



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
PETITION NO. 15 OF 2015

1. HENRY CHANGAWA BOMU
2. MWALIMU AHMED
3. JOHNSON MWAREMA MWANJE
4. FERDINARD CHARO
5. PETER THOYA IHA
6. JAMES MRAMBA THOYA
7. RAYMOND KAZUNGU KENGA
8. SARAH KARISA THETHE
9. CONSTANCE GEORGE KAINGU
10. KARISA BONGO MASHA (*suing on behalf of the 5190 members
ihaleni community based organisation.....***PETITIONERS/APPLICANTS**

=VERSUS=

1. KINDIMBA LIMITED
2. KILIFI PLANTATION LIMITED
3. NATIONAL LAND COMMISSION
4. KILIFI COUNTY GOVERNMENT.....**RESPONDENTS**

R U L I N G

Introduction:

1. In their Application dated 14th October, 2015, the Petitioners are seeking for the following orders:-

(a) THAT pending the hearing and determination of this suit the Honourable Court be pleased to grant a permanent injunction restraining the 1st and 2nd Respondents/Respondents by themselves, their servants/and or agents or anybody authorised by them from constructing, evicting, selling, transferring, carrying out destruction and/or any further dealing on the land interfering with the Applicants use and occupation of PLOT NO.11, 12, BLOCK NO. 4236/4, BLOCK NO.5023 and BLOCK 5018 Kilifi.

(b) THAT the Honourable court finds that the 3rd Respondent denied the Applicants audience and right to be heard and quash any decision made on the subject matter until the final determination of the suit

The Petitioners'/Applicants' case:

2. The 1st Petitioner deponed that the Petitioners represent family units and homesteads, that is, fathers, sons and grandsons and or mothers and daughters and that they represent the interest of about 5,190 individuals.
3. According to the 1st Petitioner, the Petitioners are all residents within Mavueni area and have been residing on the suit property which is approximately 4,181 acres; that they have been utilising the suit property without any interruption and that at no time have they required permission from the 2nd Respondent to carry out farming activities on the land.
4. According to the Applicants, the 2nd Respondent has been engaging in activities like cutting down plants and planting sisal on the land to destroy and defuse evidence that prove the existence of their forefathers; that there is a secrete subdivision of the land that is ongoing and that private developers and wealthy individuals are being issued with Certificates of Title by the 1st Respondent.

The 2nd Respondent's case:

5. The 2nd Respondent's director deponed that the Petitioners are well aware that they hold no right of ownership or legitimate title to the suit property; that it is the 2nd Respondent who holds a valid title document and that the balance of convenience is in favour of the 2nd Respondent.
6. According to the Affidavit of the 2nd Respondent's director, prior to the arrival of the British, the Arabs had already established their control of the Coast. This, it was deponed, informed the signing of concession agreements between the Sultan of Zanzibar and the Imperial British East Africa Company in 1888 and 1895 in which all the rights to land along the coastal strip, except "private lands" were ceded to IBEA and that on 11th May, 1912, the Recorder of Titles issued a Certificate of Ownership to Seif Salim bin Khalfan in respect to the suit property.
7. The 2nd Respondent's director further deponed that on 2nd September, 1926, the 2nd Respondent bought interest and title in land known as Group V measuring 478.47 acres from Esmailiji Jeevanje and Company; that on 26th April, 1927, the 2nd Respondent bought L.R. NO.5023 measuring 2,503 acres from Rashid bin Salim and that the 2nd Respondent also purchased L.R.No.5018 measuring 277 acres from Seif bin Salim.
8. That 2nd Respondent's director deponed that the agreement was signed by the British, Kenya and Zanzibar governments and had the underlying effect of committing the government to protect the already registered freehold titles to land within the ten mile coastal strip.
9. It is the 2nd Respondent's case that the Petitioners have not proved that the suit properties have ever passed to them; that the issue of the suit property being government land was addressed by the Registrar in his Ruling of 22nd July, 1987 and that suit land is private land under the ownership of the 2nd Respondent who has occupied it since 1926.
10. According to the 2nd Respondent, the Petitioners have never been in possession of the suit land; that the recorded members of the group are not even residents of the area and that save for the authorised employees of the 2nd Respondent, none of the Petitioners reside on the land.

