



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. E18 OF 2020

JULIUS MWANGATA MW.....PLAINTIFF/APPLICANT

VERSUS

ESTATE OF SAID KANDONDO *a.k.a*

KANDONDO KALAMA NGUMA (Deceased).....1ST DEFENDANT/RESPONDENT

NOEL MWATATI MWAKITELE.....2ND DEFENDANT/RESPONDENT

HAMILTON MWANDAWIRO SAMBOJA.....3RD DEFENDANT/RESPONDENT

JAMES MOSES MUGO.....4TH DEFENDANT/RESPONDENT

CONSOLIDATED BANK (K) LTD.....5TH DEFENDANT/RESPONDENT

EQUITY BANK LTD. 6TH DEFENDANT/RESPONDENT

DIRECTOR OF SURVEY.....7TH DEFENDANT/RESPONDENT

KILIFI COUNTY REGISTRAR.....8TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL – KILIFI.....9TH DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion dated 20th November, 2020, Julius Mwangata Mwamudzu (the Plaintiff) prays for:

3. A temporary (order of) injunction to be issued directed at the 1st to 8th Defendants/Respondents restraining them from in any manner interfering with the Plaintiff's quiet possession and occupation and/or from selling, charging, evicting, fencing, transferring or in any manner interfering with the Plaintiff's interests in LR No. Kilifi/Roka/1203 and/or also known as Kilifi/Roka/1243 and 1244 pending the hearing and determination of this suit.

4. The Honourable Court (to) make an order that will maintain status quo and/or meet the ends of justice in this suit.

5. Costs of the application (to) be provided and borne by the Defendant/Respondents.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

(i) The Plaintiff is the beneficial owner of an interest in land previously known as Plot B, registered as Kilifi/Roka/1203 and also known as Kilifi/Roka/1243 and 1244;

(ii) The Plaintiff acquired interest in the subject land as a purchaser for valuable consideration from the 1st Defendant (now deceased) and took over possession thereof in 1978;

(iii) The 1st Defendant knowing that he had sold his interest on Part B of the suit land nevertheless proceeded to register the same in his name;

(iv) Instead of transferring the portion formerly known as Part B and which came to be known as Kilifi/Roka/1203, the deceased sold the same to the 2nd Defendant;

(v) The 2nd Defendant thereafter caused the said parcel of land to be falsely and illegally reflected as sub-divisions Kilifi/Roka/1243 and 1244 on paper in contravention of the Survey Act and the Land Registration Act. The official record held by the 7th Defendant todate reflects that Parcel No. Kilifi/Roka/1203 remains intact;

(vi) The 2nd Defendant thereafter purportedly sold Kilifi/Roka/1244 to the 3rd Defendant who in turn sold the same to the 4th Defendant;

(vii) The 2nd and 4th Defendants purporting to be owners of the titles 1243 and 1244 charged the said titles with the 5th and 6th Defendants and obtained loans creating a real risk to the Plaintiff's interest over the land; and

(viii) Unless an injunction is granted and/or an order preserving the "status quo", the 2nd and 4th Defendants may default in paying their loans to the 5th and 6th Defendants and thereby expose the Plaintiff's in the land to a possible sale and eviction of the Plaintiff therefrom.

3. The application is opposed by the 3rd, 4th, 5th and 6th Defendants/Respondents.

4. In his Replying Affidavit sworn on 1st February, 2021 and filed herein on 4th February, 2021, Hamilton Mwandawiro Samboja (*the 3rd Defendant*) avers that the Plaintiff's application is incompetent, bad in law, misconceived, unmeritorious and an abuse of the court process.

5. The 3rd Defendant avers that 2nd Defendant was formerly the registered proprietor of the portion of land formerly known as Kilifi/Roka/1203 which was itself a sub-division of Kilifi/Roka/273 having purchased 6 acres out of the same from the late Said Kandondo on 1st October, 1987. The 2nd Defendant later sub-divided Kilifi/Roka/1203 into two portions which were registered as Kilifi/Roka/1243 and 1244.

6. The 3rd Defendant avers that Portion No. 1243 was then transferred to his name while the 2nd Defendant retained the Portion No. 1244. The 3rd Defendant was subsequently issued with a title for his portion on 25th February, 1994. The 3rd Defendant asserts that despite the parcel No. Kilifi/Roka/1203 being registered in the name of the 2nd Defendant on 4th July 1989, the Plaintiff never challenged the same until some 18 years later when he instituted *Bahari Land Disputes Tribunal Case No. 85 of 2006; Julius Mwangata -vs- Noel Mwatati Mwakitele*.

