



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 31 OF 2020

AMBIANCE HOLDINGS LIMITED.....PLAINTIFF

VS

JACOB KENGA IHA.....1ST DEFENDANT/RESPONDENT

DANIEL THOYA KATANA.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR KILIFI..... 3RD DEFENDANT/RESPONDENT

ATTORNEY GENERAL 4TH DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application brought by way of a Notice of Motion dated 17th March 2020 by the Plaintiff/Applicant seeking the following orders;

a)Spent

b)That there be a temporary orders of injunction against the 1st Respondent, his agents and/or assignees from accessing, selling, constructing on, disposing of, and/or creating any interest over the property or in any manner dealing with the property pending the hearing and determination of this suit.

c)That there be temporary orders of injunction against the 3rd Respondent, his agents and/or assignees from registering any transfer, any instrument creating any interest of whatsoever nature over the property KILIFI/MADETENI/390 pending the hearing and determination of this Application.

d)That there be temporary orders of injunction against the 3rd Respondent, his agents and/or assignees from registering any transfer, any instrument creating any interest of whatsoever nature over the property KILIFI/MAFETENI/390 pending the hearing and determination of this suit.

e)That Costs of this Application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel relied on the affidavit sworn by affidavit Khalid Gulmuh'd Khamis Shapi the director of the Plaintiff/ Applicant company who deposed that one Jaideep Singh Vohra had expressed interest in purchasing the suit property from the 2nd Defendant who was the registered proprietor at the time.

He further deposed that vide an agreement dated 22nd December 2009, the said Jaideep Singh Vohra bought the suit property for a consideration of Kshs. 12,500,000/= which purchase price was paid in full vide the transfer instrument dated 2/6/2010 and the suit property transferred from the 2nd Defendant to the Plaintiff as the nominee of Jaideep Singh Vohra a shareholder of the Plaintiff company.

Counsel submitted that the Applicant has satisfied the conditions for grant of temporary injunctions as was set out in the case of **GIELLA VS. CASMAN BROWN & CO., LTD. [1973] E.A. 358** as the Plaintiff/Applicant has demonstrated that he is the bona fide owner of the suit property and/or was in occupation of the suit property.

It was counsel's submission that there is a real danger of the property being sold or transferred to third parties which will make it difficult and or impossible to recover as the Defendant is a man of straw. Counsel urged the court to grant the orders as prayed.

1ST DEFENDANT'S SUBMISSIONS

Counsel relied on order 40 Rule (a) and (b) of the Civil Procedure Rules, 2010 on injunctions and submitted that the Plaintiff/ Applicant has not met the threshold for grant of injunctions as the purported Sale Agreement dated 22nd December 2009 between JAIDEN SIGHN VOHRA and the 2nd Defendant is unlawful, illegal and void since he did not have capacity to sell the suit land KILIFI/MADETENI/390. Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination in an application for injunction is whether the applicant has met the threshold for grant of such a relief namely, established a prima facie case with a probability of success, will suffer irreparable harm which cannot be adequately compensated by damages, and finally if the court is in doubt, then it will decide on a balance of convenience.

It should be noted that a temporary injunction is meant to preserve the substratum of the case pending the hearing and determination on the case. It would be unfortunate that at the end of the case the subject matter of the case has since ceased to exist and that court do not give orders in vain. If the Applicant proves that he/she has a prima facie case to warrant the grant of an injunction, then the court will do so in the interest of justice.

In the case of **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another. [2019] eKLR** where the court held that:

‘circumstances for consideration before granting a temporary injunction under Order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts.....’

Similarly, in the case of **Exclusive Estates Ltd Vs Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004** the court held that: -

“A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter”

In this case the Applicant fears that the Respondent may alienate, sell or transfer the suit property to 3rd parties having gone to the Land Registry and found that the 1st Respondent has procured a second discharge of charge from Settlement Fund Trustee dated 19th September 2016 and a second title issued in the name of the 1st Defendant dated 18th April 2018. This shows that the Applicant has a prima facie case against the Defendants warranting the preservation of the suit land.

The Plaintiff has also established that he will suffer irreparable harm if the orders sought are not granted. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** the court defined irreparable harm as;

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

I have considered the Application, the submission by Counsel and the relevant authorities and come to the conclusion that the Applicant has established a prima facie case against the Defendant and therefore the Application for injunction is allowed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.