



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 80 of 2012

KIDEMU CHABO KAMWENGAPLAINTIFF

VERSUS

ABDI HUSSEIN MOHAMMEDDEFENDANT

R U L I N G

[1] The applicant herein Mr. Depark Haji filed this application in court on 2/11/2012 and prayed for the following orders.

(1) *That this application be certified as urgent and heard ex-parte in the first instance.*

(2) *That the applicant be granted leave be joined to these proceedings as an Interested party on this suit.*

(3) *That there be a temporary stay of execution of the orders dated 5th October 2012, pending the hearing and determination of this application.*

(4) *That this Honourable court do issue a temporary injunction restraining pending hearing and determination of this suit or further orders of this Court.*

(5) *That this Honourable Court do issue a mandatory injunction compelling the defendant to erect and/or restore the boundary wall and/or any other structure that the defendant may have demolished on plot No. MN/I/2150 pending hearing and determination of the suit.*

(6) *That the Court be pleased to discharge and/or set aside its order dated 5th October 2012.*

(7) *That the costs of this application be provided for.*

The grounds supporting the affidavit were that he wanted to be made an interested party in this suit because he was the registered proprietor of Plot No. MN/1/2150 which was the subject matter of the consent order dated 5th October 2012 between Mr. Kidemu Chabo Kamwenga the plaintiff herein and Mr. Abdi Hussein Mohammed the defendant herein.

[2] The plaintiff herein had sued the defendant praying for a declaration that he is the legal owner of ALL THAT piece of land known as sub-division No.2150 original no. 158/10 of Sec 1 mainland North.

[3] On 5/10/2012 a consent order between the plaintiff and the defendant in this suit was entered in the following terms.

That the Plaintiff's suit be and is hereby marked as settled on the following terms

(a) that the plaintiff hereby acknowledges that the defendant herein is the duly registered owner of the suit property known as Plot No. MN/I/2150 having purchased the same from the Plaintiff for Ksh.8,00,000/-

(b) in view of paragraph 1 above, the plaintiff do grant the defendant vacant possession of the suit property with immediate effect.

(c) defendant is at liberty to demolish and pull down to ground level any wall and other structures illegal and or unlawfully constructed on the suit property.

(d) Each party to bear their own costs.

(e) Each party is at liberty to apply.

The order was extracted on 5/10/2012 and was issued by the Deputy Registrar of this court on 30/10/2012. This is the order that the applicant herein seeks to set aside.

[4] The applicants came on record on 2/12/2012. their application was certified urgent and their prayers 1&2 were granted by the Court and prayers (3),(4),(5) and (6) were ordered to be heard inter partes. The application was argued before me on 12/2/2013.

[5] Mr. Mwakireti learned counsel for the interested party applicant sought prayers 4,5,6 and 7. He argued that the consent dated 5.10.2012 should be set aside. He stated that by the time the consent was entered into, the plaintiff was not the legal or beneficial owner of the suit property. He said that the property had by then been owned by the interested party who had purchased the same from the plaintiff on 20/5/2012. He annexed in his pleadings a title in the name of Depark Harji Vekaria the applicant herein. He also annexed two search certificate one dated 9/5/12 and another dated 16/11/12. He argued that it was highly irregular for the plaintiff and defendant to enter into a consent to divest the suit property from the interested party applicant. Further that the plaintiff could not give what did not belong to him. He stated that pursuant to that consent that gave the land to the defendant, the defendant proceeded to demolish the perimeter wall constructed by the interested party. He asked the court to use its power to compel the defendant to restore the wall. He argued that the orders should be granted because the plaintiff and the applicant were trying to steal a match on the interested party applicant. He relied on the case of ***SHELL & BP KENYA LTD -Vs- KINGS WAY MOTORS***[1]. He also relied on Sec 24 and Sec.25 of Land Registration Act and said that a certificate of title is held to be conclusive evidence of proprietorship. He urged the court to peruse all documents produced to facilitate the title being issued to the interested party.

[6] Mr. Koech Learned Counsel for the 1st respondent relied on the entire record as filed, He gave what he called a background of the case. He explained how the first respondent went to an advocate called Chidzipha regarding his land Ref No. 2150 Sec I mainland North. The said advocate did the agreement for sale. That at that time the title document of the land had not been obtained and that Mr. Chidzipha advocate was to obtain the title document for the 1st respondent. That, when that happened, the 1st respondent advised the 2nd respondent to go to another advocate called Kimathi Musyoki. That the said Kimathi Musyoki obtained a title that turned out to be fake. That when Mr. Kimanathi Musyoki came out with a fake title the 1st applicant changed advocates again and went to O.M. Robinson Advocate. The proprietor of that firm is one Mr. Malombo Advocate. The instruction of Mr. Malombo was to obtain title document for the 1st respondent for his property LR No. 2150 original No. 150 Section I mainland North in favour of Abdi Hassan Mohammed the 2nd respondent herein. Mr. Mohammed paid the entire purchase price and was pressurizing the 1st respondent for documents of title. He had given his details to the first respondent. The 1st respondent is 65 years old and illiterate. According to Mr. Koech learned Counsel for the 1st respondent, when the 1st applicant went to the offices of O.M. Robinson advocate and Mr. Malombo of O. M. Robinson realizing the 1st applicant was old and illiterate, various things happened namely,