7. The 3rd Defendant further avers that despite his being the registered proprietor of the land at the time, he was not made a party in the Bahari Land Dispute Tribunal Case No. 85 of 2006 aforesaid. He subsequently transferred the property to the 4th Defendant who was equally issued with a title deed in his name.

8. The 3rd Defendant further avers that he is aware that the decision of the Tribunal awarding the land to the Plaintiff was set aside on 3rd June, 2020 in Mombasa ELC Civil Appeal No. 61 of 2013; Noel Mwakitele -vs- Julius Mwangata.

9. In his Replying Affidavit sworn on 18th February, 2021, James Moses Mugo (*the 4th Defendant*) reiterates the averments made by the 3rd Defendant and asserts that the 3rd Defendant transferred land parcel No. Kilifi/Roka/1243 to himself for good consideration before he was issued with a title deed therefore.

10. The 4th Defendant avers that he was not aware of the existence of Bahari Land Dispute Tribunal Case No. 85 of 2006 and the subsequent Appeal being Mombasa ELC Civil Appeal No. 61 of 2013 until September, 2019 when he made an application to the court to be made a party to the Appeal. The application was allowed and the court in its Judgment delivered on 3rd June, 2020 did set aside the decision of the Tribunal that had awarded the land to the Plaintiff.

11. The 4th Defendant asserts that as the registered proprietor of Parcel Number Kilifi/Roka/1243, he has every right to charge the same to the 5th Defendant or any other financial institution.

12. Consolidated Bank (K) Ltd (*the 5th Defendant*) is similarly opposed to the application. In a Replying Affidavit sworn by its Credit Officer David Ndirangu, the 5th Defendant avers that it is aware that the 3rd and 4th Defendants are directors/shareholders of Elegant Investments (1996) Limited and that on diverse dates between 2012 and 2020 the 5th Defendant advanced multiple facilities to the company which were secured by charge instruments.

13. The 5th Defendant avers further that among the securities availed by Elegant Investments (1996) Limited was a First Legal Charge dated 21st August, 2012 and Further Charge dated 30th June, 2015 which were registered over Kilifi/Roka/1243 which title is in the name of the 4th Defendant.

14. Equity Bank (Kenya) Limited (*the 6th Defendant*) is equally opposed to the application by the Plaintiff. In a Replying Affidavit sworn

on its behalf by its Manager Legal Services Kariuki King'ori on 23rd March, 2021 and filed herein on 12th April, 2021, the 6th Defendant confirms that the property known as Kilifi/Roka/1244 is currently charged to itself. Prior to the consolidation of the charge, the 6th Defendant performed due diligence and confirmed that Noel Mwateti Mwakitele (*the 2nd Defendant*) is the duly registered owner thereof.

15. I have carefully considered the Plaintiff's application and the various responses thereto. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

16. The Plaintiff herein prays for an order of injunction to restrain the Respondents from dealing with the parcel of land he describes as LR No. Kilifi/Roka/1203 and/or the parcels also known as Kilifi/Roka/1243 and Kilifi/Roka/1244, pending the hearing and determination of this suit. In the alternative he craves an order that would maintain *status quo* pending the hearing and determination of the suit.

17. The principles to be considered for the grant of an interlocutory injunction are now well settled. As was stated in the oft-cited case of **Giella –vs- Cassman Brown & Company Limited (1973) EA 358**;

“First the Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which would not adequately be compensated in damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience.”

18. That being the case, the first issue for consideration by this court is a determination on whether or not the Plaintiff has by the facts so far presented to the Court established a *prima facie* case with the probability of success at the trial. As to what would amount to a *prima facie* case, the Court of Appeal had this to say in **Mrao Limited -vs- First American Bank of Kenya Limited & 2 Others (2003) eKLR**:

“... in civil cases, it is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the Applicant's case upon trial.”

19. In the matter before me, it is the Plaintiff's case that he is the beneficial owner of an interest in land previously known as Plot B which was subsequently registered as parcel number Kilifi/Roka/1203. It is the Plaintiff's case that he did purchase the suit property from one Said Kadondo (*now deceased*) way back in 1978 and that the deceased wrongfully transferred the land to the 2nd Defendant who then falsely and illegally purported to sub-divide the land into two parcel, namely Kilifi/Roka/1243 and Kilifi/Roka/1244.

