



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
PETITION NO. 5 OF 2013

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES, 2, 19, 20, 21, 22, 23, 25(c), 27, 40, 47, 50, 60(1)(b), 62(1)(h), 64, 262 AND SECTION 19 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL ACT (REPEALED)
THE REGISTERED LANDS ACT (REPEALED)**

AND

IN THE MATTER OF: REGISTRATION OF SECTION OR BLOCK KNOWN AS KILIFI/NGERENYI/621

AND

**IN THE MATTER OF: MALINDI HIGH COURT CIVIL SUIT NO. 64 OF 2008
LANDS DISPUTES TRIBUNAL CASE NO. 78 OF 1998**

BETWEEN

JONATHAN MSOKOA SHOKA.....PETITIONER

AND

1. SAMUEL GONA NDORO

2. JOSEPH KADENGE NDORO

3. DAVID NYIRO NDORO.....RESPONDENTS

RULING

1. What is before me is the Petitioner's Chamber Summons dated 2nd April 2013. The Application is brought under Rule 22 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice & Procedure Rules, 2006, amongst other enabling provisions of the law.
2. The Application is seeking for the following reliefs:
 - a. **Until the hearing and determination of this Petition the Respondents be restrained from carrying out any fresh buildings and from continuing with the constructions and/or structures on Plot no. Kilifi/Ngerenyi/621.**
 - b. **The Respondents by themselves, employees, servants and/or contractors be restrained from entering, trespassing or remaining upon the said plot until the hearing and determination of this Petition.**
 - c. **Costs of this Application be provided for.**
3. The Application is supported by ten grounds and the Affidavit of the Petitioner who has deponed that he is the registered proprietor of a freehold interest on plot number Kilifi/Ngerenyi/621 (the suit property) which he acquired in 1977 from Elijah Chengo.

PETITIONER'S CASE

4. It is the Petitioner's deposition that he bought the suit premises for a total of Kshs.9,800 through two sale agreements dated 2nd May 1976 and 7th December 1977 from Elijah Chengo who was the only person residing on the suit property.
5. At the time of the sale, the said Elijah Chengo had not processed the title document and the Petitioner undertook to have the property registered in his name. According to the Petitioner, he obtained the consent of the Land Control Board to have the suit property registered in his name on

