



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 113 OF 2015

EMFIL LIMITED.....PLAINTIFF/APPLICANT

-versus-

THE HONOURABLE ATTORNEY GENERAL

& 423 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The Application under consideration is the Notice of Motion dated 20th May 2015 filed by the Plaintiff. It is supported by the Affidavit of VINAYCHARA DAMODAR ROPAT sworn on the same date. The Application seeks a total of 11 prayers the gravamen of which can be summarised as follows:

i. Spent

ii. Spent.

iii. Spent.

iv. Pending determination of the suit, the Defendants, their servants, agents or whoever be restrained from interfering, dealing, trespassing onto, developing, approving any development plans or interfering in any way whatsoever with the property commonly known as **Kwale/Ramisi Kinondo Settlement Scheme** including L.R Nos. Kwale/Ramisi Kinondo S.S.S Parcel No. 1 - 213.

v. A cancellation of all titles issued by the Defendants under the Settlement Scheme commonly known as **Kwale/Ramisi Kinondo Settlement Scheme** including L.R Nos. Kwale/Ramisi/Kinondo S.S.S

vi. That the Defendants, servants and their agents or whosoever be evicted from the Plaintiffs property known as Land Reference Numbers 13433/6- 13433/143 from which the Defendants have created a settlement scheme known as **Kwale/Ramisi Kinondo Settlement Scheme** including L.R Nos. Kwale/Ramisi/Kinondo S.S.S Parcel Number 1 to Kwale/Ramisi/Kinondo S.S.S Parcel Number 213.

vii. The OCS Kwale be directed to provide security to ensure that any orders issued are complied with.

viii. The Inspector General of Police to ensure that the Plaintiffs properties referred to herein are adequately protected from invasion by squatters, or any other persons.

ix. Spent.

x. That the Plaintiff do give an undertaking as to damages.

xi. That costs be in the cause.

2. The Plaintiffs case is that in 1987 it bought the property known as Land Reference No. 12335/1 from M/s Associates Sugar Company Limited and subsequently subdivided the same to over 150 plots which include the 138 parcels the subject of this suit (hereinafter called "the suit property/properties").

3. That the subdivisions were carried out after obtaining the relevant approvals and consents from the 2nd Defendant and other concerned government departments.

4. The Plaintiff averred that it has been in occupation of the suit property and has employed security guards to keep out trespassers and squatters. That however, in late October or early November 2006, a group of people visited the suit property claiming to have been allocated the same and had letters of offer from the Director of Land Adjudication and Settlement. That the 2nd Defendant issued new titles for some properties forming part of the suit property under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) yet the suit property falls under the regime of Registration of Titles Act, Cap. 281 Laws of Kenya.

5. The Plaintiff stated that it has never surrendered the title documents in respect of the suit property to the Commissioner of Lands to necessitate conversion of the registration regime from Cap. 281 to Cap. 300 and the purported issuance of the Title Deeds to third parties were therefore unlawful.

6. The Plaintiff avers that the 1st Defendant has through Gazette Notice Number 6652 (Special Issue) dated 14th June 2011 and published on 15th June 2015 purported to revoke the various titles falling under the suit property and stated that the said parcels were preserved for public purposes and the allocation to the Plaintiff was illegal and unconstitutional. The Plaintiff averred that the Defendants continued to deal with the suit property despite existence of restraining orders from the courts.

7. The Plaintiff submitted that it is entitled to the orders sought. On prima facie case, the Plaintiff submitted that it has shown that it is the legal owner of the suit properties. That the Plaintiffs rights of ownership are entrenched in the Constitution and have been affirmed by judgments issued by both the High Court and the Court of Appeal. As such, the Plaintiff submitted, the interim orders sought should be granted since the suit property was not available for allocation.

8. On irreparable loss, the Plaintiff submitted that its titles constitute 119 prime beach plots in the pristine Diani area which in total measure over 400 acres. That it will be impossible to acquire such property again. That as squatters, the Defendants are not capable of compensating the Plaintiff for the loss of its properties.

9. Finally on balance of convenience, the Plaintiff submitted that the same should be decided in its favour as it has established its rights of ownership and has, since 1987, been in occupation of the suit property.

10. The Application is opposed. The **154th** , **293rd** and **306th** Defendants filed a joint Replying Affidavit sworn by **ALEC VAN WIJK** on 17th September 2015 and filed on 18th September 2015. The deponent deposed that the 154th , 293rd and 306th Defendants purchased properties known as **KWALE RAMISI/KINONDO S.S.S Parcel Numbers 139, 140, 56 and 146** for valuable consideration without any notice of defect in title. That the Plaintiffs claim smacks of inexcusable indolence, and the Application is not only a gross abuse of the court process but is also premature,

misplaced, ill-informed and wholly unmerited.

11. The 155th, 227th, 231st, 233rd, 234th and 395th Respondents also filed joint grounds of opposition in which they stated that the application is bad in law and that the orders sought are not tenable since these Respondents have been in occupation of the suit property for almost five (5) years. Lastly that the orders sought are incapable of being implemented. They urged the court to dismiss the application with costs to them.

12. The 239th, 241st and 308th Defendants filed a joint Replying Affidavit sworn by **JOHN DENHAM VICKERS** and filed on 17th September 2015. The deponent deposed that the entities in whose names the properties known as **KWALE RAMISI/KINONDO S.S.S Parcel Numbers 115, 116 and 147** are currently registered obtained good titles thereto having purchased the same for valuable consideration without any notice of defect in title.

