



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. CASE NO. OF 459 OF 2010

FLEMISH INVESTMENTS LTD. PLAINTIFF

VERSUS

TOWN COUNCIL OF MARIAKANI DEFENDANT

JUDGMENT

[1] The plaintiff brings the suit praying for a permanent injunction to restrain the defendant its servants or agents or otherwise from stopping, obstructing, hindering or in any other way interfering with the construction of a perimeter wall around suit property LR No. 24366. They also seek special damages in the sum of Kshs. 180,000 per month from 1st June 2010 until the defendant ceases to obstruct the plaintiff from constructing a perimeter wall on the suit land. The defendant filed a defence and a counterclaim. It contended that the ownership of the suit property was fraudulent the same having been illegally acquired and that since it included two (2) acres which earlier on had been earmarked as a community cattle dip and which cattle dip remains there up to date though not in use.

[2] The defendant counterclaimed against Victor Ndambuki and the plaintiff averred that by the time of its creation, the larger County Council of Kilifi had already set aside and put a a cattle dip on a two acre plot on Mombasa-Nairobi Highway at Mnagoni area in Kawala ward. That the 1st defendant bought land that was adjacent to the cattle dip and applied for setting apart the land for industrial use and an approval for setting apart was granted for ten (10) acres. The 1st defendant obtained a lease for the same and he later transferred the land to the second defendant. It averred that in 2010 the Ministry of Lands declared Kawala 'B' an adjudication center and confirmed the setting aside of the cattle dip for the the community as plot No. 34 and a title thereof is awaited. The defendant counterclaims and states that the plaintiff has fraudulently proceeded to include the cattle dip as part of the land he had bought from the 1st defendant. The defendant has set out the particulars of fraud against the said Victor Ndambuki and the plaintiff herein. it prays for a declaration that the cattle dip now known as plot no. 34 in Kawalla 'B' adjudication section do remain a public utility further that the leasehold created under grant No. I.R.N. NO. 159 and LR. No. 24366 vide deed plan no. 226946 does not include the 2 acres of the cattle dip. it also prays for a mandatory injunction and a permanent injunction against the first defendant and the plaintiff as particularised in the counter claim.

[3] Mr Sikandar Pasta gave evidence and stated that he lives at Kizingo. He said he is a director of Flemish Investment Company the plaintiff herein. He said that his company has a grant that is 4.90 hectares. He said his company bought the land from Victor Ndambuki the 1st defendant for a consideration of Ksh. 3 million and the property transferred in 2006. He said that there was no construction. That there was a rundown cattle dip. He said he did receive approval of the boundary wall from the Town Council of Mariakani allowing construction. He further said they started construction of the wall but were stopped by the askaris from Mariakani Town Council who gave him no reasons. He went on to say that the cattle dip was in his company's plot and if the council relocates the dip his company would build the dip. That the council later declined to relocate the dip or alienate the same for any other purpose. He explained that the cattle dip was inherited from the mother county council of Kilifi in 1992 when Mariakani Town Council was created. That the cattle dip has been dormant but it can be revived.

[4] Mr Samuel Sikuku Katetei gave evidence for the defendant of how he and his brothers sold his land to Victor Ndambuki. He said that they sold to him eight acres. He said that the two (2) acres were set aside by the County Council of Kilifi for a community cattle dip. That a dip was built in 1978. He however said that his brother Mundachi sold two of his acres to Mr. Victor Ndambuki. That there were two acres at the back of the eight acres. He said the cattle dip had been used by the community for dipping their cattle and goats against insect pests but was now in a state of disrepair. He stated that the cattle dip sat on an area of two acres. It was built by Kilifi County Council for the public.

[5] Mr Isaac Kagia Obedi said that he was a Town Clerk at Mariakani Town Council. He has since retired. He said he started working in 2009 and retired in 2012. He stated that he was conversant with the plans of the suit premises. He said there was a cattle dip sitting on two acres and a land adjacent that was eight (8) acres. The witness produced various agreements and correspondences. He explained how the land at Mnagoni Kawala ward was set apart. He explained that the land was sold to Victor Ndambuki by the Katetei brothers. He said that ten (10) acres were approved for setting apart. He further said that the plaintiff company applied to Mariakani Town Council to put a fence. That is when it became clear that the plaintiff had included the two acres where the cattle dip was. The council therefore stopped the construction of the same. That Victor Ndambuki had encroached the said two acres. The witness said that in a letter dated 26th July 2010 the plaintiff wrote to the council requesting the council to relocate the cattle dip at the plaintiffs costs but the council refused. Mr. Obedi said that his position was that the cattle dip was a public utility and it is two (2) acres and it has not been transferred.

[6] I have carefully considered the submissions of the counsel for the plaintiff and counsel for the defendant.

