



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 171 OF 2013

1. VROS PRODUCE LIMITED.....PLAINTIFF

2. DEW REALITY LIMITED.....PLAINTIFF

=VERSUS=

THE CHIEF LAND REGISTRAR & 525 OTHERS.....DEFENDANTS

R U L I N G

Introduction:

1. On 5th September, 2014, this court delivered a Judgment in this matter.
2. The 2nd Plaintiff has now filed an Application dated 4th May, 2016 in which it is seeking for the following orders:

(a) Due to the circumstances and urgency of this matter and in order to avoid the application being defeated by the willful acts of the Respondents and by any delay, this issue the following orders:-

(i) The 1st defendant and J. G. Wanjohi the Registrar of Lands Mombasa do provide the Applicant and file in court within 7 days of service of the Order with certified copies of the Provisional Certificates of Title issued on 30th July 2013 for parcel of land registered as MN/SECTION IV/271 to MN/SECTION IV/309.

(ii) An order compelling Jane W. Ndiba the acting Chief Registrar and J. G. Wanjohi the Land Registrar, Mombasa to personally attend court during the hearing until discharged by the court.

(b) Summons be issued to Jane W. Ndiba and Mr. J. G. Wanjohi the acting Chief Registrar of Lands and Registrar of Lands Mombasa Land Registry respectively, and any other person for the time being occupying those positions to appear before this court and show cause why they should not be committed to jail for such term as court may deem just.

(c) The Chief Land Registrar one Jane W. Ndiba and J. G. Wanjohi be cited for contempt of this Honourable Court and be committed to jail for six months for being flagrantly contemptuous, and willfully disobedient of the Honourable Court's Order

given on 5th September 2014 by Hon. Justice Mr. Oscar Angote.

(d) An order of declaration that, where the Registrar through his or her own acts has lost, misplaced, destroyed or hidden a Land file or Register and requires to reconstruct the Land file or Register under Section 33(5) of the Land Registration Act, No. 3 of 2012, the registered proprietor of the land was not a party and or custodian of the Land Registry document has no duty and is not liable to indemnify the Registrar of his/her acts by way of the proprietor executing a Deed of Indemnity or otherwise.

(e) The said Jane W. Ndiba, the acting Chief Registrar and Mr. J. G. Wanjohi the Registrar of Lands Mombasa Land Registry respectively, be condemned to personally pay the costs of this Application.

The 2nd Plaintiff's/Applicant's case:

3. The 2nd Plaintiff's Application is supported by the Affidavit of the 2nd Plaintiff's Director who has deponed that on 5th September, 2014, this court ordered for the cancellation of the Certificates of Title numbers MN/Section IV/271 to MN/Section IV/309 which the 1st Respondent had issued to the 9th Defendant and others, and to issue fresh Certificates of Title in the name of the 1st Plaintiff.
4. The Applicant's director has deponed that the 1st Respondent was served with the court's order, decree and a penal notice on 21st January, 2015 and its Mombasa Offices on 6th July, 2015 and 7th August 2015; that the Attorney General was served with the Decree on 22nd January, 2015 and that despite being served and having knowledge of the decree, the Chief Land Registrar and the Land Registrar, Mombasa have both ignored the same and have continued to ignore the decree.
5. According to the Applicant's director, despite constant demands and requests by the Applicant to be issued with fresh titles as ordered by the Court, the Respondents have adamantly, scornfully and maliciously refused to issue fresh titles as ordered by the Court. It is the Applicant's case that the Respondents should be cited for contempt of court.
6. The Applicant's director has further deponed that the Respondents have insisted that the Applicant must provide a deed of indemnity for the lost or destroyed original land register file concerning the Applicant's parcel of land; that such an indemnity can only be issued in case it is the Applicant who has lost its documents and that having lost or misplaced the documents held by themselves, the registered proprietor is not liable to indemnify the Registrar for their own fault or negligence.
7. It is the Applicant's case that the failure by the 1st Respondent to issue the Titles to the Applicant as ordered by the court renders the Applicant powerless and makes the Applicant unable to stop the wastage, destruction and plunder of the suit land and trespass.
8. The Applicant's director finally deponed that when the 1st Respondent and others fraudulently obtained a court order through forgery of a consent order, the 1st Respondent quickly issued duplicate Certificates of Titles to the fraudsters but when she was served with the order of this court of 5th September, 2014, she refused to comply with it; that the period from 5th September, 2014 to date is a long period for the 1st Respondent to have complied with the court order and that this court has a cardinal duty to protect its integrity, processes and dignity for the rule of law to prevail.