(I) That the said Mr. Malombo of O.M. Rosbinson Advocate fraudulently deceived the 1st respondent herein that he was signing a transfer to the 2nd respondent herein while he indeed he was being made to sign an agreement of sale of land dated 5/5/2012 to sell LR. 2150 original No. 150 section I mainland North to the applicant herein for a consideration of Ksh.9,000,000 shillings. This he avers was completely against the will and instructions of the 1st applicant.

(ii) That the said Mr. Malombo advocate held out the first respondent as having signed a transfer dated 7/5/2012 to transfer LR 2150 original No. 150 section I mainland North to the applicant for a consideration of ksh.9,000,000. This Mr. Koech argues is a fraud and forgery by Mr. Malombo aforesaid.

(iii) That the said transfer was registered in the Land Titles Registry at Mombasa as CR 14636/1 on 7th May 2012 at 9.15.a.m Mr. Koech doubts the authenticity of this transfer.

(iv) That on 23/5/2012 the said Mr. Malombo of O.M. Robinson Advocate held the 1st applicant as having received Kshs.9,000,000/- less disbursement and agreed fees for the sale of subdivision No. 2150 original No. 150/10 Section I mainland North and discharging O.M. Robinson & Co. from claim/liability for the sale and transfer of the aforesaid property. This Mr. Koech states was done fraudulently and against the will of his client the first respondent.

Mr. Koech argued that this fraud can only be canvassed and established through a full hearing. He attached authorities to back his assertion that where there is a claim of fraud then those allegations can only be canvassed through a full trial. It was learned Counsel's view that the application before the court was an attempt to validate a fraud by an advocate. To validate a fraud by an officer of the Court. Mr. Koech relied on Section 25 of the Land Act which brings on board elements of valuable consideration. He stated that the interested party did not obtain the suit property for valuable consideration and his title is up for challenge under Section 25 of the Registration of land Act.

[7] Mr. Kibaara Learned Counsel for the 2nd respondent said that the defendant purchased the suit property from the plaintiff by an agreement dated 14/10/2010. The agreement is annexed to this bundle marked 4 on page 10. He said that his client's agreement was 2 years earlier than the agreement produced by the applicant herein. Further that the defendant paid ksh.8,000,000 which amount was acknowledged by the plaintiff 1st respondent and he confirmed having received it in full. He stated that the problems started when the plaintiff started relying on various advocates to process the title documents of the suit property in his behalf. Learned Counsel argued that his client was presented with fake title, he has annexed the fake title on page 34 of the 2nd defendant list of documents. He argued that the court should make a pronouncement that the 2nd defendant is entitled to the suit property and not otherwise. Learned Counsel contended that the documents with the applicants are invalid and fake. He opposed the application and requested for its dismissal.

[8] Mr. Mwakireti Learned Counsel for the applicant in reply said that Sec 35 of the Registration of Land presumes the registered owner as the owner until the contrary is proved. He argued that very serious allegations were made against an officer of the court namely Mr. Malombo who had not been served. He said the allegations were reckless. Further that no criminal proceedings had been preferred against the said advocate. Further that the respondents had not challenged the title itself and that the interested party has in accordance with Sec. 25(1) right to the suit property.

[9] I have carefully listened to arguments by Learned counsels for the parties and perused the application before the court. The case herein raised many issues. It appears the plaintiff entered into agreement for sale with the defendant of his various plots at Nyali in Mombasa. At first it was plot MN/1/2197 which the defendant bought for ksh.6,000,000/- and had it registered in his name. The intermediary of the plaintiff was his grandson one Mr. Peter Mumba. The transaction was conducted by J C Chidzipha Advocate who saw it to its conclusion. The title of that property which is in the name of the defendant is annexed to these proceedings. Thereafter, the defendant relying on the goodwill of the previous transaction entered into another sale of MN/1/2150 the subject matter of this case. The defendant avers that he also went to the firm of Chidzipha & Co Advocates paid Ksh.2,350,000 but before the sale was concluded the plaintiff and his grandson changed their advocate to Kimathi Musyoki & Co.

