counsel for the 2nd Respondent submitted that the Applicants have not met the pre-requisites for granting of interlocutory injunctions. In addition, counsel urged the court not to grant prayers 5 to 9 as they were final orders in nature and cannot be determined on affidavits, and issuing the same will leave the court with nothing at the trial of the main suit. Counsel cited several authorities to support the 2nd Respondent's case.

6. The 3rd Defendant's counsel adopted the submissions of the 2nd Respondent, both the written and oral submissions. He also relied on the Replying Affidavit filed by the 3rd Respondent. The 4th Respondent relied on the Replying Affidavit of the 3rd Respondent. The 4th Respondent's counsel submitted that the agreement relied on by the Applicants is null and void for all purposes for lack of consent from the Land Control Board.

7. In his brief response, counsel for the Applicants submitted that the Applicants have established a prima facie case to qualify for the orders sought. Counsel submitted that the difference in the name "Kenya Wool Limited" and "Kenya Wool Investment Company Limited, the 1st Respondent is as result of a typographical error. Counsel further submitted that the suit is not time barred as the Applicants are seeking for compensation but not recovery of the land.

8. I have considered all the issues raised in the Application, Affidavits on record and the submissions made as well as the authorities cited. The main issue that I now have to determine is whether the Applicants have satisfied the conditions for grant of the conservatory orders sought.

9. I have perused the plaint and it is clear that the Plaintiffs, besides claiming for compensation, are claiming for ownership over the suit land. The Plaintiffs are relying on an agreement for sale dated 14th February 2002 entered into between them and a company known as Kenya Wool Limited. Kenya Wool Limited is not a party to this suit. **Section 7** of the Limitation of Action provides as follows: -

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

If the Applicants are relying on a contract entered into on 15th February 2002, they are clearly time barred by virtue of the above provision of the law. However, this issue has to await the main trial.

10. The evidence on record shows that the 2nd Respondent is the registered owner of the suit property by

virtue of a Grant issued to it on 4th July 1991. **Section 26 (1)** of the Land Registration Act No.3 of 2012 provides.

26 (1) "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except -"

**a) On the ground of fraud or misrepresentation to which the person is proved to be a party;
or**

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

No evidence has been brought forward by the Plaintiffs that falls within the exceptions outlined under **Section 26 (1)** of the Land Registration Act. In the absence of fraud or evidence to show that the 2nd Respondent acquired the land through a corrupt scheme, I have no reason why I should not take the Grant held by the 2nd Respondent as prima facie evidence that it is the proprietor of the land and therefore is the absolute and indefeasible owner. I do not wish to pretend to determine the issues of ownership at this interlocutory Application without full facts.

11. Applying the principles set out in the case of **GIELLA – VS- CASSMAN BROWN**, and for the reasons above, I find that the Applicants have not established on a balance of probability a prima facie case against the Defendants.

12. On whether or not the Plaintiffs would suffer irreparable harm if the orders sought are not granted, I take the view that the loss that may result if the orders sought for are declined can be quantified in damages as the amount of compensation sought to be stopped from being made is in monetary terms and the amount is known. As for the balance of convenience, I take the view that the same tilts in favour of the 2nd Defendant who is the registered owner of the suit property. I therefore decline to issue prayers 1 to 5 of the Application.

13. Prayers 6 to 9 of the Application are final orders that if issued would determine this suit at a preliminary state. Major reliefs cannot be issued at this interlocutory stage. Such orders can only be issued under special circumstances. No special circumstances have been demonstrated by the Applicants to warrant the grant of the same.

14. For the foregoing reasons I do find that this Application is without merit and is hereby dismissed with costs to the Respondents.

Delivered, dated and signed at Mombasa this 15th day of June 2017.

C. YANO

JUDGE