13. **RONALD MUINDE KISIA**, the 76th and 127th Defendant filed a Replying Affidavit sworn and filed on 29th October 2015. He deposed that he is the holder of two title deeds over **KWALE/RAMISI KINONDO SETTLEMENT SCHEME/22** and **KWALE/RAMISI KINONDO SETTLEMENT SCHEME/ 41** which he acquired as an innocent purchaser for value without notice and as such he should not be made to suffer. That if the government officials acted illegally he should not be made to suffer but be left to enjoy his parcel of land peacefully.

14. **NASSOR ABDALLA MWACHIBULO**, the 167th Defendant filed a Replying Affidavit sworn and filed on 8th October 2015 on behalf of himself and 157th, 158th and 161st Defendants. According to the deponent, the titles of the suit properties were surrendered, cancelled and revoked when their leases expired and therefore the titles do not exist. The deponent denied that the Plaintiff has been in occupation of the suit properties.

15. In their written submissions, the 157th, 158th, 161st and 167th Defendants submitted that prayers 4 and 5 cannot be granted in an interlocutory application since the same call for adducing of oral evidence. They submitted that the Plaintiff has not satisfied the conditions necessary for the grant of temporary injunction as laid down in the case of **Giella vs. Cassman Brown & Company Limited [1973] EA 358.**

16. The 155th, 227th, 233rd, 234th and 395th Defendants/Respondents submitted that the application is an abuse of the court process as the orders sought are not tenable in law and even if they were to be granted, they cannot be implemented. These Respondents submit that the Applicant admits the existence of their titles. Secondly that the property has changed and is renamed which does not bear the name of the Applicant therefore the orders of injunction cannot be implemented.

17. In regard to prayer 5 & 6, the Respondents herein submit that the said prayers support the submission that prayer 4 cannot be granted. Secondly the prayers of cancellation of title and eviction cannot be issued without the court hearing any evidence from both parties. They concluded that the remainder of the prayers fails once the above prayers are refused. In support of their submissions, they relied on the Nigerian case of **UKET VS OKPA (2005) LPELR-128876 (CA)** and the renowned case of **Giella vs Cassman Brown**. The rest of the defendants did not file their submissions within the agreed timelines.

18. I have analysed the pleadings filed and the submissions rendered. To begin with, prayer no. 9 was granted *ex parte* and thus service of process done through the daily newspaper as a result of which the defendants who are on record entered appearance. The core prayers for determination are nos. 4, 5 and 6. Prayers 7, 8 and 10 are dependent on the success of the prayers 4, 5 and 6 for determination. In prayer 5 & 6, the Applicant sought for the cancellation of the titles and eviction of the Respondents from the suit properties. All the Respondents submitted that the Court cannot grant these prayer at an interlocutory stage. In the grounds in support of the motion, the Applicant stated that the Respondents disregarded the stay orders issued by Odero J. and the Court of Appeal and proceeded to issue new titles.

19. The said titles if they were issued irregularly may easily be cancelled without a hearing if the orders for cancellation were taken out by way of Notice to Show Cause in the file in which the order was granted. However my view is that once the Applicant commenced a fresh suit then the people sued must be given an opportunity to explain the reasons they took such an activity in contravention of the existing court order or for the title holders to justify how they acquired their titles. If I give an order of cancellation at an interlocutory stage, I will be condemning the Respondents unheard contrary to the rules of natural justice.

20. Similar scenario would apply to issuance of eviction orders at this stage. In the wording of prayer 6, no mandatory injunction is sought neither is there any justification in the grounds or affidavit in support of the application why this court is called to grant the mandatory orders. I do therefore find that the prayers sought in nos 5 and 6 are premature at this stage as they require adduction of evidence before they can be allowed.

21. The Court is left now to determine whether there is merit in prayer 4. The Applicant is asking the Court to issue orders restraining the Respondents from **entering, dealing, trespassing onto, developing, approving any development plans or in any way interfering with the suit properties**. In light of the fact that some of the Respondents stated that they are and have been in occupation of the different parcel numbers stated. And in the absence of clarity from the Applicants pleadings in terms of which Respondents are in occupation and who are not, the prayer for **entering and trespassing onto** is not available in the circumstances.

22. The Applicants has however demonstrated that at one time it was the registered owner of what was the original title of the suit property. The pleadings further reveal that the Applicant successfully challenged the order which cancelled its title. The result of this is that the suit property has two parallel titles with one set issued to the Respondents and the other held by the Applicant. To allow for both parties to present evidence and for this court to determine who the right owner of the suit property is, it is imperative that the status quo be maintained.

23. The status quo if not maintained would then the Applicant's suit will be conducted merely as an academic exercise. Therefore to achieve this status quo, I will partially allow prayer 4 of the application. This prayer is allowed to the extent that the Respondents are restrained from undertaking any **new and or further developments on, approving any development plans or parting with possession of the suit parcels described as Kwale/Ramisi Kinondo/SSS No 1 to 213 pending hearing and determination of the suit**.

24. In order to maintain law and order given the number of Respondents involved, it is necessary for the Applicant to be provided with security while ensuring the order granted above is complied with. I have taken note of the finding of the Court in the case of **MUCUHA VS RIPPLES LTD**. The Police department in this instance is required to ensure law and order is maintained and not to enforce a civil order. For this to be achieved, I do allow prayer no 7.

25. Lastly since the application has partially succeeded whose effect bars the Respondents from undertaking any new or further developments on the land or parting with its possession, the Applicant shall give undertaking as to damages in case his suit does not succeed. Consequently, I grant prayer 10 of the motion and direct the Applicant to file an undertaking in damages within 30 days of this ruling. The parties be at liberty to agree on the wordings of the undertaking.

26. Costs follow the event. The application has partially succeeded therefore I make an order that each party to bear their costs of the application.

Ruling Dated & Delivered this 28th day of January 2016

A.OMOLLO

JUDGE