



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 77 OF 2014

MARGRETVILLE ASAMI MACHIO.....1ST PLAINTIFFS

GRIGORIOS SMARAGDIS.....2ND PLAINTIFF

VERSUS

MUSA MWERA ATHUMAN.....DEFENDANT

RULING

1. The matter for ruling is the notice of motion dated 4th April 2014 in which the plaintiffs/applicants sought the following orders;

1. ...

2. ...

3. *An order of inhibition be issued to inhibit the registration of any transfer, charge, lease, transmission, Disposition, any registrable instrument under Land Registration Act, 2012 or any other dealings over the acre of land known as Title Number Kilifi/Mtwapa/1496 pending the hearing and determination of the suit filed herein.*

4. ...

5. *An order of temporary injunction be issued to restrain the defendant from wasting, damaging, alienation,sale,removal, disposition, taking possession or dealing in any manner with the parcel of land known as Title Number Kilifi/Mtwapa/1496 pending the hearing and determination of suit filed herein.*

6. *Costs of the application be provided for.*

2. The application is premised on the seven (7) grounds listed on the face of this application and the affidavit sworn by the 1st applicant. The applicant deposes that the defendant/respondent is registered as owner of land title No. Kilifi/Mtwapa/1496 which they entered in an agreement of sale in respect thereof. The sale agreement set out terms which terms the respondent is hesitant to complete. According to the plaintiffs, the reasons given by the defendant was not a applicable at the time the agreement was drawn (spousal consent). They are apprehensive the respondent may dispose of this land to their detriment.

3. The motion is opposed by the respondent and he has sworn a replying affidavit to that effect. In the

replying affidavit, the respondent admits the existence of the sale agreement. He also admits receiving Kshs. 572000 from the applicants. He admits breaching the agreement but gives a defence that this is a result of persuasion from his children. He deposes that he promptly notified the applicant and he is ready and willing to refund the monies so far paid plus 10% of the purchase price as compensation for the breach in accordance with Clause 13 of the agreement. He deposes that the applicant has not established a prima facie case to deserve the order sought and urged the court to dismiss the motion.

4. The advocates for the parties herein canvassed the application by way of written submissions. I have read the submissions and my view is that both parties submitted as if this matter had proceeded to hearing and therefore canvassed on the merits of the case and not the application. Most of the submissions discussed on the subject of specific performance which submissions was not necessary at this stage. My predecessor judge on 10th April 2014 issued orders of inhibition inhibiting the suit title pending hearing and determination of the application. From the submissions and pleadings, it is admitted there was a sale contract entered into by the parties herein. It is admitted, the terms of this contract has not been fulfilled. The two questions as to whether the applicants fulfilled their obligations under the agreement or that the defendant is permitted to terminate the contract under clause 13 should be the subject for determination in the main suit. They cannot be dealt with in an interlocutory application as the parties are asking this court to do at this stage going by their submissions.

5. In regards to the prayers sought, the purpose of the inhibition is to secure the suit title so that this suit does not proceed to hearing merely as an academic exercise. The fact of existence of sale contract in my view established a prima facie case by itself. Damages in this case is quantifiable but the balance of convenience tilts in favour of the applicant as the respondent still holds both the title deed and the money paid. When he filed his replying affidavit, he did not annex any document as proof that indeed there has been an attempt to pay the refund together with the 10% damages. For this reason I am satisfied that prayer no. 3 has merit and I allow it.

6. On prayer no 5, part of it is taken care of by granting of prayer 3. The defendant seems to be in possession of the suit title as the applicants had not been handed vacant possession. The limb of prayer 5 seeking to restrain the defendant from taking possession or in any manner dealing in this land is uncalled for since the applicant is attempting to get possession through the back door. I will only allow this prayer to the extent that the defendant is restrained from selling and or wasting the suit land pending determination of the suit. The costs are ordered in the cause.

7. The title the subject of this matter reads Kilifi/Mtwapa which registry falls under the geographical jurisdiction of the Malindi ELC. The suit ought not to have been filed in Mombasa ELC in the first instance. Consequently this court *suo moto* transmits this file to Malindi Environment and Land Court for further determination of any issues and the suit. The parties should not file cases at courts convenient to them.

Dated and delivered in Mombasa in open court this 22nd day of April 2015.

A. OMOLLO

JUDGE

22.4.2015