



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
Hccc No. 18 Of 2013 (Os)

In The Matter Of The Registration Of Title Act Chapteer 281 Of The Laws Of Kenya

And

In The Matter Of: Lr. Portion No. 20119-Cr 2651

Lr. Portion No.20130-Cr33295

Lr. Portion No.24845-Cr33298

Lr.Portion No.24486-Cr33297

And

In The Matter Of The Registered Land Act Cap 300 Laws Of Kenya

And

**In The Matter Of Plot Nos Nombeni/Squattrrs Settlnent Scheme/1882,892, 811, 983, 813, 986,
1025,987, 988, 787, 1887, 188 And 1373**

And

In The Matter Of The Survey Act Cap 299 Laws Of Kenya

Between

NGOMENI SWIMMERS LTD.....PLAINTIFF

=VERSUS=

1. THE COMMISSIONER OF LANDS

2. THE DIRECTOR LAND ADJUDICATION & SETTLEMENT

3. THE DIRECTOR OF SURVEY
4. THE DISTRICT LAND REGISTRAR(KILIFI)
5. THE REGISTRAR OF TITLES (MOMBASA)
6. THE HONO. ATTORNEY GENERAL.....DEFENDANTS

AND

1. ST. PATRICK'S HILL SCHOOL LTD
2. NDURYA MSANZU NDURYA
3. MORRIS SULUBU HARE
4. KADII TEZI TSUMA
5. SWALEH AHMED SAID
6. NICHOLAS KAANDO MWANGI
7. FENYSAN CONSTRUCTION LIMITED
8. KARISA FUNDI BULUSHI
9. KAHINDI KAINGU GONDA
10. TABU TUVA KHONDE
11. THE ESTATE OF SAFARI KIMERI THUVA
12. THE ESTATE OF CHARO MWABAYA NDURYA
13. THE ESTATE OF KATANA KENGA MWANYIRO.....INTERESTED PARTIES

J U D G M E N T

Introduction

1. What is before me is the Plaintiff's Originating Summons dated 8th February 2013. The Originating Summons is brought pursuant to the provisions of Order 36 Rule 3 and 7 of the Civil Procedure Act. The suit is seeking for the following orders:
 - (a) A declaration that the registration and issuance of title deeds in respect of Plot Nos, NGOMENI SQUATTERS SETTLEMENT SCHEME/1882, 892, 811, 893, 813, 1025, 987, 988, 787, 1887, 1888 and 1273 under the Registered Land Act Cap 300 laws of Kenya, overlapping the existing boundary on fixed boundary Plot Nos 20119, 20130, 24845 and 24846 registered under the registration of titles Act cap 281 of the laws of Kenya is erroneous, illegal and unlawful.
 - (b) THAT Honourable court be pleased to compel the 1st, 2nd and 3rd Defendants/Respondents to visit this particular region of Ngomeni Squatters Settlement Scheme and ascertain and/or determine the extent of the Adjudication boundary and the fixed boundary in order to settle the issue of overlap once and for all.

(c) THAT the Honourable Court be pleased to order service of this Originating Summons by substituted service by advertisement in the Daily Nation News Paper on a weekday to facilitate the widest possible participation by Interested Members of Public.

(d) Cost of this Application

2. The Originating Summons is premised on the grounds that the Applicant is the absolute proprietor of L.R Nos. 20119, 20130, 24845 and 24846; that the Applicant is an innocent purchaser for valuable consideration; that the Applicant is in physical possession of the suit properties and has spent Kshs.190,000,000 to develop the properties and that the 2nd Defendant subsequently declared the Ngomeni region a Settlement Scheme.
3. Initially, the Plaintiff sued only six Defendants as shown on the face of this Ruling. However, when the Originating Summons was advertised in the *Standard* Newspaper on 16th February 2013 pursuant to the orders of this court of 12th February 2013, the parties who were to be affected by the orders of this court entered appearance and failed their respective responses as interested parties. The said parties were ZEDI AHMED SAID, ST. PATRICKS' HILL SCHOOL LIMITED, THABU TUVA KONDE, SUMSON MWARINGA AND NICHOLAS KABANDO MWARIGA who stated in their Replying Affidavits that they were the registered owners of Ngomeni Settlement Scheme/1361, 892, 787, 988 and 1888 respectively.
4. The parties agreed to dispose of the Originating Summons by way of Affidavit evidence and written submissions.

