



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 30 OF 2011
(consolidated with HCCC NO. 22 OF 2011)

SOFT WHITE BEACH LIMITED.....PLAINTIFF

=VERSUS=

JOSEPH KASHURU MUMBO.....1ST DEFENDANT

MASUMBUKO YERRY KOMBE.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE DISTRICT LAND REGISTRAR, KILIFI5TH DEFENDANT

RULING

Introduction

1. This suit was filed by the Plaintiff on 13th April 2011. In the Complaint, the Plaintiff is seeking for a declaratory order that it is the indefeasible and absolute proprietor of plot number Chembe/Kibabamshe/651 and 652 which was a sub-division of Chembe/Kibabamshe/393.
2. The suit was consolidated with Malindi HCCC No. 22 of 2011. In the said suit, the 2nd Defendant herein is the Plaintiff. The only Defendant in HCCC No. 22 of 2011 is the defunct Municipal Council of Malindi. In HCCC No. 22 of 2011, the Plaintiff in that suit claims to be the registered owner of Chembe/Kibabamshe 393.

The Application

3. The voluminous Application before me is dated 13th April 2011. The Plaintiff is seeking for the following reliefs in the Application:
 - a. **Pending the hearing and determination of the suit, the 1st and 2nd defendants by themselves, servants and/or agents be restrained from further construction of a permanent wall, carrying on developments of whatsoever kind, transferring and or disposing plot title number Chembe/Kibabamshe/393 and/or 651 and 652.**

b. The cost of this application be provided for.

4. The Application is supported by the Affidavit of Mr. Philip Munge Ndolo, a director of La Marina Limited
5. According to the deponent, some residents of Chembe Kibabamshe approached him, together with the other directors, and offered them for sell plot numbers Chembe/Kibabamshe/ 651 and 652; that prior to the year 2001, there was a plot known as Chembe/Kibabamshe/393 registered in the name of the Government of Kenya; that between 1998 and 2001, the property was sub-divided into two portions, namely 651 and 652 and that La Marina Limited sold these two plots to the Plaintiff in the year 2006.
6. The deponent finally stated that he has sworn affidavits in Misc. Application number 72 of 2006 Malindi, High Court Misc. Application number 34 of 2005, Malindi and Malindi HCCC No. 18 of 2009 which he annexed on his Supporting Affidavit.

Respondent's case

7. The 2nd Respondent filed his Replying Affidavit on 2nd June 2011 and deponed that the Plaintiff has not shown the existence of the company.
8. The Respondent further deponed that the letters of offer dated 30th June 1999 and issued to Lucas Kadenge and Japhet Charo Chome are not genuine documents; that no payment to the Settlement Fund Trustees was paid in respect to the said plots to enable the allottees obtain Title Deed for the plots as required by Law.
9. The 2nd Respondent stated that parcels of land known as Chembe/Kibabamshe 651 and 652 do not exist and that the title in respect to Chembe/Kibabamshe/393 was never closed for sub-division.
10. The 2nd Respondent further deponed that parcel of land number 393 was allocated to the 1st Respondent vide a letter of offer issued on 30th June 1999 whereafter he paid Kshs.19,987 to the Settlement Fund Trustees. The 1st Defendant was then issued with a Title Deed for Chembe/Kibabamshe/ 393 on 19th January 2003.
11. The 2nd Respondent finally deponed that he purchased parcel of land number Chembe/Kibabamshe/ 393 for Kshs.10,000,000 on 1st December 2008 from the 1st Defendant and that the land has never been sub-divided as alleged by the Plaintiff; that the Title Deeds that were issued to the Plaintiff in respect to Chembe/Kibabamshe/393 are not genuine; that he has been paying rates to the Municipal Council of Malindi and that the Application should be dismissed.

Analysis

12. The dispute herein is the double allocation of parcel of land known as Chembe/Kibabamshe 393. It is just one of the many disputes within the Chembe Kibabamshe settlement scheme which have been filed in this court.
13. According to the letter dated 17th May 2000 annexed on the Plaintiff's Supporting Affidavit by the Malindi District Surveyor addressed to the Director of Survey, Jimba and Chembe Kibabamshe sections were adjudicated and registered way back in the 1970's.
14. Later on, some of the parcels of land were found to have been erroneously adjudicated as they fell within Government land. The titles were nullified and the parcels of land reverted to the Government.
15. In the mid 1990's, an exercise was embarked on of identifying squatters within the parcels with a view of allocating them land in the settlement scheme. The beneficiaries were issued with letters of offers on the basis of the then existing Registered Index Maps. The survey department carried out mutations in favour of the allottees for the specific parcels of land.
16. The Plaintiff also annexed on its supporting a letter dated 1st December 2000 by the Malindi District Surveyor forwarding the mutations in respect to Chembe/Kibabamshe/393 amongst other parcels of land.
17. It would appear that by the time the District Surveyor was forwarding the mutation form showing the sub-division of 393 into parcels of land numbers 649, 650, 651, 652 and 722, some of the sub-

