



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC CIVIL CASE NO. 82 OF 2014

SHARRIF MOHAMED A. OMAR1ST PLAINTIFF/APPLICANT

BOGANVILLE COTTAGES LTD.....2ND PLAINTIFF/APPLICANT

=VERSUS=

BONTEMPTI LUIGI.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. What is before me is the Plaintiff's Application dated 9th April 2014 seeking for the following orders:
 - a. **That the Defendants, his agents, servants, auctioneers or successors in title (if any) be restrained from transferring, charging, selling, leasing or in any way dealing with the sub-division Number 5650, Malindi (Vol No. LT. 21, Folio B 20A, File 7031) hereinafter referred to as "the property") whatsoever, until hearing and determination of this suit.**
 - b. That the costs of the application be provided for.
2. The Application is based on the grounds that the 1st Plaintiff and the Defendant were shareholders in the 2nd Plaintiff's company; that in contravention of the agreement of sale dated 26th December, 1991 and despite a deposit of Ksh. 300,000 paid by the 1st Plaintiff towards the purchase of the suit property, the suit property was transferred in the sole name of the Defendant and that unless the Defendant is restrained from selling the suit property, the Applicant shall suffer irreparably.
3. In opposing the Application, the Defendant filed a notice of preliminary objection, grounds of opposition and a Replying Affidavit.

The Plaintiffs'/Applicants' case:

4. According to the Affidavit of the 1st Plaintiff, him, together with the Defendant, were shareholders in the 2nd Plaintiff's company, with the 1st Plaintiff holding 150 shares and the Defendant and his son holding 25 shares each.
5. According to the 1st Plaintiff, he agreed with the Defendant to purchase the suit property and a sale agreement was executed between the vendor on the one hand and himself and the Defendant

on the other hand.

6. The 1st Plaintiff he deponed that the purchase price was Kshs.1,200,000, of which he paid Kshs.300,000/- as deposit and that Kshs.900,000 was to be paid from the 2nd Plaintiff's account.
7. However, the 1st Plaintiff deponed, by an Indenture dated 15th August, 1994, the suit property was transferred in the sole name of the Defendant whereafter he lodged a caveat.
8. According to the 1st Plaintiff, he realized later that the caveat that he had registered on the suit property had been lifted for unknown reasons and he is apprehensive that the Defendant is likely to sell the suit property.

The Defendant's/Respondent's case:

9. In the notice of preliminary objection filed on 13th May, 2014, the Defendant has averred that the suit is *res judicata* Mombasa HCCC NO. 255 of 1995; that a derivative action can only be commenced with the leave of the court, which leave was not obtained in this matter and that the purported resolution of the 2nd Plaintiff is defective.
10. In the Replying Affidavit, the Defendant has denied that him, together with the other shareholder known as Bontempi Claudio approved the filing of this suit by the 2nd Plaintiff and the suit as filed is a nullity.
11. The Defendant has deponed that he is a stranger to the sale agreement being relied on by the 1st Plaintiff and that in any event the 2nd plaintiff was not a party to the said agreement.

Submissions:

12. The Plaintiffs' advocate submitted that the Plaintiffs were defrauded off their interest of land when the property was registered in the name of the Defendant.
13. Counsel submitted that this suit is no *res judicata* because Mombasa HCCC Number 215 of 1995 was not in respect to sub-division number 5650.
14. The Plaintiff's counsel submitted that as a majority shareholder of the 2nd Plaintiff, he has filed the suit because of the fraudulent nature that has been suffered by both the 1st and 2nd Plaintiffs.
15. The Defendant's advocate submitted that courts only protect rights that are already vested in an individual and not otherwise. Counsel relied on the case of **Kyangombe Resident Association & 4 Others vs Attorney General & 2 Others, Nairobi Petition Number 188 of 2011.**
16. Counsel submitted that it is a cardinal principle of law that it is for the company and not the individual shareholder to enforce rights of actions vested in the company and sue for wrongs done to it. That is not the case herein.
17. The Defendant's counsel submitted that a claimant without a title to prove his interest in land must yield quit or be evicted from land by a claimant who has a title.