Advocates. In that firm, the defendant signed a further agreement and paid Ksh. 800,000/- and Ksh.700,000/- in various cheques in favour of the said Kimathi Musyoki & Co. Advocates. He says that he later paid Ksh.300,000 cash to the same advocate and that in the month of March he paid a further sum of Ksh.1,650,000 to the same advocates in the presence of Peter Mumba aforesaid. The defendant states that inspite of paying the full purchase price he is yet to be given the title. He claims he has yet another transaction with the 1st respondent concerning Plot MN/1/2149 in which he has paid a total of 1,938,00 to Omondi Waweru & Co, advocates.

[10] The applicant interested party says he purchased the suit land for Ksh.9000000 through O.M. Robinson Advocate. He attached an agreement for sale dated 5/5/2012. The said agreement for sale set out how the purchase price was to be paid. The same was as follows;

(a) ksh.350,000 on signing the agreement

(b) ksh.500,000 on registration of title

(c) ksh.8,150,000 to be deposited with O.M. Robinson's account for the plaintiff which was to be released to the vendor on completion of the boundary wall/fence.

The transfer is dated 7th May 2012 it was signed on the same day and registered on the same day at 9.15 am. The consideration in the transfer is indicated as Ksh.9,000,000. The said transfer is stamped with Ksh.18,000. The stamp duty paid raises eye brows. The duty on transfer was assessed at Ksh. 18,000/- and copies at 40/- on 4/5/2012. Was the transfer document presented for assessment before it was signed or even before the agreement for sale was made? The law requires that documents of this nature be stamped with 4% of the consideration or the correct valuation[2]. The duty payable herein @ 4% of purchase price should be Ksh.360,000 not Ksh.18,000. Are we looking at a document which is not properly stamped?. What would be the effect of underpaying duty?. Is the document genuine? Its genuineness and authenticity has been challenged. If the document is genuine what is the effect of the consent entered into by the plaintiff and defendant on 5/10/12? this consent was after the transfer of 7/5/2012, a consent that compromised this suit.

A perusal of the agreement for sale aforesaid gives Mr. Koech concerns some merit. The same was entered on 5/5/2012. ksh.350,000 should have been paid to the 1st respondent on that day. The transfer was signed and registered on 7/5/2012 at at 9.15 a.m. Ksh.500,000 should have been paid on that day also. There should be proof of receipt of the balance and how Ksh.8,150,000 was received by O.M. Robinson advocates and disbursed to the 1st respondent. The legal fees and disbursements should be shown separately now that there is a dispute. What is annexed is a global acknowledgment of ksh.9,000,000/- by the 1st respondent from O.M., Robinson.

All these issues need and must be canvassed to the full at the hearing of this case. This is because the 1st respondent denies having ever instructed O.M. Robinson Advocate from doing anything else other than obtain a transfer of Plot No. MN/1/2/2150 from himself to the 2nd respondent herein.

Acknowledgement of a global sum of Ksh.9,000,000 by the 1st respondent does not tally with the sale agreement at all. Advocates have a legal duty to account to their clients when called upon to do so. It appears Mr. Malombo advocate of O.M. Robinson is being called upon to do this Honourable task by his client through this suit. This to me appears to be the only way he can answer the allegation of fraud visited upon him by the 1st respondent herein. This can easily be done by having him summoned to appear in court or by him applying to be enjoined in this suit for the purpose of clearing his name.

There is yet another paradox in this case. The interested party who claims to have bought the suit property herein claims to have purchased the property through O.M. Robinson Advocate. He has not annexed any proof of deposit of purchase price with O.M. Robinson Advocate. All he annexes are an agreement of sale and transfer documents. It is his duty, now that he claims he has title to prove that he bought it for valuable consideration. This is so because he comes to Court and asks to be joined as an interested party claiming to be the legal owner after the suit herein has been compromised, and the suit property passed on

to the 2nd respondent herein by a consent that is duly filed in Court and adopted as the order of the Court.

What orders should be made under the circumstances?

In the interest of justice, the Court makes the following orders.

- (1) ***Prayers 3,4,5 and 7 are dismissed with costs being in the cause.***
- (2) ***Prayer 2 and 6 are granted in the following terms, that the consent filed in court on 5/10/2012 is stayed until further orders of the court.***
- (3) ***That status quo of plot MN/1/2150 shall be maintained. No party to this suit should have any right to deal, work, improve, dispose of the same until further orders of the court or until this suit is finalised.***
- (4) ***Any lawyer adversely mentioned in this matter is at liberty to apply to be enjoined in this suit.***
- (5) ***Counsels having the conduct of this case are at liberty to issue witness summons on any person who has had dealings, legal or otherwise with the suit property for the effective determination of this suit.***
- (6) ***Direction be taken in this matter and the case be fixed for hearing on priority basis.***
- (7) ***Costs be on the cause.***

It is so ordered.

DATED and delivered at Mombasa this 22nd Day of April 2013.

**S. MUKUNYA
JUDGE**

Non appearance for the plaintiff

Non appearance for the defendant

[1]

[2006] e. KLR

[2] Stamp Duty Act