Supplementary Affidavit.

11. In response, the 1st Petitioner deponed that their ancestors were living on the land but the land was taken away from them; that no land was set aside for them as Trust land; that the land belonging to the community was annexed by the 2nd Respondent and that the National Land Commission has refused to give them a hearing.
12. According to the Petitioners, the 2nd Respondent wants this court to close its eyes to the historical land injustices brought by the agreement of the Sultans of Zanzibar, the British Colonial Government and the past Governments that favoured the 2nd Respondent and that in any event, the lease being of 99 years lapsed in the year 2013.

Submissions:

13. The Petitioners' advocate submitted that the Petitioners' ancestors have been living on the suit property; that when Trust land was being allocated to African communities, none was set aside for the Petitioners; that the mandate to rectify this land injustice is vested in the National Land Commission and that the National Land Commission has denied the Petitioners audience.
14. Counsel submitted that the Petitioners have a legitimate interest in the land and the injunctive orders should issue.
15. The 2nd Respondent's advocate submitted that the Petitioners have not demonstrated the claim that their rights have been infringed upon; that for one to claim that his rights have been infringed upon, he must establish what the right is from the outset and that the Applicants have not done so.
16. Counsel submitted that the 2nd Respondent holds a proper title since 11th May 1912; that the order of injunction has the consequences of denying the 2nd Respondent its proprietary rights over the land and that the 2nd Respondent has been in occupation of the suit land with the knowledge of the Petitioners.
17. The 2nd Respondent's advocate submitted that the Petitioners misled the court in believing that they are in the suit property and that there is no proof that the Applicants are living on the suit property.
18. The 2nd Respondent's counsel finally submitted that the Petitioners severally submitted themselves to the jurisdiction of the 3rd Respondent and that the 3rd Respondent released its report on 11th December, 2015 and that the Applicants have not challenged the said report.
19. Counsel relied on several authorities which I have considered.

Analysis and findings:

20. The Petitioners are members of Ihaleni Community Based Organisation. According to the Petition, the Petitioners have filed the suit on behalf of the 5,190 members. The Petitioners have annexed on their Affidavit names of the 5190 members that they are representing.
21. The Petitioners Application for injunctive orders is premised on the ground that they reside on the suit property; that their forefathers resided on the land before and after independence and that since the year 2009, they have been making a follow up on the issue of the Lease, the Lease which was issued to the 2nd Respondent having expired in the year 1987.
22. It is the Applicants' case that instead of the land being allocated to them, the said land has been subdivided and is being sold to third parties.
23. The 2nd Respondent's case on the other hand is that it is the registered owner of the suit land having purchased it for value. The 2nd Respondent has shown by way of documentary evidence how it purchased the land.
24. According to the documents produced by the 2nd Respondent, it purchased land known as Plan Group V measuring 478 acres from Esmailji Jeevanjee and company on 2nd September, 1926, land known as L.R.5023 measuring 2,533 from Rashid bin Salim and L.R.No.5018 measuring 277 acres from Seif bin Salim.
25. I have perused the Certificates of Title and the Indentures in respect of the suit property. The said titles show that the suit properties have freehold titles which were registered and issued under the

