



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 179 OF 2015

DURSOMA INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

1. CHIRUNGA BONGO MUNDALU

2. TROPICAL TREASURE LIMITED

3. THE CHIEF LAND REGISTRAR.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. What is before me is the Application dated 9th September, 2015 in which the Plaintiff is seeking for the following orders:-
 - (a) **THAT this Honourable court be pleased to issue a temporary injunction restraining the Respondents jointly and severally by themselves or their authorised servants, agents, employees and/or any other person acting under their instructions from trespassing, developing, fencing, dealing and/or interfering with property known as Plot No. 29992 C.R. No. 65726 pending the hearing and determination of the suit herein.**
 - (b) **THAT the respondents herein jointly and/or severally be ordered to demolish and/or remove any development and/or structure and/or on the property forthwith.**
 - (c) **THAT the OCS Mariakani Police Station do ensure compliance of the order.**
 - (d) **Any other order the court may deem fit to grant in the circumstances.**
 - (e) **Costs of the application be provided for.**

The Plaintiff's/Applicant's case:

2. The Plaintiff's director deponed that the Applicant is the registered owner of plot number 19992 CR No. 65726 measuring 80.94 Ha; that the Plaintiff has been in occupation and has been using the property for more than 20 years and that on 25th August, 2015, the Respondents trespassed on the suit property and started fencing the land.

The Defendants'/Respondents' case:

3. In his Replying Affidavit, the 1st Respondent deponed that the suit property belongs to Mwachiro Bongo, Benson Dzombo and himself; that they agreed to sell and transfer a portion of 45 acres to a third party and that the purchaser agreed to pay them Kshs.28,600,000.
4. According to the Respondents, the people who purchased part of the suit property from them processed the title document before paying them fully and that they have since sued them in Malindi ELC Case No. 132 of 2014; that the rest of the land has not been registered and that the said land belongs to their families.
5. According to the 1st Defendant, the suit property is their ancestral land; that he was able to ascertain that the Plaintiffs' directors are Durumas and Somali who are not the indigenous people of the area and that the suit land has always been occupied by Giriama.
6. The Respondents deponed that they have also filed Malindi HCCC No. 157 of 2015 against the Plaintiff & Others over the suit property.

Submissions:

7. The Plaintiff's counsel submitted that the Plaintiff applied to the then County Council of Mariakani for setting apart of the suit property; that the Application was approved; that the Plaintiff was issued with a Certificate of Title and that the Defendants have not substantiated their claim viz-a-viz the suit property.
8. Counsel submitted that L.R. No.29992 is different from L.R.NO.29170 and that the Plaintiff is the only registered owner of the land.
9. The Defendants' advocate did not file submissions.

Analysis and findings:

10. The Plaintiff's Application for injunctive orders is premised on the ground that it is the registered proprietor of L.R. NO. 29992 measuring 80.9400 Ha.
11. On the other hand, the Defendants' case is that the suit property is their ancestral land and that the Plaintiff's directors are not the indigenous people of the area.
12. To support its claim, the Plaintiff has annexed on the Supporting Affidavit a Lease for L.R. No.29992 dated 31st July, 2015 issued under the Land Act and the Land Registration Act.
13. The said Lease shows that the County Government of Kilifi, in consideration of Kshs.3,237,600, leased to the Plaintiff the suit property for a term of 99 years with effect from 1st September 2013.
14. The Lease was registered by the Land Registrar on 12th August, 2015 and a Certificate of Title was issued by the Registrar of Titles on the same date.
15. The Plaintiff has also annexed on its Affidavit a gazette notice number 10164 dated 24th July, 2013 signed by the Chairman of the National Land Commission.
16. According to the said gazette notice, the Chairman of the National Land Commission "set a part" the suit property pursuant to the provisions of Part IV of the Trust Land Act.
17. The gazette notice that was published by the Chairman of the National Land Commission confirms that the land in question is Trust land, and that the same was set apart by the National Land Commission and then allocated to the Plaintiff.
18. It is trite that Trust land is the land that was declared as such by Section 114 of the repealed Constitution. Under both the repealed Constitution and the Trust Land Act, Trust lands were neither owned by the Government nor by the County Council, unless such land was set apart pursuant to the provisions of Sections 117 and 118 of the repealed Constitution.
19. The County Councils held Trust land on behalf of the local inhabitants of the area. For as long as Trust land remained unadjudicated and unregistered, it belonged to the local communities, groups, families and individuals in accordance with the applicable African customary law.
20. The unadjudicated and unregistered Trust land is what is known as "Community land" in the current Constitution.
21. According to Article 63(3) of the Constitution, any unregistered community land is to be held in trust by the County Government on behalf of the communities for which it is held. Such land is

- not “public land”.
22. Article 63(4) of the Constitution provides that Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively. Parliament is required to enact legislation to give effect to the Article.
 23. I am aware that the Community Land Bill has not been enacted into law. Consequently, the law which is applicable in the allocation of Trust Land is the Land Adjudication Act and Trust Land Act. The two pieces of legislation have to be construed with alterations, adaptations, qualifications and exceptions necessary so as to bring them into conformity with the Constitution (See section 6 of the Sixth Schedule of the Constitution).
 24. The National Land Commission purported to “Set apart” the suit property pursuant to the provisions of Part IV of the Trust Land Act and allocated it to the Plaintiff.
 25. Section 7(1) of the Trust Land Act allows for the setting apart of Trust land at the instance of Government.
 26. The said section states that where such land is to be set apart, the Council (read County Government) shall give a notice stating the reasons for the setting apart and shall cause the notice to be published in the gazetted.
 27. Section 8 of the Trust Land Act states that where land is set apart under Section 7, full compensation shall be promptly paid by the Government to any resident of the area of the land set apart who under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof.
 28. The law therefore allows the County Government to set apart Trust land at the instance of the government and for prompt compensation.
 29. I have checked the jurisdiction of the National Land Commission as provided for in the Constitution and the National Land Commission Act. I have not come across a provision giving the Commission the mandate to “set apart” Trust land or to allocate such land to an individual or a company.
 30. Under Article 67 (2)(a) of the Constitution, the Commission can only manage public land, and not Community land, on behalf of the national and county government. The Commission also has the mandate of alienating public land on behalf of, and with the consent of the national and county governments (see section 5(2)(a) of the NLC Act).
 31. Although section 3(2)(e) of the National Land Commission Act allows the Commission to manage and administer all unregistered Trust land and unregistered community land on behalf of the County Government, the law does not give it the mandate to set apart or alienate such land, and more so without the consent of the County Government.
 32. The Plaintiff in this matter has not annexed documents showing that the County Government of Kilifi authorised the setting apart of the suit property. There is also no evidence before me to show that the County Government established if indeed there were people who had a right to occupy the suit property for the purpose of compensating them before it set apart the land.
 33. In the absence of the consent of the County Government to have the suit property set apart for the purpose of allocating it to the Plaintiff, and in view of the fact that the Lease that is held by the Plaintiff shows that it is the County Government of Kilifi that consented to the allocation, I find that the Plaintiff has not established a prima facie case with chances of success.
 34. If the Plaintiff's case is that it has occupied and utilised the suit property for over 20 years, then it would be only entitled to the land as “ a resident of the area” after an adjudication process has been undertaken as provided for under the Land Adjudication Act. That was not done in this case.
 35. For those reasons, I dismiss the Plaintiff's Application dated 9th September, 2015 with costs.

Dated, signed and delivered in Malindi this 24th day of June, 2016.

O. A. Angote

Judge