- divisions, to wit 651 and 652 had already been allocated to Lucas Kadenge in 1999 and Japheth Charo Chome on 30th June 1999. The two subsequently sold subdivision numbers 651 and 652 to La Marina Limited and the Title Deeds were issued to La Marina Limited in the year 2001.
18. According to the letters of offer to Mr. Kadenge and Mr. Charo Chome, they were supposed to liaise with the District Land Adjudication and Settlement Officer, Malindi so as to be shown the plot boundaries.
 19. It would appear, from the documents placed before me, that the mutation forms which created the sub-divisions of 393 were neither signed by the land registrar now registered. The Registered Index Map, according to the 2nd Respondent, was also never amended to reflect the sub-division of parcel of land number Chembe/Kibabamshe/393.
 20. The 2nd Respondent claims that the Title Deeds in respect to parcel of land number Chembe/Kibabamshe /651 and 652 are not genuine and that parcel of land number Chembe/Kibabamshe/393 was allocated to the 1st Defendant vide a letter of offer dated 30th June 1990. the 1st Defendant subsequently sold the parcel of land to the 2nd Defendant.
 21. It is interesting that the letters of allotment to Lucas Kadenge, Japhet Charo Chome and the 1st Defendant were all issued by the same Ministry.
 22. In a letter dated 21st April 2004, the Senior Land Registrar gave a detailed explanation to the Chief Land Registrar of what transpired in the allocation of parcels of land number Chembe/Kibabamshe/393.
 23. According to the said letter, the transfer instrument in favour of the 1st Defendant was suspiciously executed on 30th December 2002, “ a day when the Kenya's current President was being installed at Uhuru Park.”
 24. The said Senior Land Registrar states in his letter that parcel of land number 393 having been sub-divided into new parcels numbers, it was closed and registers were opened in the name of the Settlement Fund Trustees and the records in respect to parcel of land number 651 and 652 were available in his office.
 25. The said officer confirmed in his letter that the transfer of the land in the name of the 1st Defendant was executed by then Permanent Secretary, Ministry of Lands, on 17th October 2002 and was registered on 9th January 2003.
 26. After looking at the available records, the Senior Land Registrar concluded that there was deliberate cheating on the part of the transaction involving the 1st Defendant's title and that the original genuine register was replaced with a false one which culminated in the registration of the parcels of land number 393 in the name of the 1st Defendant on 9th January 2003.
 27. The contents of the letter by the Senior Land Registrar have not been tested. I will therefore not at this stage express my views on the truthfulness or otherwise of the contents of the said letter.
 28. The Plaintiff has not explained in its affidavits as to how the sub-division of parcels of land number Chembe/Kibabamshe /393 was effected before the mutation forms were signed by the registrar and registered and before the Registered Index Maps were amended to reflect the new numbers.
 29. The Registrar who purportedly issued the Title Documents in respect to plot number 651 and 652 has sworn an affidavit denying that she ever issued the said Title Deeds to La Marina who transferred the suit properties to the Plaintiff.
 30. The question I have raised above leaves me in doubt as to whether the Plaintiff has a prima facie case with chances of success. The same doubt applies to the genuineness of the Title Deed that was issued to the 1st Defendant in respect to Chembe/Kibabamshe 393 in view of the contents of the letter of the Senior Land Registrar that I have reproduced above.
 31. The doubts in the court's mind will be cleared after *viva voce* has been called to ascertain which of the titles that are being held by different parties are genuine. Certainly one of them is a forgery.
 32. In view of the observations I have made above, and considering that there has been a temporary order of injunction since this matter was filed in the year 2011, the interests of justice demands that the *status quo* should subsist until the suit is heard and determined.
 33. In the circumstances, and for the reasons I have given above, I order that the status quo subsisting should be maintained until the matter is heard and determined.
 34. Each party shall bear its/his own costs.

Dated and Delivered in Malindi this 25th day of **October**, 2013

O. A. Angote

Judge