



**REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI**

PETITION NO. 11 OF 2011

**IN THE MATTER OF: ARTICLES 21, 22, AND 23 OF THE CONSTITUTION OF
KENYA**

AND

**IN HE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS**

**UNDER ARTICLE 40,47,60,64, 65,73 AND 232 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA SUPERVISORY
JURISDICTION AND PROTECTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH
COURT PRACTICE RULES, 2006**

BETWEEN

BEACH BAY HOLDINGS LTD.....PETITIONER

AND

1. RATIM RELATIONS LTD

2. THE COMMISSIONER OF LANDS

3. THE ATTORNEY GENERAL.....RESPONDENTS

J U D G M E N T

Introduction

1. The Petition before me is dated 25th August 2011 ad filed on 1st September 2011.
2. The Petitioner is seeking for a declaration that all the acts carried out by the Respondents jointly and severally in the preparation and production of the letter of allotment reference

number 5529/102 dated 24th December 1991 and the title that may have been issued subsequently, if any, is void. The Petitioner is also seeking for an order of vacant possession to issue, a mandatory injunction and a prohibitory injunction.

The Petitioner's case:

3. The Petitioner has averred in its Petition and Supporting Affidavit that it is the proprietor of an Estate in fee simple of all those portions of land measuring approximately 56 acres and known as portion number 10836 Mambrui in Malindi.

4. According to the Petitioner's Attorney, some people invaded the Petitioner's land in the year 2009 where upon he was shown a letter of allotment reference number 5539/102 dated 24th December 1991. The letter showed that on 18th November 2008, the Department of Lands purportedly received Kshs.162,320 from the 1st Respondent being rent for a lease hold over the suit property.

5. According to the report that was prepared by the surveyor who was appointed by the Petitioner, the Petitioner is the owner of Portion numbers 10835, 10836 and 10837 all of which are subdivisions of portion number 800 Mambrui.

6. Because of the letter of allotment that was issued to the 1st Respondent, it was deponed that the 1st Respondent has trespassed onto the suit property and sunk a well, a pit latrine, developed makuti bandas and put up a wire fence.

7. The Petitioner's Attorney finally deponed that the letter of allotment that was issued to the 1st Respondent is void ab initio because when the suit property was registered in favour of the Petitioner, it ceased to be available to the Government for allocation.

8. The Petitioner is also seeking for a refund of Kshs.70,000 that it paid to the surveyor to establish the boundaries of the suit property when the 1st Respondent's agents invaded the suit property.

1st Respondent's case

9. The 1st Respondent's Director filed her Replying Affidavit on 30th September 2011 and deponed that the 1st Respondent is the allottee and proprietor of unsurveyed hotel plot number C Mambrui Town as per plan number 55529/83.

10. It is the 1st Respondent's assertion that its claim over the land in dispute arises from a letter of allotment number 55529/102 of 24th December 1991 having been allocated the land by the 2nd Respondent who was acting on behalf of "Kilifi County Council"; that the 1st Respondent is awaiting the issuance of a certificate of lease and that the 1st Respondent has the right of possession, which it has since done and constructed a church, a nursery school, a bore hole and pit latrines.

11. The 1st Respondent's director deponed that because the word "Limited" has not been indicated on the Certificate of Title that the Petition is relying on, then the Petitioner is not the proprietor of the suit property as alleged; that the Petitioner has no *locus standi* to commence these proceedings and that the Petitioner cannot donate a power of attorney over the suit premises.

12. The 1st Respondent's director finally deponed that in view of the fact that the Petitioner's directors are Italian nationals, the Petitioner's interest in the suit property is unconstitutional, illegal, null and void and therefore unenforceable.

13. The 1st Respondent also filed Grounds of Opposition and stated that the Petitioner has no proprietary interest in the suit property capable of enforcement, that the Petitioner has no *locus standi* to institute the Petition and that the juristic person of the Petitioner is ambiguous and uncertain.