The Applicant's case

5. According to the Affidavit of the Plaintiff's director, Mario Nuzzo, the Applicant in the absolute registered proprietor of L. R. Numbers 20119, 20130, 24845, 24846 which it purchased from the previous owners in the year 1994.
6. The Applicant's director deponed that it has been in occupation of the said portions of land and has spent over Kshs.190,000,000 in excavation, construction of roads and the application for power supply.
7. However, in the year 2007, the 2nd Defendant gazetted Ngomeni area to be a squatter settlement scheme, adjudicated the land and eventually issued titles to the squatters.
8. The Plaintiff's director further deponed that in the year 2010, he realised that some of the plots within he settlement scheme were encroaching on the Plaintiff's portion of land. The parcels of land that were encroaching on his portion of land included Ngomeni Settlement Scheme/1882,892, 811, 893, 813, 986, 1025, 987, 988, 787, 1887, 1888 and 1373.
9. The Plaintiff's director finally deponed that the Plaintiff is seeking for a declaration that the registration and issuance of title deeds in respect to Ngomeni Settlement Scheme/1882,892, 811, 893, 813, 986, 1025, 987, 988, 787, 1887, 1888 and 1373. is illegal and unlawful.

The Respondents and Interested Parties cases

10. The Interested Parties filed their Replying Affidavits with one common denominator; that the suit raises complex issues of both law and fact which can only be determined by way of a Plaint and not Originating Summons.
11. The other preliminary point of law that was raised by Samson Ngowa Mwariga was that the Plaintiff did not disclose to this court that it has separately filed other suits in this court raising the same issues in respect to parcel of land number 1887. The said suits are Malindi HCCC No. 15 of 2010, Malindi HCCC No. 31 of 2006 and Malindi HCCC No. 87 of 2009.
12. I shall deal with the two preliminary objections first.
13. The Plaintiff is seeking by way of an Originating Summons that the issuance of title deeds in respect of Ngomeni Settlement Scheme/1882,892, 811, 893, 813, 986, 1025, 987, 988, 787, 1887, 1888 and 1373 registered under the repealed Registered Land Act, Cap 300 were issued erroneously and are null and void.
14. Order 37 Rule 8 of the Civil Procedure Rules, 2010 provides that Applications under the

- Registered Land Act shall be made by way of an Originating Summons except under section 120, 128, 133, 143 and 150 of the Act.
15. Section 143 of the repealed Registered Lands Act, Cap 300 is the only section that gives the court the mandate to rectify the register by directing that any registration be cancelled or amended once it is satisfied that the registration was made or omitted by fraud or mistake.
 16. In view of the fact that Order 37 Rule 8 of the Civil Procedure Rules, 2010 expressly prohibits the filing of an Originating Summons in respect to claims brought pursuant to the provisions of section 143 of the repealed Registered Land Act, this court cannot grant the declaratory orders that are being sought by the Plaintiff by way of an Originating Summons.
 17. As was held by the Court of Appeal in the case of **Wakf Commissioner Vs Mohamed bin Umeya bin Abdulmaji Bin Mwijabu (1984) KLR 346**, an Originating Summons is intended for settling simple matters without the expense of a full trial and not for serious issues.
 18. The issues raised by the Plaintiff and the Interested Parties in this matter are complex issues which can only be dealt by way of a Plaint and after the full hearing of evidence. Declaratory orders for cancellation of title deeds cannot be said to be a simple issue which can be decided by way of an Originating Summons.
 19. In any event, the Plaintiff has filed other suits by way of Plaints in respect to the same suit properties. The said suits are dealing with the same issues that it has raised in the current Originating Summons. I therefore do not understand why the Plaintiff would file the current Summons seeking for declaratory orders in view of the pending suits. That is an abuse of the court process. The Plaintiff should move with haste and have those pending suits heard and determined. All the prayers that the Plaintiff is seeking in the current summons should be pursued in those suits or in other Plaints that it may so wish to file as against the Defendants and the Interested Parties.
 20. For the reasons I have given above, I find that the Plaintiff's Originating Summons dated 8th February 2013 is unmeritorious and I strike it out with costs.

Dated and Delivered in Malindi this **20th** Day of **December**, 2013

O. A. Angote

Judge