



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

At Malindi

ELC CIVIL CASE NO. 116 OF 2014

1. BETTA SYSTEMS LIMITED

2. CAMPBELL CREATIONS LIMITED.....PLAINTIFFS/APPLICANTS

=VERSUS=

HON. ABU MOHAMED CHIABA.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Plaintiffs' Application dated 20th June 2014 seeking for the following orders:
 - (a) **That the Defendant by himself, agents, servants, proxies and/or employees be restrained by way of an injunction from trespassing, alienating, fencing further, selling, disposing, constructing, leasing, entering interfering with the Plaintiffs' quiet possession and/or dealing in whatsoever manner with the suit properties portion number 4400,4401 and 4402 Malindi pending the hearing and final determination of the suit herein.**
 - (b) **That the costs of this application be provided for.**
2. The Application is premised on the grounds that the Plaintiffs are the purchasers and registered owners of the suit properties.

The Plaintiffs/Applicants' case:

3. In his affidavit, the 1st Plaintiff's director has deponed that the Plaintiffs are the registered proprietors of portion numbers 4400, 4401 and 4402 having purchased the same from NET INVENT LTD; that in-spite of the said ownership, the Defendant has trespassed on part of the suit premises and fenced two sides of the suit properties and that the said invasion of the suit properties by the Defendant is unconstitutional, illegal and unlawful.
4. In the Supplementary Affidavit, the 1st Plaintiff's director deponed that there is no contradiction between L.R. NO. 4400, 4401 and 4402 and plot number 634/2, 3 and 4 Malindi as the later numbers referred to the original land parcel numbers before the current numbers were issued.
5. The 1st Plaintiff's director further deponed that the Defendant's ownership does not relate to the

suit properties.

The Defendant's/Respondent's case:

6. According to the Defendant, the Plaintiffs have not made reference to plot numbers 634/2 and 3 because they are totally different from portion numbers 4400, 4401, and 4402.
7. The Defendant has deponed that he is the registered proprietor of the suit property known as plot number 634 Malindi having acquired it from its previous owners Timsales Limited vide an Indenture dated 16th August 1984.
8. According to the Defendant, Timsales Limited acquired the suit property in 1981 from Mrs. Ellison, vide an indenture dated 23rd February, 1981 and that since he acquired the land, he has exercised all the rights of a proprietor such as payment of rates and charging of the property to Habib Bank Limited.
9. The Defendant deponed that the Plaintiffs' claim is nothing more than fraudulent, illegal and connish attempt to deprive him of his property.
10. According to the Defendant, the title documents annexed on the Plaintiffs' affidavit are fake because although the property was all along registered under the Government Lands Act (repealed), the Plaintiff's titles were issued under the Registration of Titles Act (now repealed); that where land has been sub-divided, there ought to be a sub-division certificate from the Council and that non disclosure of material facts dis-entitles a party to the remedies of injunction.

Submissions:

11. The advocates of the Plaintiffs and the Defendant filed their respective submissions and authorities.
12. The Plaintiffs' counsel submitted that unlike the Plaintiffs who have identified the locality of the suit property, the Defendant has not bothered to do so; that the Defendant is holding documents for a non-existent property and that if plot number 634 exists, then its locality is somewhere else.
13. Counsel submitted that where two parties are claiming ownership of the same properties, the one who avails searches and copies of titles prevails.
14. On the other hand, Defendant's advocate submitted that the Plaintiffs have produced documents which are suspect; that the Plaintiffs have not produced the sale agreement between themselves and Net Investment Limited and that the land in question was registered under the Government Land Act and not the Registration of Titles Act.
15. The Defendant's counsel submitted that the Defendant has given an expensive and detailed chronology of how the ownership of the suit premises has been since 1913.
16. Counsel submitted that the Plaintiffs have failed to clearly show how they acquired the suit property from the previous registered owner, this court cannot conclude that the Plaintiffs have any right to the suit property. Counsel relied on the case of **Ngurumen Limited Vs Ian Bunda Nelson & 2 others (2014) e KLR.**

Analysis and findings:

17. The Plaintiffs' Application for an order of injunction is premised on the ground that they are the registered owners of portion numbers 4400, 4401 and 4402 having purchased the same from Net Investment Limited.
18. The Plaintiffs have annexed on their affidavit copies of the Certificates of Postal Searches as at 29th April 2014 in respect of portion numbers 4400, 4401 and 4402.
19. According to the said searches, the 1st Plaintiff is the registered proprietor of portion number 4400 and 4401 while the 2nd Plaintiff is the registered proprietor of portion number 4402, Malindi.
20. The said searches further show that the Plaintiffs are holding the three portions as lessees for a period of 99 years with effect from 1st January 2009.
21. The Plaintiffs also attached on their Affidavits the copies of the grants that were issued to Net Investment Limited by the Commissioner of Lands.
22. The grant in respect of portion number 4400 was registered in favour of Net Investment Limited