Analysis and findings

18. The Plaintiffs are seeking in the Plaintiff for a declaration that the suit property has been illegally transferred to the Defendant and that all dealings in the property are null and void.
19. According to the affidavit of the 1st Plaintiff, the suit property was purchased by the Directors of the 2nd Plaintiff's company, with him making a personal contribution of Ksh.300,000. It is his position that the balance of the purchase price of the suit property was from the 2nd Plaintiff's account and that the suit property should have been registered in the name of the 2nd Plaintiff.
20. The first issue that I am supposed to determine is whether the suit is *res judicata*.
21. The Defendant has annexed on his Replying Affidavit the pleadings in Mombasa HCCC No.255 of 1995, which suit was determined.
22. According to the second further amended Plaintiff in Mombasa HCCC No.255 of 1995, the Plaintiffs in this matter are the same Plaintiffs in HCCC No.255 of 1995. In the said suit, there were there Defendants, that is, Bontempi Luigi, Bruno Turato and Elizabeth Anyango Ngege.
23. According to the Plaintiff in Mombasa HCCC No.255 of 1995, the 2nd Plaintiff had entered into contracts with third parties for the construction of a hotel known as Temple Point in Watamu and

- the allegation was that the Defendants converted to their own use Ksh.17,500,000 and failed to account to the company.
- 24.The other allegation in that suit was that the 2nd Plaintiff had been engaged by Aspain Properties to do some construction work and the 2nd Plaintiff was given a plot in consideration of the said works. However, the Defendants sold the said plot and failed to account for the proceeds that were raised in the said sale.
 - 25.The other allegation was that the Defendants had purchased plot numbers 3074 and 3104 using the company's money.
 - 26.The main prayer in that suit was therefore for the Defendants to account for all the money which they had received and for a declaration that plot numbers 3074 and 3104 Malindi are held by the 1st Defendant in trust of the 2nd Plaintiff.
 - 27.The court delivered its judgment on 26th July, 2007 and allowed the Plaintiffs' claim.
 - 28.Mombasa HCCC No. 255 of 1995 had nothing to do with portion number 5650 Malindi (the suit property herein). Indeed, the suit property was not in dispute at all in that suit and the court never made a determination on it. This suit is therefore not *res judicata*.
 - 29.The 1st Plaintiff has annexed an agreement of sale showing that him, together with the Defendant purchased the suit property from Mr. Salim Bakshuwein on 26th December, 1991. The 1st Plaintiff has annexed a copy of the cheque counter foil showing that he made his personal contribution of Ksh.300,000 towards the purchase of the property.
 - 30.An indenture in respect to the same property but in favour of the Defendant alone was entered into between the Defendant and Mr. Salim Abdalla Bakshuwein on 11th August, 1994. However, the Indenture was not registered until 14th May, 1997.
 - 31.All the details that are in the sale agreement of 26th December, 1991 are captured in the Indenture of 11th August 1994 except that neither the 1st nor the 2nd Plaintiffs' names have been captured in the Indenture. The Indenture shows the Defendant as the sole transferee.
 - 32.The Defendant has not denied that he signed the agreement dated 26th December 1991 together with the 1st Plaintiff as purchasers of the suit property. Indeed, there signatures were witnessed by Daniel Musinga advocate on 26th December, 1991.
 - 33.The Defendant has not explained what happened thereafter, and whether he entered into another agreement with the seller in respect to the same property. The Defendant has not stated if he is the one who paid the entire purchase price and the mode of payment.
 - 34.The issue as to whether the suit property should have been registered in the name of the 2nd Plaintiff or in the name of the 1st Plaintiff and the Defendant as tenants in common are issues which the Defendant cannot run away from considering that there is an agreement of 26th December, 1991 which him and the 1st Plaintiff signed in respect to the suit property.
 - 35.When a title is challenged, it is not enough for the holder of the title to say that because he is the registered owner, he cannot be questioned on how he obtained it because the title is indefeasible. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows;-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

- 36.In the circumstances of this case, the 1st Plaintiff is entitled to interrogate how the suit property was eventually registered in favour of the Defendant in view of the agreement of 26th December, 1991.
- 37.The question as to whether this is a derivative action or not can only be answered at full trial.
- 38.For those reasons, I find that the Plaintiffs have established a prima facie case with chances of success. Unless the injunctive order is granted, the Plaintiffs are likely to suffer loss because the

Defendant may sell the suit property to a third party.
39.I therefore allow the Plaintiff's Application dated 9th April, 2014 as prayed.

Dated and delivered in Malindi this 31st day of **October**, 2014

O. A. Angote

Judge