



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 150 OF 2012

KAZUNGU CHARO MADAGO administrator of

the estate of KITSAO MADAGO (deceased).....PLAINTIFF

VERSUS

KAIUNGU KITSAO.....1ST DEFENDANT

MOHAMED HANIF WALI MOHAMED.....2ND DEFENDANT

Reasons for ruling given on 13/12/12

1. The Plaintiffs filed two applications dated 10th September, 2012 and 3rd October, 2012. Both seek temporary injunctive orders against the 2nd Defendant in particular to restrain the said Defendant from claiming, entering, fencing, selling, leasing, renting, disposing off, interfering with, evicting from or chasing away the family of the deceased and or dealing in any matter with the suit land Kilifi / Mtondia / 153.
2. The applications are premised on grounds, amongst others, that the 1st Defendant fraudulently entered into a sale agreement with the 2nd Defendant over the suit land which was registered in the name of the deceased. The Plaintiff is the administrator, while the 1st Defendant is one of the beneficiaries of the said estate but has no letters of administration nor did he consult the other beneficiaries. That the Applicant discovered the sale on 6/7/12 and applied for grant *ad litem* was issued with a grant on 5/9/12. Further the 2nd Defendant has already issued a verbal notice for vacating the suit land and also served them with an order for eviction from Kilifi magistrate's Court vide suit number 141 of 2010.. That the Plaintiff had not been served with the pleadings or decree of the said Kilifi matter and only knew of the suit upon demolition of his houses on 26/9/12.
3. The supporting affidavits state that the 1st and 2nd Defendant secretly entered into a sale agreement and did not obtain the consent of the , land consent board that had sat before the purported consent was granted for transfer of the suit property. The transfer was purportedly made on 25/4/1993 before it had been sold on 17/5/1993. That the said consent and the transfer are therefore a forgery. That the police demolished the houses and other structures on the suit land in executing the Kilifi case decree. That the 2nd Defendant then entered the suit land and set ablaze the belongings of the family. That due to the August High Court Vacation, the letters of administration were issued on 5/9/12. That the 2nd Defendant may sell the suit land to a third-party negating the instant suit, that the family will then suffer irreparable loss and damage. That the 1st Defendant has sworn an affidavit averring that he had been lured into entering the sale agreement and that on the day the Land Consent Board was to sit, he had gone for a funeral and on the date he purportedly appeared before an advocate and a C. G. Kariuki, he had not as he had gone to see the medicine man in respect of his child's health. That the signatures on the application

- for consent to transfer and the transfer are a forgery.
4. The applicant filed a supplementary affidavit dated 27th September, 2012 deponing that as his parents had separated whilst he was still young, he had been taken under the custody of the uncle as per Mijikenda tradition. Hence did not grow with his siblings as a result his brother failed to inform him when he was selling the suit land and further that the 2nd Defendant has no proof that he is not a son of the deceased. That the other children of the 1st Defendant filed suit being Kilifi 141 of 2010. That he got wind of the sale on 6/7/12.
 5. An Affidavit sworn by one Jane Jumwa Kitsao dated 7th December, 2012 was also filed. It states that she is the sister to the Plaintiff and 1st Defendant. That they moved to the suit land in 1968 and the deponent of the affidavits annexed to the 2nd Defendant's affidavits does not have knowledge of their family as he claims. It confirms the Applicant's assertions that he was in his uncle's custody for a while. That the deceased was the absolute registered owner of the suit land. That upon his death, the 1st Defendant being the eldest took custody of all the title documents. The deponent confirms the assertions of the 1st Defendant as written in the affidavit annexed to the Applicant's affidavits as regards the attendance of the Land Consent Board.
 6. The 2nd Defendant filed a replying affidavit dated 25th September, 2012 and a further affidavit dated 24th October, 2012 stating that the Plaintiff is not a son to the deceased. He has annexed affidavits sworn by elders to the effect that the Applicant is not the deceased's son and the letters of administration *ad litem* were therefore fraudulently obtained. That he bought the suit land when it was still under a settlement scheme from the 1st Defendant who had as yet to obtain title. That a result of the sale, the 2nd Defendant was entered into the records of the scheme and got the land transferred to him by the Settlement Fund Trustees after discharging the charge. That the Plaintiff was not evicted as he resides on a different property. That the judgement in the Kilifi case was not appealed against. That the Land Consent Board sat in March and not in April as indicated. That the April date was written in error. That the 1st Defendant was convicted of the offence of obtaining through false pretence when he attempted to sell the suit land on 14/1/07 to a third-party.
 7. The Applicant filed written submissions before he filed the second application and he is also relying on the same.
 8. In considering the grant of an order for temporary injunction, the principles established **Giella V Cassman Brown & Co. Ltd [1973] E.A 358** and restated in the *Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others [2003] KLR 123* must be applied. Firstly, a *prima facie* case with chances of success must be established. Then the party must demonstrate that they are likely to suffer irreparable harm or damage of which damages will be an insufficient recompense if not granted the prayer. Where this is not clear the court may invoke the principle of on a balance of convenience see *EA Industries v Trufoods [1972] EA 420*
 9. The Applicant has failed to establish a *prima facie* case with chances of success. The Applicant has claimed that the deceased was the registered owner of the suit property. However no document in proof of this has been displayed. A title to land is *prima facie* proof of ownership of that land and the is indefeasible , unless it is proved that the same was procured through fraud or misrepresentation: see **Wreck Motor Enterprises Ltd Vs The Commissioner of Lands & 3 Others, Civil Appeal No. 71/97, Dr. Ogok vs Justice Moiyo Ole Keiwa Civil Application No. 60 of 1997**
 10. The Applicant has averred that there was fraud and in particular in obtaining the title to the land and has annexed an affidavit by the 1st Defendant stating that he was lured into the sale. The sale and eventual transfer took place in year 1993. It is not indicated the route taken by the 1st Defendant to rectify this 'mistake'. Besides, injunctive orders are governed by the principles of equity. Equity does not assist the indolent and this is in reference to laches. The applicant faces a bar by laches in seeking the same. Secondly, the Applicant has not shown that there is any irreparable loss and damage the estate would suffer that an award of damages cannot best address. There already a court order in place ordering the occupants eviction which was unchallenged.
 11. The annexures indicate that the 1st Defendant was convicted for obtaining money through false pretence in respect of the same property. The particulars were that in year 2007 he represented to a third-party that he had capacity to sell off the suit land. His affidavit annexed to the Applicant's affidavits indicates that he was lured to a sale. What drove him to attempt to 'sell' the land again without informing the Applicant or the family if the first time was a mistake. Why didn't the

family, the Applicant included, attempt to do something about the title then and not almost three years later in year 2010 through the Kilifi case? Why did the family not inform the Applicant in the Kilifi case if truly he was a beneficiary of the deceased's estate? These questions raise doubts as to the 'arguability' of the Applicant's case see *Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others [2003] KLR 123*.

12. For the foregoing reasons, the two applications are dismissed with costs.

Delivered and signed this 30th April, 2013 at Malindi in the presence of Mr. Matata for the Applicant/Plaintiff, N/A for Defendants, Court clerk Evans.

C. W. Meoli

JUDGE