



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL CASE NO. 47 OF 2012

1. HUSSEIN ALI
2. KALUMEIY MOHAMED
3. MOHAMED BUTE
4. MOHAMED MURSAL
5. ABDI ABDULAHI.....PLAINTIFFS/RESPONDENTS

=VERSUS=

- THE COMMISSIONER OF LANDS.....1ST DEFENDANT
- THE LAND REGISTRAR, LAMU.....2ND DEFENDANT
- THE OFFICER COMMANDING STATION, MPEKETONI.....3RD DEFENDANT
- ABDULWAHID MAHAMOUD.....4TH DEFENDANT
- SWALEH A. BAJABER.....5TH DEFENDANT/APPLICANT
- BAJABER LIMITED.....6TH DEFENDANT/APPLICANT
- BAJABER SALT WORKS LTD.....7TH DEFENDANT/APPLICANT
- THE HON. ATTORNEY GENERAL.....8TH DEFENDANT/APPLICANT

R U L I N G

Introduction

1. The 5th, 6th and 7th Defendants have filed an Application dated 29th August 2013 seeking for the following orders:

- a. **THAT the Honourable court be pleased to set aside the ex parte Ruling delivered on 12th July 2013 and the ex parte orders issued herein on 5th day of August 2013.**
 - b. **THAT the 3rd Plaintiff/Respondent to maintain peace and order during the strict adherence and compliance of the above.**
 - c. **THAT the Plaintiff/Respondent to pay costs of this application**
2. The Application is premised on the grounds that the property known as L. R. No. 26781 is registered in the name of the 7th Defendant who is also in possession of the property; that the Plaintiff failed to inform the court that there is an injunctive order in force over the suit property in Malindi HCCC No. 100 of 2007 and that the existence of two injunctive orders is prejudicial to his client.
 3. The 1st Plaintiff filed a Replying Affidavit on 4th October 2013 opposing the Defendant's Application.

The Defendants'/Applicants' case

4. According to the Supporting Affidavit of the 5th Defendant, the 7th Defendant is the lawful registered proprietor of the suit property; that after all the relevant land acquisition procedures were followed and adhered to, the 6th Defendant was issued with a leasehold grant for 99 years and that sometimes in the year 2004, the local residents of Koreni Village led by the 4th Plaintiff raised a complaint with the local administration concerning the ownership of the suit premises.
5. The 5th Defendant deponed in detail how the suit property was registered in favour of the 6th Defendant and further stated that there is a pending suit being Malindi HCCC No. 100 of 2007 in which the subject matter and the parties in that suit are the same as in this matter. Consequently, it was deponed, this matter could not have proceeded alongside Malindi HCCC No. 100 of 2007, which fact was not disclosed to the court by the Plaintiff.
6. In the circumstances, it was deponed, the orders issued by this court on 5th August 2013 were issued in error and in very prejudicial to the utilization and development of the suit property since the Plaintiffs have invaded the property.
7. The 5th Defendant finally deponed that the Application and Summons were never served upon him or the 6th and 7th Defendants and that he did not have knowledge of this suit. The 5th Defendant stated that he only came to know of the existence of this suit on 28th August 2013 when the O.C.S Lamu, emailed him a copy of the order dated 5th August 2013.

Plaintiffs'/Respondents' case

8. The 1st Plaintiff swore an affidavit on 2nd October 2013 on his own behalf and on behalf of the 2nd to 5th Plaintiffs/Respondents.
9. According to the Plaintiffs, their families and ancestors lived on the suit property peacefully

until when the 5th Defendant/Applicant claimed the ownership of the property in 1997; that he is the chief elder of the Koreni Community which encompasses persons of Swahili, Bajuni, Orma, Walamu and Somali cultures and that they are a pastoralist community.

10. The 1st Respondent deponed that there are several affidavits of service which shows that the 5th, 6th and 7th Defendants were variously served with court documents but they deliberately refused to enter appearance in the matter.
11. On the issue of Malindi HCCC NO. 100 of 2007, the 1st Plaintiff/Respondent deponed that that case was deliberately stage managed and proceedings delayed by the Plaintiff so as to defeat justice; that the law provides for the consolidation of the cases and that that is what should happen in this particular case.
12. The parties appeared before me on 4th November 2013 and made oral submissions. The Plaintiffs' counsel also filed skeleton submissions which I have considered.

