



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 13 OF 2013

1. GULAM RASUL MIRDAT

2. KAMALKHAN HASSANRAZA NAWAZHAN.....PLAINTIFFS

=VERSUS=

1. ELISHA NASOR

2. JULIUS AYUBU

3. CHARITY MAKENA GITOBU.....DEFENDANTS

RULING

1. What is before me is the Plaintiffs' Application dated 29th January 2013 brought pursuant to the Provisions of Order 40 of the Civil Procedure Rules.
2. The Application is seeking for the following injunctive orders:
 - a. **THAT the 2nd Defendant by himself, his servants and/or agents or otherwise howsoever, be restrained by temporary injunction from trespassing upon and/or in any other manner whatsoever interfering with the Plaintiffs' use, possession and quiet enjoyment of that portion of Plot No. 7 Group V measuring 158 X 200 situated at Mnarani within Kilifi District pending the hearing and determination of this suit.**
 - b. **THAT costs of this application be borne by the defendants.**
3. According to the deposition by the 1st Plaintiff, Mohamed Hussein Adam, now deceased, entered into an agreement of sale of a portion number 7 Group V measuring 158 X 200 feet situated at Mnarani within Kilifi County with one Abdalla Seif for Kshs.100,000 which amount was duly paid.
4. It is the 1st Plaintiffs' deposition that he agreed with Mohamed Hussein Adam to occupy a portion of the suit property measuring 79 X 200 feet on the eastern side while the deceased was to occupy the western side; that after the death of Mohamed Hussein Adam, his wife and daughter sold his portion to the 2nd Defendant.
5. The 1st Plaintiff further deposed that in November 2001, one Said Khamis, the 1st Defendant's son trespassed on his land and he obtained an injunction order in Kilifi SRMCC No. 235 of 2011 against the said Said Khamisi. That suit is pending.
6. According to the 1st Plaintiff, the suit property was sold to unknown people and that the 2nd

- Defendant has in fact constructed a perimeter wall; that the 2nd Defendant purchased the suit property from the 1st Defendant who was aware of the pending case in Kilifi.
7. The 1st Plaintiff filed a Further Affidavit on 14th May 2013 which I have considered.
 8. According to the 1st Defendant, she was the lawful wife of the late Abdalla Seif and therefore the lawful beneficiary of the suit property; that the deceased signature on the Sale Agreement which the 1st Plaintiff is relying on is a forgery and that a wakf property cannot be transferred in absolute as claimed.
 9. The 1st Defendant finally deponed that she was not a party to the proceedings in the lower court in Kilifi.
 10. On his part, the 2nd Defendant deponed that he was informed that the 1st Defendant was selling the suit property; that he confirmed from the area chief that the suit property indeed belonged to the 1st Defendant and that he bought the suit property together with his aunt, Charity Makena Gitobu for Kshs.2,000,000.
 11. The parties agreed to dispose of the Application by way of written submissions. The Plaintiffs' advocate filed his submissions on 20th June 2013 while the 1st and 2nd Defendants' advocate filed their submissions on 17th July 2013 and 23rd July 2013 respectively. I have considered the submissions by the learned counsels.
 12. The principles for grant of an injunction are now well settled. The Plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt, it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
 13. It is also trite law that the principles on which a court of law grants an interlocutory injunction are predicated on the need to preserve the suit property and maintain status quo pending the final determination of the rights of the parties. However, as was held in the case of **Thompson VS Park (1944) 2 ALL E.R. 477, a litigant cannot unlawfully and illegally bring about a state of affairs and then apply to the court to preserve that state of affairs as the status quo.**
 14. The 1st Plaintiff has annexed on his Supporting Affidavit a Sale Agreement showing that he bought the suit property from one Abdalla Seif in 1992. The said Sale Agreement was witnessed by K. M. Karimbhai.
 15. The vendor's wife, on the other hand, has denied that his husband ever sold the suit property to the Plaintiff and that the signature which is on the Sale Agreement and purportedly belonging to her late husband is a forgery. The 1st Defendant has annexed documents on her affidavits showing that the sale agreement is subject to investigations by the police.
 16. The court cannot at this stage make a definitive finding on whether indeed the late Abdala Seif sold the suit property to the Plaintiff or not. That is an issue which can only be decided upon at full trial.
 17. The 1st Defendant has deponed that she is the beneficial owner of the suit property. It is not clear from the 1st Defendant's affidavit the capacity under which she purported to sale the suit property to the 2nd Defendant or at all. There is no evidence that the 1st Defendant complied with the provisions of the Law of Succession Act or any other law governing the inheritance of the deceased Estate.
 18. Although the 1st Defendant deponed that the suit property is a wakf hence incapable of being disposed of, the 1st Defendant has herself gone ahead to sale the property to the 2nd and 3rd Defendants.
 19. A wakf is a gift of land or property made by a Muslim, intended for religious, educational or charitable use.
 20. Indeed, a wakf can be terminated and dealt with like any other private property of an individual where the condition for termination has been fulfilled. In **Asila Mohamed Bin Ali VS Rukiya Binti Soud Bashir & 2 others (2012) e klr**, the court held as follows:

“According to Maliki school of thoughts, the termination of the wakf may be specified in its foundation declaration. As the wakf would expire wherever its termination conditions are fulfilled. The wakf property then returns to the founder,

his/her heirs or whosoever is to receive.

21. The 1st Defendant did not show by way of documentary evidence that the suit property was a wakf and that the same had not reverted back to her late husband before he sold it to the Plaintiff
22. It is clear from the circumstances of this case that there is a need to preserve the suit property and maintain its status quo pending the final determination of the Plaintiffs' rights viz-a-viz the Defendants'.
23. For the reasons I have given above, I allow the Plaintiffs' Application dated 29th January 2013 as prayed.

Dated and Delivered in Malindi this 20th day of **September, 2013**

O. A. Angote

Judge