Petitioner's Supplementary Affidavit

14. The Petitioner filed its Supplementary Affidavit on 18th October 2011 and deponed that the Petitioner is a limited liability company; that the original portion number 800 was transferred to the Petitioner on 22nd May 1996; that portion number 800 was subdivided into portion numbers 10835-10837 and new Certificates of Title were issued and that the error in the name of the proprietor was made by the Registrar of Titles, Mombasa when he issued the Certificates of Title in the names of Beach Bay Holdings instead of the names of the Petitioner.

15. The parties agreed to dispose of the Petition by way of written submissions. The Petitioner's Advocate filed his submissions on 27th November 2013. The Respondents did not file their submissions despite being given adequate time by this court to do so.

The Petitioner's submissions:

16. Mr. Ole Kina, counsel for the Petitioner submitted that the Respondents action of depriving the Petitioner of the right over some section of portion number 10836, Mambrui, violates Article 65 as read together with Article 40 of the Constitution of Kenya.

17. The Petitioner's counsel submitted that the Respondents are duty bound to safeguard the Petitioner's proprietary rights over the suit property and the failure by the State to do so is a violation of Article 21(1) of the Constitution. Counsel submitted extensively on the rights of the Petitioner over property pursuant to the provisions of Article 60 (1)(b) and Article 40 of the Constitution amongst other issues.

Analysis and findings:

18. The only two issues that I am supposed to determine are as follows:

(a) Who is entitled to portion number 10836 Mambrui

(b) What is the effect of a letter of allotment viz-a-viz an existing Certificate of Title.

19. The Petitioner has annexed on its Affidavit a Certificate of Title for sub-division number 10836 measuring 22.51 Hectares. The original number of the sub-division is indicated as 800/2 Kilifi.

20. Article 40 of the Constitution provides that every person, including a foreigner, has the right either individually or in association with others to acquire and own property of any description and in any part of Kenya. However, the right under Article 40 does not extend to

property that is found to have been unlawfully acquired. Where the court finds that a title was unlawfully acquired, then it has the power to cancel such title.

21. Although the 1st Respondent has challenged in its affidavit the legality of the said Certificate of Title, the 1st Respondent did not place before me any evidence to show that the said Certificate of Title was obtained by Beach Holdings fraudulently or by mistake.

22. It is true, as argued by the 1st Respondent in its Replying Affidavit that pursuant to the provisions of Article 65 of the Constitution, a person who is not a citizen of Kenya can only hold land on a leasehold basis not exceeding 99 years. However Article 65(4) of the Constitution mandates Parliament to enact legislation to make further provisions for the operation of the Article.

23. It is therefore not true that a person who is not a citizen and who owns free hold land should lose such land on the basis of the provisions of Article 65 of the Constitution. In the case of **Du Plessies & Others Versus De Klerk and Another (1997) I LR C 637**, the constitutional court of South Africa, and rightly so, held as follows:

“A right of action was a form of incorporeal property and there was no warrant in the constitution for depriving a person of property which he lawfully held before the constitution came into force by invoking against a right which did not exist at the time when the right of property vested in him. The citation of well-known authorities on the need for a generous rather than a legalistic interpretation of the constitution hardly supported an argument directed to depriving an individual of an existing right.”

24. The above holding was cited with approval by the Supreme Court of Kenya in **Samuel Kimeu Macharia & Another Vs KCB & 2 others (2012) e KLR**.

25. Indeed, the question that this court, the Court of Appeal and the Supreme Court is going to deal with in the foreseeable future is whether, in view of the provisions of Article 65 (1) and (2) of the Constitution, a person who is not a citizen of Kenya and who was holding a freehold title before the promulgation of the 2010 Constitution automatically loses the right to hold such a freehold title.

26. Until the question I have posed above is resolved, and until Parliament legislates on the issue of converting freehold titles held by non-citizens to leaseholds, the Petitioner's title must be protected by the Constitution until cancelled by this Court for having been acquired unlawfully or until it is converted into a 99 years leasehold.