20. The Plaintiff further accuses the 3rd and 4th Defendants of irregularly acquiring the titles for the two sub-divisions before charging the same to the 5th and 6th Defendant Banks.

21. In their response to the application, the 3rd and 4th Defendants on their part aver that the 2nd Defendant was formerly the registered proprietor of the parcel of land known as Kilifi/Roka/1203 which was itself a sub-division of land parcel No. Kilifi/Roka/273. They further aver that the 2nd Defendant purchased 6 acres of the said parcel No. 273 on 1st October, 1987 from the late Said Kadondo whose estate has been enjoined herein as the 1st Defendant.

22. In support of their case, the 3rd and 4th Defendants have annexed a copy of a Sale Agreement dated 1st October, 1987 between the said Said Kadondo and the 2nd Defendant. It is apparent from the material placed before the Court that upon execution of the Sale Agreement, the late Said Kadondo applied for Land Control Board consent to have the said parcel No. Kilifi/Roka/273 sub-divided into two portions each measuring 6 acres that would appear to be the process that gave birth to parcel numbers Kilifi/Roka/1202 and Kilifi/Roka/1203. While Said retained Kilifi/Roka/1202, the other parcel Kilifi/Roka/1203 was transferred to the 2nd Defendant.

23. It was further the Defendants' case that the 2nd Defendant proceeded to have title number Kilifi/Roka/1203 sub-divided into two portions resulting into Kilifi/Roka/1243 and Kilifi/Roka/1244. Parcel number Kilifi/Roka/1243 was then transferred to the 3rd Defendant who was subsequently issued with a title therefore on 25th February, 1994.

24. It was interesting to note that despite the Plaintiff's contention that he bought what became known as parcel number Kilifi/Roka/1203 way back in the year 1978, and in spite of the fact that the said parcel number came to be registered in the name of the 2nd Defendant on 4th July, 1989, the Plaintiff appears to have hitherto taken no steps to challenge the refusal to transfer the land to himself and/or the registration of the 2nd Defendant.

25. It would appear that the first challenge to the 2nd Defendant's title was brought by the Plaintiff some 18 years after the parcel of land got registered in the 2nd Defendants name by way of the case the Plaintiff instituted vide *Bahari Land Disputes Tribunal Case No. 85 of 2006; Julius Mwangata –vs- Noel Mwatati Mwakitele*. As at the time of lodging the case before the tribunal, the 2nd Defendant had ceased to be the owner of the land some 13 years earlier as the title was registered in the name of the 3rd Defendant on 25th February, 1994.

26. As it turned out, the 3rd Defendant was not made a party to the Tribunal case and he in turn subsequently transferred the said parcel of land to the 4th Defendant by way of sale.

27. Given that the Plaintiff alleges that the 2nd, 3rd and 4th Defendants irregularly or fraudulently acquired the titles in contention, I think it was incumbent upon the Plaintiff to place some material before the Court to demonstrate that there was fraud and/or that the said Defendants were parties to the alleged fraud and/or irregularities. Other than the averments by the Plaintiff, I have to this extent not seen anything from which I could draw an inference of fraud in the acquisition of the titles.

28. As it were both the 2nd and the 4th Defendants have given some historical basis for the certificates of titles that are presently charged to the 5th and 6th Defendants to secure various loan facilities. In this respect, **Section 26 of the Land Registration Act, 2012** provides as follows:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except –

(a) On the ground of fraud or misrepresentation to which a person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

29. Having found that there is nothing so far placed before me to connect the Defendants to any fraud or irregularities in the acquisition of the titles, it follows that the Plaintiff has failed to demonstrate that he has a *prima facie* case with a probability of success at the trial.

30. Arising from the foregoing, I did not find any merit in the application dated 20th November, 2020. It is dismissed with costs to the Defendants.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF JANUARY, 2022 VIA MICROSOFT TEAMS.

IN THE PRESENCE OF:

MS RAJAB FOR THE PLAINTIFF/APPLICANT

NO APPEARANCE FOR THE DEFENDANTS

COURT ASSISTANT - MUGAMBI

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J. O. OLOLA

JUDGE