The District Land Registrar's case:

9. The District Land Registrar, Mombasa, filed a Replying Affidavit in response to the Notice of Motion.
10. In the said Affidavit, Mr. Wanjohi deponed that the decree that was issued by this court on 19th September, 2014 was served upon Mr. G.S. Birundu, the Deputy Chief Land Registrar on 21st January, 2015 in Nairobi; that the parcel files for the disputed parcel of land are held at the Mombasa Registry and that the said decree was not served on him until 6th July, 2015 and that it was not until 7th August, 2015 when the said decree was presented for registration and assigned

- day book number 78.
- 11.The District Land Registrar deponed that the Applicant was well aware that the orders of this court had been complied with on 7th August, 2015; that order number 9 in the decree compelled the Chief Land Registrar to issue to the Applicants with fresh Certificates of Titles in respect of the 39 parcels of land and that because the Certificate of Title serves both as the title and the register, it was not practical to issue fresh Certificates of Title to the 1st Plaintiff as ordered by the court.
 - 12.It is the deposition of the District Land Registrar that this position was communicated to the Applicant by the Chief Land Registrar in her letter dated 24th March, 2016 and 19th April, 2016 and that they have instructed the Attorney General to seek a review of the said orders.
 - 13.It is the deposition of Mr. Wanjohi that the records held his the office confirms that Vros Produce Ltd, the 1st Plaintiff, is the registered owner of the 39 parcels of land.
 - 14.Ms Jane W. Ndiba, the acting Chief Land Registrar, did not respond or file a response to the Application.
 - 15.In cross-examination, the District Land Registrar, Mombasa (PW1), informed the court that he complied with the order of the court of 5th September, 2014 by registering the decree.
 - 16.PW1 admitted that he issued provisional Certificates of Titles as shown in entry number 3 of all the 39 parcels of land to the 9th Defendant after the decree that was issued to the Petitioner on No. 9 of 2012 was registered.
 - 17.PW1 informed the court that he issued the provisional titles, as shown in entry number 3, because the Petitioners in Petition No. 9 of 2012 did not have the original titles; that the 1st Plaintiff in this matter has the original title documents and that the decree that he registered as entry number 5 cancelled the provisional certificates that were issued by him.
 - 18.PW1 stated that although the decree that he registered as entry number 5 does not show that the 1st Plaintiff is the registered proprietor of the suit properties, that entry expressly reverted the title to the 1st Plaintiff.
 - 19.It was the testimony of PW1 that he can issue to the 1st Plaintiff “replacement” Certificates of Title which will be based on the original deed plans.
 - 20.PW1 was shown a copy of the Certificate of Title for L.R. No. MN/Section IV/287 annexed on his Replying Affidavit which shows that after the provisional certificate was issued, the land was transferred to Muthuka Muvee for Kshs.10,000,000 on 13th August, 2014 whereafter it was transferred to General Mills East Africa Limited for Kshs.10,000,000 and charged to National Bank of Kenya for Kshs.250,000,000 on 13th February, 2015.
 - 21.PW1 stated that although the decree of this court cancelled all the transactions on the 39 parcels of land, it will be confusing to know the registered owner. However, it was the evidence of PW1 that the registered owner is the 1st Plaintiff.

