



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 43 OF 2012

SAID SALIM OMAR.....PLAINTIFF

=VERSUS=

JAPHET ENOCK MRABU.....DEFENDANT

R U L I N G

1. What is before me is the Plaintiff's Application dated 6th November 2012 seeking for the following orders:.
 - a. **THAT pending hearing and final determination of this suit inter partes this Honourable Court be pleased to issue an injunction restraining the Defendant/Respondent herein whether by themselves, servants and/or agents from in any manner whatsoever dealing with or disposing or in any other way alienating plot numbers 374 and 375 situated at Kilifi.**
 - b. **THAT the costs of this application be provided for.**
2. The Application is supported by four grounds and the Affidavit of the Plaintiff/Applicant.
3. The Applicant has deponed that he bought plot number 374 and two other parcels of land measuring 50 by 100 feet of plot number 375 from Enock Japhet Mrabu, deceased, in 2007 and 2009.
4. The purchase price for the two parcels of land was Kshs.90,000 and 1,000,000 respectively, in which he paid Kshs.90,000 in full and Kshs.300,000 being part payment of the Kshs.1,000,000. He made a further payment of Kshs.11,000 being the transfer fees for plot number 375.
5. It is the Plaintiff's deposition that on 30th October 2009, Allan and Donald, the sons of the late Enock Japhet Mrabu wrote to the Plaintiff stating that they had no objection to the sale of the house by their father.
6. The Plaintiff has further sworn that subsequently, a meeting was held in which the late Mrabu's family members decided that the sale of one the plot that the Enock Mrabu sold to the Plaintiff should be nullified and that the Defendant is now renovating the house on the suit property which house does not belong to him.
7. The Respondent filed his Replying Affidavit on 6th June 2013 and deponed that although the Applicant entered into a written agreement with his late father for the sale of plot numbers 374 and 375, the said sale is null and void because the sale was done without family members being present.
8. The Respondent has further deponed that Allan and Donald had no right of giving authority of the sale of the suit property as they do not stay in the property and those who were to give authority for the sale are Japhet Enock Mrabu (the defendant), Rachael E. Mrabu, Gemina E. Mrabu and

Moses Enock Mrabu.

9. It is the Respondent's deposition that though his father sent a letter to the Applicant to bring somebody to fence the plot in dispute, he failed to do so because he was aware that the sale of the plot had been stopped by family members; that it was true that the chief had informed his father that he was free to carry on with the transaction but the family members refused and that the house and plot belongs to Mr. Bilali, their grandfather.
10. The Applicant finally deponed that the family members decided that the sale of the two plots should be nullified and the Applicant be refunded his money which he has refused to take.
11. The parties' advocates made their oral submissions on 13th June, 2013.
12. Mr. Odhiambo, counsel for the Applicant submitted that the Respondent has admitted that there was an agreement of sale between the Plaintiff and his father.
13. Counsel further submitted that although the chief had stopped the sale of the plots, he subsequently allowed the Respondent's late father to proceed with the sale and the family members were informed about the sale in a letter dated 17th December 2009 to seek court intervention, if they so wished, which they never did.
14. Mr. Japhet Enock Mrabu, the Respondent, submitted that their late father only sold part of plot number 375. He posed the question as to why a seller of land would want to be paid the purchase price in 16 installments, as in this case.
15. According to Mr. Mrabu, the transaction between the Plaintiff and their late father was cancelled by the family members because it was not being fulfilled; that the family agreed to refund the Plaintiff the money he had paid their father which he has refused to take and that before he could finish paying the installments agreed upon, he was eager to take over the plot.
16. The Respondent has not disputed the fact that his father entered into two sale agreements dated 23rd February 2007 and 10th November 2009.
17. In the agreement dated 23rd February 2007, the Respondent's late father sold part of plot number 375 to the plaintiff for Kshs.90,000 and the agreement was witnessed by four people.
18. The said agreement further stated that the size of the plot that was being sold was around 0.25 acres. The agreement has a sketch map showing plot number 375 as belonging to "Enock". According to the attached sketch plan, the said plot has been divided into two and one must be the one measuring 0.25 acres that the Respondent's father sold.
19. The Agreement of sale dated 10th November 2009 was for the sale of two parcels of land measuring approximately 50 x 100 feet each known as plot 375 for Kshs.1,000,000. The Plaintiff, according to the sale agreement, paid a deposit of Kshs.200,000 and the balance of Kshs.800,000 was to be paid by monthly installments.
20. The Plaintiff annexed on his supporting affidavit petty cash vouchers showing the payments that he subsequently made to the Plaintiff's late father totaling to kshs. 56,000. The Plaintiff also annexed a copy of a receipt from Kalolo Kibaoni Bagamagonzi upgrading project for Kshs.11,000 being the Transfer fees.
21. The Plaintiff also annexed on his supporting Affidavit a letter dated 30th October 2009 by Donald Mrabu and Allan Mrabu, the sons of the late Enock Japhet Mrabu allowing their father to sell "his present house". There is also a letter from the chief annexed on the Supporting Affidavit allowing the Respondent's father to sell the plot in dispute.
22. The Respondent annexed on his Replying Affidavit the letter by the chief dated 17th December, 2009 in which the chief informed the late Enock J. Mrabu to sell the plot in dispute and if the family members were aggrieved to go to court and seek redress.
23. There is no indication from the Respondent that they filed a suit in court stopping the sale of the plot(s) by their father upon being advised to do so by the area chief.
24. The Respondent has also annexed a copy of a Chamber Summons Application that was filed in Kilifi SRMCC No. 259 of 2010 by his late father. In the said Application, the late Enock Japhet Mrabu was seeking for injunctive orders against the Bilahi's. According to the annexed proceedings, the suit was marked as settled.
25. Dispositions in land are normally conducted in two stages. The first stage is the entering in contract for the sale of land and the second stage involves completion of the contract.
26. Section 3(3) of the Contract Act, Cap 23 clearly states that a memorandum of disposition in land must be in writing. That is what happened in this case.

27. The Respondent cannot at this stage, after the demise of his father challenge the contract of sale that the Plaintiff entered into with his late father. What the Respondent can, and should do is to enforce the two agreements upon obtaining the letters of administration by demanding for the full purchase price.
28. The Respondent has not shown that the said contract was entered into by fraud, misrepresentation, mistake, duress, collusion, or undue influence.
29. To the extent that there is a valid contract of sale in respect of the suit property between the Plaintiff and the Defendant's father, I find and hold that the Plaintiff has established a prima facie case with chances of success.
30. In the circumstances, and for the reasons I have given above, I allow the Plaintiff's Application dated 6th November, 2012 as prayed.

Dated and Delivered in Malindi this 25th day of **July**, 2013

O. A. Angote

Judge