Analysis and findings

13. In determining whether or not I should set aside my Ruling of 12th July 2013, I have to make a finding on two issues, firstly whether the Plaintiffs, while moving the court for an order of injunction, are guilty of material non-disclosure and secondly whether the 5th, 6th and 7th Defendants were served with the summons to enter appearance and the application for injunction.
14. It is not in dispute that the subject suit property in this matter is the same subject property in HCCC NO. 100 of 2007: The 6th Defendant/Applicant in this suit is the Plaintiff in Malindi HCCC No. 100 of 2007 while the 3rd Plaintiff herein is the 2nd Defendant in Malindi HCCC NO. 100 of 2007.
15. I have perused Malindi HCCC NO. 100 of 2007 in which Judgment was delivered dismissing the suit by Meoli J on 7th November 2013. However when this suit was filed on 9th November 2012, Malindi HCCC NO. 100 of 2007 was pending. The 3rd Plaintiff herein did not disclose to this court, either in the Plaint or during the arguments that were made in the Application dated 8th November, 2012 for injunctive orders at the *ex parte* stage that Malindi HCCC No. 100 of 2007 was pending.
16. According to paragraph 18 of the Plaint, the Plaintiffs/Respondents averred that there had been no previous proceedings before any court in relation to the suit property between the same parties. This averment was not true considering what I have already observed above.
17. Indeed, when the Plaintiffs/Respondents advocate appeared before me on 26th November 2012 seeking for ex-parte injunctive orders, the advocate did not inform me that Malindi HCCC No. 100 of 2007 was in existence and that indeed the court had issued injunctive orders in favour of the 6th Defendant herein.
18. I have perused the injunctive orders which were issued in Malindi HCCC No. 100 of 2007 pending the hearing of the suit and noticed that that order was in favour of the Plaintiff therein (the 5th Defendant/Applicant herein). The *ex parte* orders which I issued on 26th November 2012 and on 26th July 2013 were in direct conflict with the order that was subsisting in Malindi HCCC

No. 100 of 2007.

19. Where a party is guilty of material non-disclosure, such a party will be dis-entitled to the equitable remedy of injunction. It is also an established principle of law that a party cannot be heard to say that he was not aware of the importance of the facts so misstated or concealed or that he had forgotten them (See **Malindi Misc. Civil Application No. 27 of 2012; Vischi Fernando Vs Land Registrar, Kilifi & 2 others**).
20. It was the duty of the Plaintiffs/Respondents to disclose to this court the existence of Malindi HCCC No. 100 of 2007. As was stated in the case of **THE OWNERS OF THE MOTOR VESSEL "LILIANS -VS- CALTEX OIL (KENYA) LIMITED C.A. NO. 50 of 1989**, in which the court cited with approval the case of **REPUBLIC -VERSUS- KENSINGTON EDMOND DE POLIGNA C (1917) 1 K.B. 486** which held as follows:

"It is well settled that a person who makes an *ex-parte* Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."

21. The Court in **Nipun Naginda Patel -Vs- AG: H.C. Misc Application No. 463/2005** adopted the above principles and discharged an *ex-parte* order that had been issued without the Applicant making a full and frank disclosure of the material facts.
22. In **Uhuru Highway Development Ltd. -Vs- C.B.K; H.C.C.C. No. 29 of 1995**, the Court considered the issue of non-disclosure of material facts. The court adopted the decision of Viscount Reading C.J. In **King -Vs- G.C for customs purposes of Income Tax (1917) 1 KB** where at Page 495 he stated as follows:

"Before I proceed to deal with the facts I desire to say this, where an *ex-parte* application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the affidavit in support of the Application was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts, the court ought for its own protection and to prevent an abuse of its process, refuse to proceed further with the examination of the merits."

23. I have stated that this court issued an *ex parte* order of injunction in favour of the Plaintiffs'/Respondents and subsequently proceeded to hear the Application *inter partes* when the Defendants/Applicants failed to enter appearance. All along, I was not informed of the existence of Malindi HCCC No. 100 of 2007 and the prevailing order of injunction. Had I been informed of the said suit and the orders of injunction which were existing then, I would not have proceeded to hear the Plaintiffs' application for injunction as I did, leave alone granting the order.
24. In the circumstances, and in view of the non-disclosure of material facts by the Plaintiffs/Respondents, I shall, which I hereby do set aside my Ruling and Orders of 26th July 2013.

25. I shall not consider whether the 5th, 6th and 7th Defendants were duly served with the summons to enter appearance in view of the orders that I have made above.
26. The 5th, 6th and 7th Defendants'/Applicants' Application dated 29th August, 2013 is therefore allowed as prayed.

Dated and delivered in Malindi this 19th day of **December**, 2013.

O. A. Angote

Judge



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