Submissions:

- 22.The Applicant's counsel submitted that PW1 has admitted that they can replace title documents; that the Respondents should have replaced the titles as ordered by the court and that initially, the Respondents were categorical that they cannot issue new Certificates of Title to his client.
- 23.The Applicants' counsel submitted that considering that the law allows the Registrar to reconstruct a register, and in view of the fact that in some of the sub-divisions the Registrar issued provisional certificate of Titles based on a consent orders, the contemnors could still comply with the order of the court by issuing to his client fresh Certificates of Title but declined to do so.
- 24.The Applicant's counsel also filed written submissions and authorities which I have considered.
- 25.The Respondents' counsel submitted that entries in respect of the suit property are made in the Mombasa office; that having registered the order of the court, the Respondents complied with the orders of the court and that considering that the decree of this court cancelled all the transactions, the Applicant remains the registered proprietor of the suit properties.
- 26.The Respondents' advocate further submitted that the law that is applicable in this matter is the Registration of Titles Act (repealed) and that therefore Section 22 of the Act is applicable in this matter.

27. Counsel submitted that the Respondents cannot issue “fresh” Certificates of Title as ordered by the court because the 1st Plaintiff is holding the original title; that the word “fresh” denotes a new title deed and plan; that however, the Respondents can issue to the Applicant a “replacement” upon surrendering the old title documents and that the Respondents have filed an Application to review the orders of the court.
28. Counsel showed the court how a “replaced/duplicate” Certificate of Title looks like.

Analysis and findings:

29. The 2nd Plaintiff is a shareholder in the 1st Plaintiff.
30. At all material times, the 1st Plaintiff was the registered proprietor of L.R. Nos. MN/Section IV/271 to MN/Section IV/309.
31. However, on 22nd May, 2013, 509 Petitioners sued a company with a name that is similar to the 1st Plaintiff herein together with the Chief Land Registrar in Malindi Petition No. 9 of 2013 claiming that the company (Vros Produce Ltd) had fraudulently acquired the 39 parcels of land fraudulently.
32. On 5th July, 2013, the Petitioners' advocate in Petition No. 9 of 2013 and the Attorney General, who was acting on behalf of the Chief Land Registrar, entered into a consent in respect to the suit properties. The consent was extracted as a decree of the court and was registered as entry number 2 on all the 39 Certificates of Title for MN/Sec.IV/271-309 that were being held by the Ministry of Lands, Mombasa. The entry reads as follows:-

“2. DECREE DATED 15TH JULY, 2013 LAND AND ENVIRONMENTAL DIVISION PETITION NO. 9 OF 2013 HC MALINDI DIRECTING THE REGISTRAR OF TITLES TO CANCEL THE NAME OF THE 2ND RESPONDENT (VROS PRODUCE LTD) AND REPLACE IT WITH THE NAME OF JOSEPH MZUNGU NYOKA ON BEHALF OF HIMSELF AND OTHER 508 PETITIONERS”

33. The above entry was made by the District Land Registrar, Mombasa, PW1, on 30th July, 2013 on all the 39 Certificates of Title. The “2nd Respondent” that was referred to in the said entry and whose name was to be replaced is the 1st Plaintiff herein.
34. On the same day the decree was registered against the 39 Certificates of Title by the District Land Registrar, Mombasa, Provisional Certificates of Title were issued by the Registrar to the Petitioner and entry number 3 was made on the 39 titles held by the Registrar as follows:-

“3 PROVISIONAL CERTIFICATE OF TITLES ISSUED -SEE ENTRY NO. 2”

35. With the above entry, the District Land Registrar released 39 Provisional Certificates of Title of land that initially belonged to the 1st Plaintiff without its knowledge to the Petitioners in Petition No. 9 of 2013.
36. After the Provisional Certificates of Title were issued by the District Land Registrar pursuant to the consent order, L.R. Nos MN/Section IV/281 and 282 were sold to Zulekha Mohamed Agil Awadh for Kshs. 12,500,000 and Kshs.5,000,000 respectively on 13th August, 2014.
37. On the same day, L.R. No. MN/Section/IV/286 was sold to Christopher Stelly Letingiso for Kshs.10,000,000 while L.R. Nos. 283 and 280 were sold to Zulekha Mohamed Agil for Kshs.10,000,000 and 12,500,000 respectively.
38. Fatuma Benson Kairu had L.R. NO. MN/Section IV/284 sold to her on 13th August, 2014 for Kshs.10,000,000.
39. All these transfers were effected on the basis of a consent in which the Chief Land Registrar was a party, and while this suit was pending.
40. It is those entries and the issuance of Provisional Certificates of Title to Joseph Mzungu Nyoka that led to the filing of this suit in which the court delivered its Judgment on 5th September 2014 after hearing the Plaintiffs. The Defendants, including the Chief Land Registrar and the Attorney

General did not participate in the suit, whose core prayer was to set aside the consent Judgment in Petition number 9 of 2013.