- Land Titles Act (now repealed). The titles in question are not leaseholds as pleaded by the Petitioners.
26. The 2nd Respondent's director has deponed in detail how the suit properties came to be registered under the 1908 Land Title Act.
 27. The 2nd Respondent's director deponed that unlike Mainland Kenya, the then ten mile coastal strip remained under the Sultan of Zanzibar until 1963 when the Sultan renounced sovereignty of the strip following the signing of an agreement between the British, Kenya and Zanzibar effectively integrating the coastal strip into independent Kenya.
 28. Although the Petitioners have not disputed the historical aspect of how the suit property was registered in favour of the 2nd Respondent, it is their case that the land initially belonged to their forefathers before the same was registered in favour of the 2nd Respondent.
 29. The bottom line of the Applicants' case is that the deprivation of their forefathers and themselves of the suit property is a case of historical land injustice which has to be ventilated before this court.
 30. According to the Petitioners, the 3rd Respondent has refused to give them a hearing on the issue and that is why they want this court to intervene.
 31. Although the National Land Commission is a party to this suit, it has not responded to the Applicants' Application or Petition.
 32. The 2nd Respondent's advocate submitted that under the Constitution, it is the National Land Commission that is supposed to investigate the issue of the alleged historical land injustices, and recommend appropriate redress and that this court cannot delve in that issue.
 33. The documents annexed on the 2nd Respondent's Affidavit do not show that indeed the National Land Commission has investigated the Petitioners' complain.
 34. The letter dated 11th December, 2015 by the National Land Commission is not a report on historical land injustices in respect to the suit property, but rather “ a process of Alternative Dispute Resolution as provided for under the National Land Commission (sic) Section 6”. That is what the letter by the Commission states.
 35. It would appear from the said letter that the Commission heard the Applicants and the 2nd Respondent but it is yet to deliver its Report. However, in the letter, the Commission cautioned all the Interested Parties in the matter to desist from committing any acts that may disrupt the peace.
 36. It is therefore not true, as submitted by the 2nd Respondent's counsel, that the Commission is investigating the issue of historical land injustice in respect to the suit property.
 37. It is also not true that a party cannot ventilate the issue of historical land injustices before this court.
 38. I say so because pursuant to the provisions of Article 159(1) of the Constitution, judicial authority is derived from the people and vests in and is exercised by the courts and tribunals which have been established under the Constitution.
 39. Article 162 (2)(b) of the Constitution provides that it is this court that has the Constitutional mandate to hear and determine disputes relating to the environment and the use and occupation of, and title to land and not the National Land Commission.
 40. The mandate of NLC is limited to investigating historical land injustices and making recommendations. That mandate does not inhibit this court from hearing matters pertaining to historical land injustices. Indeed, once such a dispute is before this court, the National Land Commission can only submit its findings on the issue to enable the court to make an informed decision. The court may also in appropriate circumstances recommend for investigations by the National Land Commission and then receive a report before making a determination.
 41. The recommendation by the Commission after investigations can only form part of the evidence that the court is to rely on in making its final decision. The recommendations by the Commission are in themselves not final.
 42. The issues before this court relate to how the 2nd Respondent and its predecessors acquired the suit property.
 43. Indeed, considering that the land in question measures over 3,000 acres, and in view of the alleged deposition by the Applicants that their forefathers were evicted from the land before the same was registered in favour of the 2nd Respondent, it is only just and prudent to preserve the suit property

- in its current state and hear the Petition.
44. I say so because the Constitution recognises the fact that there were historical land injustices in the allocation and registration of certain parcels of land in the country. The Constitution also recognises the principle of equitable access to land.
45. The issues raised by the Applicants that the suit property initially belonged to their forefathers, are not trivial. Those issues have to be ventilated at the hearing to enable the court make a definitive finding.
46. In the circumstances, I am of the view that the status quo prevailing now should be maintained pending the hearing and determination of the Petition.
47. However, the status quo order should not be interpreted to mean the invasion of the suit property by the Applicants or at all.
48. For those reasons, I make the following specific orders:-

(a) The status quo prevailing now to be maintained, that is:-

- (i) The 1st and 2nd Respondents should not alienate, sell, transfer or charge the suit property pending the hearing and determination of the Petition.**
- (ii) The Petitioners should not invade or interfere in any way whatsoever with the suit property pending the hearing and determination of the Petition.**
- (iii) Each party to bear his/its own costs.**

Dated, signed and delivered in Malindi this 1st day of **July**, 2016.

O. A. Angote

Judge