The issue for this court to determine is whether the cattle dip and its area said to be two acres now inside land reference no. 24366 is part of that land or whether it was illegally incorporated therein and whether it is a public utility as alleged by the Town Council of Mariakani the defendants herein.

This land was trust land prior to its allocation to Victor Ndambuki for a term of 99 years from 1st May 1999. Mr. Ndambuki bought this land from Samuel Sikuku Katetei Mwakulu and Elijah Ngolainie Kimanti who acknowledged receipt of Kshs. 214,000.00 as the total cost of the eleven acres of land at Mnagoni on 13th August 1993. The defendants produced that acknowledgment as Dexh. 3.

[7] Mr. Samuel Sikuku Katetei gave evidence and said they sold eight (8) acres to Mr. Victor Ndambuki. He said that two acres were set aside since the County Council of Kilifi had put a cattle dip which was built in 1978. He said that when they sold the land to Mr. Ndambuki the cattle dip was there but it was not in use. He said that between him and his brother they sold eight (8) acres and that two (2) acres were sold by Mr. Mudachi. That Victor had in all 10.1 acres. That they discovered this after survey. He said the one (1) point may have been added by mistake in surveying. He emphatically said that they sold eight (8) acres and his brother sold two (2) acres at the back. He said that Mr. Ndambuki preferred the two (2) acres at the front where the cattle dip was, foregoing the two (2) acres at the back.

Mr Katetei said the dip was built for the public. He said the council never gave them any

compensation when it built the dip and that Mr Victor Ndambuki never gave them anything for the dip either. So he argued that it was their property.

[8] It is important to note that this was trust land. The Katetei brothers the four of them were selling this land before it was set apart. It is Mr. Victor Ndambuki who applied to set the land apart. This is evidenced by the letter from Chiefs Office Mariakani dated 31st January 1996. Mr. Ndambuki's application for setting apart dated 9th July 1997 states the acreage to be ten (10) acres. It was approved by Clerk to Council Town Council of Mariakani, District Land Officer Kilifi and District Commissioner Kilifi. This fact corroborates and ties in with what Mr Sikuku said, that the land bought was ten (10) acres. Obviously Mr Victor Ndambuki knew his acreage and as per section 7 of the Trust Land Act Cap 288 he must have caused his land to be surveyed before his application. He knew it was ten (10) acres. Mr. Ndambuki's title is now 4.090 hectares which is approximately 10.1 acres. Mr Victor Ndambuki is the one who showed the surveyors his land. He included the cattle dip which was not owned or built by the Katetei brothers because that is what he preferred. When he bought the land the cattle dip was there though in a state of disuse. It was made of stone and timber roofing which looks like (from the photographs of the plaintiff) as asbestos or iron sheet roofing. It was a permanent building built by the County Council of Kilifi for the public. The Katetei brothers could not sell it. It was not theirs. They do not claim it and they say they did not sell it to Victor Ndambuki. Indeed they say the two acres that were sold separately by their brother Michael Mudachi was at the back not where the dip is currently standing. It was therefore fraudulent for Victor Ndambuki to include the two acres on which the dip is sitting as part of LR 24366 just because it abutted Mombasa-Nairobi Highway. This was a public utility. it must remain so. When Flemish Investments Ltd bought this land from Victor Ndambuki, the two (2) acres on which the dip sits were not available for sale. They had been included in the said land by fraud. Flemish Companies recourse is not on the Town Council but elsewhere.

[9] When the plaintiffs bought the suit land, they knew the dip was there. That is why they asked the defendant to move the dip at their cost. If the dip was sitting on their land illegally why had they not moved the court to have it removed? Why would they plead with the defendant to move the same at their cost? They must have known that it is a public utility property. The law is clear on properties attached to the land, belong to the land. If that is so and the dip was there for all to see, why did the plaintiff not claim the dip? The reasonable proposition is that Mr. Ndambuki must have told them that he found the dip there. It did not belong to the Katetei brothers. It was built by the Kilifi County Council for the public. The plaintiffs were not therefore bona fide purchasers for the area of two acres where the dip sits. The plaintiffs claim of Ksh.180,000 per month from purchase of alternative parking to date has no merit. The plaintiffs suit is dismissed with costs. The counter claim succeeds to the extent that the two (2) acres where the dip sits will be hived off the suit land and will be registered in the name of Kilifi County Government in trust for the people of Mnagoni area and for use as a cattle dip. The Counterclaim succeeds and is allowed in terms of prayers (a) (b) and (c) and (e).

Dated and delivered in open court at Mombasa this 30th day of October 2014.

S. MUKUNYA

JUDGE

30.10.2014

In the presence of;

Mr Asige advocate holding brief for Mrs Oluoch advocate for the plaintiff.