41. In its Judgment of 5th September, 2014, this court issued several declaratory orders. However, the declarations which are relevant to the present Application are these:-

“(g) An order be and is hereby issued that any transaction as a result or caused by the decree issued by this court in Petition number 9 of 2013 be and is hereby set aside.

(h) An order be and is hereby issued that any transfer of the suit property and or any Provisional Certificates of Title issued in respect of MN/Section IV /271 to MN/Section IV/ 309 to Joseph Mzungu Nyoka, the 9th Defendant, on his own behalf and on behalf of 508 others, be and is hereby set aside and cancelled.

(i) The 1st Defendant do issue to the 1st Plaintiff fresh Certificates of Title in respect of the 39 parcels of land registered as L.R. Nos. MN/Section IV 271 to MN/Section IV/309.”

42. The Decree of this court in respect of the Judgment dated 5th September, 2014 was issued by the Deputy Registrar on 19th September, 2014.

43. According to the evidence before the Court, the said Decree was served on Mr. G. S. Birundi, on behalf of the Chief Land Registrar in Nairobi, on 21st January, 2015 at 4.10 pm. The acting Chief Land Registrar, Ms Ndiba, has not denied that indeed the order was brought to her attention on the same day.

44. According to the Affidavit of the District Land Registrar, Mombasa, he was served with the same Decree on 6th July, 2015 and registered it against all the 39 parcels of land as entry number 5 on 7th August, 2015.

45. In the meantime, between the time that the Chief Land Registrar, who is the 1st Defendant in this suit and an alleged contemnor was served with the Decree and when the same was registered against the titles, the people who had been issued with the Provisional titles on the basis of the consent order in Petition No. 9 of 2013 were busy selling the suit properties.

46. The certified copies of the Certificates of Title annexed on the District Land Registrar's Affidavit shows that L.R. No. MN/Section IV/279 was transferred to Zulekha Mohamed Agil Awadh for Kshs.5,000,000 on 27th January, 2015 while L.R.NO. MN/Section IV/287 was transferred to General Mills East Africa Limited for Kshs.10,000,000 on 13th February, 2015 and charged to National Bank of Kenya for Kshs.225,000,000 on the same day.

47. The acting Chief Land Registrar has not denied that she was aware of the decree of this court that was served on her office on 21st January, 2015. The acting Chief Land Registrar has not stated why she never forwarded the decree of this court to the District Land Registrar Mombasa for registration immediately after the same was served upon her.

48. When the Chief Land Registrar was requested by the Applicant's counsel to effect the order of the court by way of a letter dated 5th July, 2015 and 14th April 2016, she responded as follows:-

“However, under the RTA(Cap 281) there is no provision to issue new titles after endorsement. The endorsement of the order against the title suffices and passes rights in the properties as per the court order” ”

49. That is the same information that she relayed to the Directorate of Criminal Investigations vide her letter dated 24th March, 2016.

50. Although the Chief Land Registrar held the view that she cannot issue “fresh” Certificates of Title to the 1st Plaintiff for lack of a law empowering her to do so, she did not raise the same issue when she registered the fraudulently obtained consent order of 5th July, 2013 on 30th July, 2013 and caused to be issued 39 Provisional Certificates of Title on the same day to the Petitioners.