- 26th November 1980 and thereafter paid the requisite fees to have the title processed.
6. The Petitioner was subsequently issued with the Title Deed on 24th October 2002. The Petitioner later on learned of several court cases, touching on the suit property which included the Lands Dispute Tribunal case number 78 of 1998 in Bahari Division and Kilifi SRMCC Number 4 of 2002. The Petitioner deponed that he was not a party to the two disputes.
 7. The Petitioner has deponed that when he learnt about the cases, he filed Malindi HCCC No. 64 of 2008 with a view of having the orders of the subordinate courts set aside; that although the Respondents obtained the decree to sub-divide the suit property in 2002, the same has not been done and that the only entry against the suit property is a charge of Kshs.160,000 advanced to him by the Agricultural Finance Corporation.
 8. The Petitioner finally deponed that by the time the Respondents filed their claim in the Lands Dispute Tribunal, they knew, through the District Settlement Officer's letter of 30th March 1998 that he was the registered owner of the suit property; that the Tribunal did not order for the cancellation of his title and that being the first registered owner, the title he holds is indefeasible.
 9. The Respondents filed a joint Replying Affidavit on 29th April 2013 and deponed that the High Court in Malindi HCCC No. 64 of 2008 found and held that the contract that was entered into between the Petitioner and Elijah Chengo Ngoro was void for non-compliance with the mandatory provisions of the law and the issues which the Petitioner has raised herein were heard and determined in Malindi HCCC No. 64 of 2008.
 10. The Respondents further deponed that the Petitioner participated in the proceedings before the Tribunal and that the effect of the judgment in HCCC No 64 of 2008 was that the land was and ought to be sub-divided as per the award of the Tribunal which was adopted as a Judgment by the Magistrate's Court.
 11. The Petitioner filed a further affidavit on 10th June 2013 and deponed that the matter which he has raised in the Petition were not addressed in Malindi HCCC No. 64 of 2008; that he was not aware of the fact that his advocate had lodged an appeal in respect to the decision in HCCC No. 64 of 2008 although he had instructed his former advocate to lodge an appeal against the decision in HCCC No. 64 of 2008 and that it is too late for him to continue with the said appeal now.
 12. The parties agreed to dispose of the application by way of written submissions. The Petitioner's advocate filed his submissions on 1st July 2013 while the Respondents' Advocate filed his submissions on 28th June 2013. I have considered the said submissions.
 13. In his Petition, the Petitioner has averred that the Lands Disputes Tribunal did not have the jurisdiction to order for the sub-division of the suit premises since the suit property was already registered in his name as at the time the proceedings were commenced. Consequently, it has been averred that the orders which were issued by the Tribunal and all the other subsequent orders are null and void.
 14. The Petitioner has annexed on his verifying affidavit the copy of the Title Deed that was issued to him on 24th October 2002 and an agreement of sale between the Commissioner of Lands and Elijah Chengo for parcel number 621 dated 25th November 1966.
 15. The said agreement between the Commissioner of Lands and Elijah Chengo shows that Elijah Chengo was a licensee and he was only supposed to sell, transfer, sublet or charge the land with the consent of the Commissioner of Lands in writing.
 16. The Petitioner has also annexed on the Verifying Affidavit the proceedings and award by the Land Disputes Tribunal, the Plaintiff between the Petitioner (as Plaintiff) and the Respondents (as Defendants) in Malindi HCCC NO. 64 of 2008.
 17. In the Plaintiff in HCCC No. 64 of 2008, the Plaintiff averred that his registration as proprietor of the suit premises was a first registration which cannot be extinguished by an order of the Land Disputes Tribunal and that the action by the Defendants of sub-dividing the suit property will violate or extinguish his proprietary interests in the property. Consequently, the Plaintiff sought for a permanent order of injunction restraining the Defendants from sub-dividing or dealing in any way with parcel of land Kilifi/Ngerenyi/621.
 18. The parties were heard by Omondi J in HCCC No. 64 of 2008. On 10th December 2010, Omondi J dismissed the suit in the following words:

“My view is that the registration was tainted with misrepresentation made by the

Plaintiff (the Petitioner herein) to the effect that the land was not encumbered yet he was fully in the picture regarding the dispute at the Lands Disputes Tribunal.....In any event section 143(1) is a provision made subject to subsection (2) and I make a finding that the Plaintiff's title is subject to challenge. His claim therefore fails and is dismissed with costs."

- 19.The Petitioner now wants this court, which has concurrent jurisdiction with the High Court, to declare that he is the sole legal registered owner of the suit property when that issue, amongst others, was canvased before Omondi J and dismissed.
- 20.Indeed, the Petitioner's advocate in HCCC NO. 64 of 2008 filed an Appeal against the decision of Omondi J which the Petitioner purported to withdraw on 10th June 2013 when the Respondent raised the issue in their Replying Affidavit. That is a practice which this court cannot condone and it is a typical act of abuse of the court process.
- 21.If the Petitioner was of the view that Omondi J was wrong in holding that he does not hold a valid title, and that his title to the suit property is not subject to challenge, then the only recourse he had was to pursue the appeal which he had, and correctly so, filed.
- 22.In the circumstances and considering that the issues in the current Petition were directly and substantially in issue in Malindi HCCC No. 64 of 2008, I find and hold that the Petitioner has not established a prima facie case with chances of success. The Petitioner is seeking for the same orders that he sought in HCCC NO. 64 of 2008, which claim was dismissed.
- 23.Having found that the Petitioner has not established a prima facie case with chances of success, I will not consider the issue of whether or not he will suffer irreparable injury that cannot be compensated by an award of damages if the injunctive orders are not granted.
- 24.For the reasons I have given above, I dismiss the Petitioner's Application dated 2nd April, 2013 with costs.

Dated and Delivered in Malindi this 20th day of **August, 2013**

O. A. ANGOTE

JUDGE