- on 27th May 2010 while the grant for portion numbers 4401 and 4402 were registered on 21st June 2010 and 6th July 2010 respectively.
23. The three grants show that the suit properties were transferred to the Plaintiffs on 25th March 2014.
 24. The Plaintiffs annexed on their Affidavit a survey plan number 174/42. The said survey plan is the one which created portion numbers 4400, 4401 and 4402.
 25. The survey plan annexed on the Plaintiffs' affidavit shows that parcel of land number 634 was sub-divided on 11th July 1985 to create portion numbers 4400, 4401 and 4402.
 26. Although the subdivision was done in 1985, it was not until the year 2010 that the three plots were registered in favour of Net Invent Limited.
 27. It is therefore clear, from the Plaintiffs' documents, that portion numbers 4400, 4401 and 4402 are a sub-division of portion number 634. That is the same land that the Defendant says he purchased from Timesales Limited on 16th August 1984.
 28. Prior to the ownership of portion number 634 by Timesales Limited, an Indenture under the (repealed) Government Lands Act has been exhibited showing that portion number 634 was owned by Fredrick Ellison until 22nd February, 1981 when Timesales Limited bought it. The Indenture between Timesales and Fredrick Ellison was registered at the lands registry, Mombasa on 23rd February, 1981.
 29. The other Indenture which has been produced by the Defendant shows that portion number 634 was owned by Barclays Bank International Limited, as a personal representative of Fredrick Charles Ellison by way of an Indenture dated 3rd November 1972 and registered on 17th November 1972.
 30. The late Fredrick Charter Jack, Alexander Seynour Jameson and Alexander Morrison on the other hand had bought portion number 634 from Herbert Stranack Foster by way of an Indenture dated 30th March 1955 and registered at the Mombasa land registry on 18th April 1955.
 31. From the mentioned Indentures which were duly registered under the Government Lands Act (repealed), portion number 634 was a subdivision of M17G/18. The Deed Plan annexed on the Indenture of 30th March 1955 shows that portion number 634 is a sub-division of M17G/18 and the same was created on 7th November 1929.
 32. Considering that portion number 634 was created by way of a Deed Plan number 29992 dated 7th November 1929, and in view of the fact that the said land was freehold and was privately owned, the question that arises is this: at what particular point was the land converted into being unalienated government land for it to be available for allocation to Net Invent Limited in the year 2010.
 33. By the time portion of land number 634 was being subdivided to create portion numbers 4400, 4401 and 4402 in the year 1985, it was, prima facie, owned by the Defendant by virtue of the Indenture dated 16th August 1984 and registered on 22nd August 1984.
 34. The Plaintiffs in this matter have not attempted to show how portion number 634 which was private land and registered in the name of the Defendant was eventually subdivided and allocated to Net Invent Limited in the year 2010 as a leasehold.
 35. The mere fact that portion numbers 4400, 4401 and 4402 are registered in favour of the Plaintiffs does not answer the question of why and how the Defendant was dispossessed of portion number 634, which, according to the Plaintiffs' documents was sub-divided to create the said portions.
 36. Indeed, the Defendant cannot be able to conduct an official search on portion number 634 because the said land has since been sub-divided and does not exist as a whole. The record shows portion number 634 therefore ceased to exist upon the said subdivision.
 37. However, the Defendant's right over the said portion of land cannot be wished away merely because he cannot avail the official searches considering that he is in possession of the Indenture showing that he was the registered proprietor of portion number 634 in 1984.
 38. Having failed to show how portion number 634 was converted from a freehold parcel of land to a leasehold, and the process that was followed to dispossess the Defendant of portion number 634, I find and hold that the Plaintiffs have not established a prima facie case with chances of success. As was held by the Court of Appeal in the case of **Nguruman Limited Vs Jan Bonde Nelson & 2 Others 2014**, e KLR, all the court has to see is that on the face of it, the person applying for an

- injunction has a right which has been or is threatened with violation.
39. In my view, the Plaintiffs have not shown that they have a superior right to that of the Defendant in view of the questions I have raised above.
40. For those the reasons, I dismiss the Application dated 20th June 2014 with costs.

Dated and delivered in Malindi this 5th day of June, 2015.

O. A. Angote

Judge