51. Indeed, the Chief Land Registrar's script keeps on changing. According to the evidence of the

- District Land Registrar and the pending Application for review dated 25th May, 2016, the Chief Land Registrar can indeed issue a replacement of the titles to the 1st Plaintiff as ordered by the court.
52. Although the alleged contemnors' advocate submitted that the court ordered for the issuance of "fresh" titles and not "replacement", I am of the view that that argument is meant to take the court and the Applicant on a wild goose chase, and to avoid to comply with the orders of the court.
 53. It does not matter whether that the Chief Land Registrar was to issue to the 1st Plaintiff with fresh titles or replacements. The bottom line was that she was required by an order of this court to make an entry on the 39 Certificates of Title that she was holding to show that the 1st Plaintiff has been re-issued with Certificates of Title for the purpose of "sanitising" the record, and to actually re-issue the said titles to the 1st Plaintiff.
 54. It is obvious from the copies of the Titles that have been produced by the District Land Registrar that the last entry does specifically state the owner of the land, contrary to the order of this court.
 55. The entry simply shows the decree of this court, and it will require someone to read the entire court file to understand what the decree meant, and who the registered owner of the suit property is. It was with that in mind that this court ordered that a specific entry be made showing that fresh certificates of titles have been issued to the 1st Plaintiff, followed with the issuance of fresh titles.
 56. What the Chief Land Registrar is doing in the instant case is to challenge the orders of this court by refusing to issue or re-issue another set of titles-whether fresh or replacements, to the 1st Plaintiff. That, in my view, is contemptuous of the orders of the court that were served on her on 21st January, 2015.
 57. It is even more curious that while the Chief Land Registrar continues to defy the orders of the court, the people that were issued with the Provisional Certificates of Title by the same Registrar on the basis of a consent order are trading in those parcels of land. That is not acceptable.
 58. If the Chief Land Registrar required the Certificates of Title that are held by the 1st Plaintiff to be surrendered before re-issuing fresh ones, she should have told the Applicant to do so instead of defying the orders of the court.
 59. Section 64 of the RTA (repealed) gives this court the powers to direct the Registrar to do such acts or make such entries as may be necessary to give effect to the Judgment of the court. It is not in the province of the Registrar to question such directions without moving the court appropriately.
 60. As was held in the case of the **Refrigeration and Kitchen Utensils Ltd Vs Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990**, A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.
 61. It is the Chief Land Registrar, and not the District Land Registrar, Mombasa who was a party in this matter. Indeed, it is that office that was served with the Decree of the court on 21st January, 2015 but failed to instruct the District Land Registrar, Mombasa, to stop any further transactions on the suit premises and to issue or to re-issue to the 1st Plaintiff fresh titles.
 62. In fact, evidence has been produced to show that as late as May, 2015, the searches that were conducted by the Applicant on some of the suit land shows that it is third parties who are indicated as the registered proprietors of the suit properties.
 63. The person who is contemptuous of the orders of this court, and the one who has been writing letters by stating that she cannot comply with the said orders is Ms Jane W. Ndiba, the acting Chief Land Registrar and not the District Land Registrar, Mombasa.
 64. Indeed, Under the Land Registration Act, it is the Chief Land Registrar who is mandated to re-issue to the Applicant with Certificates of Title. The District Land Registrar's authority is limited to registering such a title once the same is forwarded to him by the Chief Land Registrar.
 65. The above, coupled with the fact that it is the Chief Land Registrar who is a party to this suit, and the fact that she is the one who declined to comply with the orders of this court, shows that it is her, and not the District Land Registrar, Mombasa, who is in contempt of the orders of this court.
 66. In the circumstances, and for the reasons I have stated above, I find and hold that Ms Jane W. Ndiba, the acting Chief Land Registrar, is in contempt and continues being in contempt of the orders of this court of 5th September, 2014.
 67. For those reasons, I direct that Ms Jane W. Ndiba do personally pay a fine of Kshs.2,000,000 and in default to serve a jail term of twenty one (21) days commencing on the date of this Ruling.

68. Ms Jane W. Ndiba, the acting Chief Land Registrar to personally pay the costs of this Application and the Application for leave to commence contempt proceedings. The Application as against the District Land Registrar, Mombasa is dismissed with no orders as to costs.

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

O. A. Angote

Judge