



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.173 OF 2014**

**ANTONY ISAAC MWARO (*suing as the Legal Administrator of the Estate of*  
**FERDINAND KAHINDI MWARO (DECEASED).....PLAINTIFF****

**=VERSUS=**

- 1. DIAMOND TRUST BANK KENYA LIMITED**  
**2. SWALEH MOHAMED HEMED**  
**3. REGISTRAR OF TITLES, MOMBASA.....DEFENDANTS**

**R U L I N G**

**Introduction:**

1. What is before me is the Application by the Plaintiff dated 23<sup>rd</sup> September 2014 seeking for the following orders:

- (a) A temporary order of injunction against the 1<sup>st</sup> Defendant, by itself, its agents or servants or otherwise howsoever from selling, wasting by public auction or in any way from dealing with plot NO. Kilifi/Ngerenyi/909 being the suit premises until the hearing and determination of this suit.**
- (b) Costs of and incidental to these proceedings.**
- (c) Interest on (4) above at court rates;**
- (d) Any other or further relief this honourable court may wish to award.**

**The Plaintiff's/Applicant's case:**

- 2. The Plaintiff has deponed that he is the legal administrator of the Estate of Ferdinand Kahindi Mwaro, the registered proprietor of parcel of land number Kilifi/Ngerenyi/909 ( the suit property).
- 3. According to the Plaintiff, the deceased agreed to guarantee the 2<sup>nd</sup> Defendant in security of a loan

from the 1<sup>st</sup> Defendant and charged the suit property; that it was a term of the agreement that after the 2<sup>nd</sup> Defendant repays the loan, the title deed would be discharged and returned to the deceased and that the Defendant deliberately and flagrantly failed to honour the agreement.

4. It is the Plaintiff's case that the 2<sup>nd</sup> Defendant repaid the loan to the 1<sup>st</sup> Defendant and fraudulently transferred the suit property in his name and then further charged the property on 28<sup>th</sup> July 2011 for a loan of Kshs.2,300,000.

6. It is the Plaintiff's case that the 2<sup>nd</sup> Defendant does not have a legal or equitable interest in the land and that the 1<sup>st</sup> Defendant remedy lies as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in damages.

7. It is the Plaintiff's position that the 2<sup>nd</sup> Defendant took advantage of the demise of the deceased and unlawfully dis-entitled him and transferred the suit property to himself and then unlawfully charged it to the 1<sup>st</sup> Defendant.

#### **The 1<sup>st</sup> Defendant's/Respondent's case:**

7. The 1<sup>st</sup> Defendant's Company Secretary stated in his Replying Affidavit that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property and that at the instance of the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant extended to him various banking facilities.

8. According to the Company Secretary, the 2<sup>nd</sup> Defendant charged the suit property vide a legal charge dated 19<sup>th</sup> August 2008 and a further legal charge dated 28<sup>th</sup> July 2011; that before disbursing the facility, the Bank undertook due diligence by conducting various searches and that as per the official search of 15<sup>th</sup> August 2014, the 2<sup>nd</sup> Defendant is still the registered proprietor of the suit property.

9. It is the 1<sup>st</sup> Defendant's case that the 2<sup>nd</sup> Defendant is in arrears to the tune of Kshs.909,886.78 as at 27<sup>th</sup> February 2014 and that despite repeated demands to the 2<sup>nd</sup> Defendant to settle the arrears, he has failed to do so.

10. It is the 1<sup>st</sup> Defendant's position that the 2<sup>nd</sup> Defendant acquired a valid title to the suit property on 17<sup>th</sup> July 2008 before the demise of Ferdinand Kahindi and that once property is registered in the name of a party, he is deemed to have absolute and unfettered ownership of the same.

#### **Submissions:**

11. The Plaintiff's advocate submitted that the Plaintiff has proved that it is him and his family who use the suit property as a family graveyard; that the transfer of the suit property to the 2<sup>nd</sup> Defendant was fraudulent and that the balance of convenience tilts in favour of the Plaintiff.

12. The 1<sup>st</sup> Defendant's advocate submitted that the Plaintiff has failed to lay evidence to support his claim that there was an act of fraud by the 2<sup>nd</sup> Defendant; that the evidence adduced by the Plaintiff is contradictory and at cross purpose where he alleges that the suit property was transferred after the demise of Ferdinand Mwaro and that the late Ferdinand Mwaro transferred the suit property for a consideration of Kshs.500,000.

13. It is the 1<sup>st</sup> Defendant's advocate submissions that the Plaintiff has not established a prima facie case with chances of success.

#### **Analysis and findings:**

14. The Plaintiff has not denied that the 2<sup>nd</sup> Defendant charged the suit property to the 1<sup>st</sup> Defendant. The

Plaintiff has also not denied that the 2<sup>nd</sup> Defendant has fallen in arrears and that the 2<sup>nd</sup> Defendant has been served with statutory notices by the 1<sup>st</sup> Defendant.

15. According to the affidavit of the Plaintiff, “the 2<sup>nd</sup> Defendant flagrantly took advantage of the demise of the deceased and unlawfully disentitled him and transferred the deceased title to his name and unlawfully charged the title.”.

16. Annexed on the Supporting Affidavit is the copy of the Title Deed that was issued to the late Ferdinand Kahindi Mwaro on 28<sup>th</sup> April 1994. The Plaintiff has not deponed that he is in possession of the original title deed.

17. The Certificate of Death and the limited letters of administration annexed on the Plaintiff's Affidavit shows that the deceased died on 10<sup>th</sup> September 2009.

18. The Certificate of Search and the Copy of the Title Deed for Kilifi/Ngerenyi/909 annexed on the 1<sup>st</sup> Defendant's Affidavit shows that Title Deed in respect to the suit property was registered in favour of the the 2<sup>nd</sup> Defendant on 17<sup>th</sup> July 2008 whereafter he charged it to the 1<sup>st</sup> Defendant.

19. The evidence before this court therefore shows that the suit property was registered in favour of the 2<sup>nd</sup> Defendant before the demise of Mr. Ferdinand Kahindi and not after his death as alleged by the Plaintiff.

20. Having been satisfied that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property, the 1<sup>st</sup> Defendant charged it on 14<sup>th</sup> October 2008 and 5<sup>th</sup> August 2011.

21. Indeed, considering that no evidence has been placed before me to show that the suit property was fraudulently transferred to the 2<sup>nd</sup> Defendant who then charged it to the 1<sup>st</sup> Defendant, and in the absence of privity of contract between the 1<sup>st</sup> Defendant and the Plaintiff, I find and hold that the Plaintiff cannot, prima facie, challenge the 1<sup>st</sup> Defendant's statutory power of sale conferred to it by the charge documents and the Land Act.

22. In the premises, I find and hold that the Plaintiff has failed to demonstrate that he has a prima facie case with chances of success. The Plaintiff's remedy, if at all, is as against the 2<sup>nd</sup> Defendant if he proves at trial that indeed Ferdinand Kahindi Mwaro did not transfer the suit property to the 2<sup>nd</sup> Defendant. Having conducted a search and found that the property was registered in the name of the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant was entitled to charge it.

23. For those reasons, I dismiss the Plaintiff's Application dated 23<sup>rd</sup> September 2014 with costs.

Dated and delivered in Malindi this 26<sup>th</sup> day of June, 2015.

**O. A. Angote**

**Judge**