27. The 1st Respondent averred in her Grounds of Opposition and Replying Affidavit that the Plaintiff has no *locus standi* to institute these proceedings because the annexed title is in favour of “Beach Bay Holdings” and not “Beach bay Holdings Limited”.

28. According to the Petitioner, the error to leave out the word “Limited” on the Certificate of Title was made by the Registrar of Titles and that under Section 59 (2) of the Registration of Titles Act, the Registrar has the power to rectify such an error which is apparent on the face of the Certificate of Title.

29. I entirely agree with the Petitioner. The mere fact that the Certificate of Title is in favour of Beach bay Holdings instead to Beach bay Holdings Limited does not render the title invalid. That is an error which can be rectified by the Registrar of Titles without affecting the proprietary right of the Plaintiff over the suit property. In any event, the said error has nothing to do with the 1st Respondent's claim over the suit property. The 1st Respondent has not claimed or proved that the real owner of the suit property, Beach bay Holding, is distinct from Beach bay Holdings Limited, the Petitioner.

30. The 1st Respondent relied on the letter of offer dated 24th December 1991 to lay claim over the suit property. The 1st Respondent annexed on its Supplementary Affidavit filed on 7th November 2011 a Certificate of Incorporation together with the Memorandum and Articles of Association. It is clear that the 1st Respondent was incorporated on 14th July, 1994 after the letter of allotment had been issued to it.

31. The 1st Respondent has not explained how it was issued with the letter of allotment before it was incorporated. The Petitioner's counsel submitted, and correctly so, that pre-incorporation contracts are void in nature and unenforceable. In the case of **Newborne Vs Sensolid (Great Britain) Ltd (1953) All ER 708** it was held as follows:

“The contract was made, not with the Plaintiff, whether as agent or as principle, but with a limited company which at the date of the making of the contract was non-existent and therefore, it was a nullity and the Plaintiff could not adopt it or sue on it as his contract.”

32. On that ground alone, I find that the letter of allotment reference number 55529/102 dated 24th December 1991 is a nullity *ab initio*. The court cannot rely on it to ascertain the rights of the 1st Respondent over the suit property or any other property for that matter. The 1st Respondent cannot by any stretch of imagination use the said letter of allotment to occupy the suit property. Such occupation can only amount to an act trespass which this court cannot uphold.

33. Article 22 of the Constitution and Section 13 of the Environment and Land Court Act empowers this court to issue declaratory orders, Judicial Review Orders and orders for compensation. I have already held that the 1st Respondent's letter of allotment is a nullity in view of the fact that the suit property is registered in favour of the Petitioner and also because the said letter was issued way before the 1st Respondent was incorporated. I have also read the report of the surveyor in respect to the suit property and seen the receipt of Kshs.70,000 that was incurred by the Petitioner in the preparation of the Survey Report. That amount should be paid by the 1st Respondent.

34. For the reasons I have given above, I allow the Petitioner's Petition dated 25th August 2011 in the following terms:

(a) A declaration do and is hereby issued, that all the acts carried out by the Respondents jointly and severally in the preparation and production of the letter of allotment reference number 55529/102 dated 24th December 1991 is void.

(b) An order of vacant possession of portion number 10836 and 10837 Mambrui is hereby issued.

(c) An order of Mandatory Injunction to remove makuti bandas and a barbed wire fence and any other developments by the 1st Respondent on portion number 10836 Mambrui within 30 days of this order be and is hereby issued.

(d) That in the event the 1st Respondent does not comply with the (c) above, the Petitioner is at liberty to engage the services of a contractor to remove and cut away the developments by the 1st Respondent on the suit property at the 1st Respondents costs.

(e) An order of injunction be and is hereby issued restraining the 1st Respondent, its servants and or agents or any one of them from trespassing upon, selling, mortgaging, transferring or in any other way dealing with the Petitioner's land.

(f) The 1st Respondent to pay to the Petitioner Kshs.70,000 with interest at court rates with effect from 1st September, 2011.

(g) The 1st Respondent to pay to the Petitioner the costs of the suit.

Dated and Delivered in Malindi this 6th Day of March 2014

O. A. Angote

Judge



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