



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL NO. 164 OF 2011

JEREMIAH MUSEMBI KIKUVI PLAINTIFF

VERSUS

ALI IBIDO YUSUFU

MOHAMED BUTE GALGAL

THE DISTRICT LAND REGISTRAR DEFENDANTS

R U L I N G

1. The plaintiff came to court under certificate of urgency on 17-10-11 seeking to restrain the 1st and 2nd defendants from inter alia, interfering, with intruding upon, trespassing onto, transferring or alienating the land parcel LR 452/LAMU within Lake Kenyatta Settlement Scheme (hereinafter the suit land).
2. The plaintiff lays claim to the suit land by virtue of the purported allotment thereof to himself in 2002, after a prior allotment made to the 1st defendant was allegedly cancelled. The 1st defendant was however subsequently issued with a title to the land, and, according to the plaintiff, has evinced intentions to sell the same to the 2nd defendant.
3. The 1st defendant asserts that he is the lawful owner holding an indefeasible title to the suit property, and denies that his allotment was ever cancelled. He also denies that he intends to sell the land to the 2nd defendant.
4. The above summary represents the material canvassed before me through affidavits, annexures and arguments of the parties, in respect of the applications herein.
5. Having carefully considered the material, I take the following view.
6. The 1st defendant holds a title to the suit land which 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 AND 3 OTHERS, CIVIL APPEAL NO. 71/97, DR. OGOK VS JUSTICE MOIYO OLE KEIWA CIVIL APPLICATION NO. 60 OF 1997**).
7. Apart from the allegations by the plaintiff, and denied by the 1st defendant that the initial allotment to the latter was cancelled, there is no evidence that the 1st defendant acquired title through fraud or misrepresentation.
8. As pointed out by the 1st defendant, the plaintiff himself did not take up his own offer annexed as JMK 1(b) until six months later, by which time the 90 day period set for acceptance had lapsed. He cannot therefore claim title on the basis of his late acceptance of the offer while at the same time asserting that 1st defendant's earlier offer has lapsed for non-acceptance, the alleged cancellation notice annexures JMK1(a) notwithstanding.

9. But more importantly, the 1st defendant appears to be in physical possession of the suit land. Regarding the 2nd defendant, there is no evidence that the 1st defendant has sold or intends to sell the suit land to him. It is therefore not clear whether the plaintiff has a cause of action against the 2nd defendant.

10. Applying the principles settled in **GIELLA VS CASSMAN BROWN & CO.** on the granting of temporary injunctions to the facts before me, I think that the plaintiff has not established a prima facie case with a probability of success.

11. Secondly, the subject matter of the suit is land whose value can be quantified and damages awarded for any loss the plaintiff might incur. Besides, the balance of convenience appears to lean in the 1st defendant's favour as he is in actual occupation.

12. For these reasons, I decline to grant the plaintiff's application which I now dismiss with costs to the 1st and 2nd defendants.

Delivered and dated in Malindi this **28th** day of **February 2012**.

Mr. Michira holding brief for Mr. Omwancha for plaintiff.

Defendants – No appearance.

Court clerk - Leah

C. W. Meoli

JUDGE