



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 19 of 2012

MOHAMED SHAFIQ RAFIQ.....PLAINTIFF/APPLICANT

VERSUS

AYUB KHAN KARIM.....DEFENDANT/RESPONDENT

RULING

The plaintiff filed this claim seeking two prayers. Firstly, that an injunction be issued restraining the defendant, his servants or agents from dealing with or transferring parcel number Kwale/Pungu Fuel Area/3, the suit property. Secondly the plaintiff seeks an order of revocation of title of the suit property registered in the defendant's name. The plaintiff filed an interlocutory application dated 8th February, 2012. By that application he seeks interlocutory injunction pending the determination of the suit in terms of the prayer as sought in the plaint. The court ordered, on 23rd February 2012, the parties to file written submissions to that application. When the matter came up for hearing, only the defendant had filed his submissions. On the day of hearing the plaintiff and his counsel failed to attend court. The application dated 8th February 2012 is supported by the plaintiff's affidavit whereby he deponed that he is the registered owner of the suit property by virtue of a power of attorney which however was not annexed to the affidavit. Further the plaintiff deponed that the defendant had vowed to use means of force to dispose off the suit property. He further deponed that the defendant had interchangeably used the names Ayub Khan Karim and other times Ayub Khan. The plaintiff was of the view that the defendant's use of those different names was for fraudulent reason.

The injunction application was opposed by the defendant. The defendant denied that the plaintiff is or had ever been the registered owner of the suit property. The defendant confirmed that he was the registered owner of that property, having purchased it for valuable consideration. To that end, he annexed a copy of the agreement of sale which showed that the estate of Abdul Hameed Moghul had sold that property to him. The agreement for sale was executed by administrator of that estate. The defendant deponed that he is the registered owner of that property and had been so registered from 30th September 2005 to date. That further since that date he had been in sole possession of it. The defendant stated that the plaintiff had never been in possession. In regard to his names, the defendant said that his names were Ayub Khan whilst the last name Karim was his father's name. He attached a copy of his birth certificate to prove the same. The defendant therefore concluded that the plaintiff had failed to show a prima facie case with probability of success.

The principles of granting an injunction are as set out in the case **GIELLA VS CASSMAN BROWN [1973] E.A 358**. Those principles are as follows:

- (i) ***That an applicant must show prima facie case with probability of success;***
- (ii) ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;***
- (ii) ***When the court is in doubt, it will decide the application on the balance of convenience.***

The plaintiff alleged without attaching proof that he is the owner of the suit property. In my view the plaintiff has failed to show a prima facie case with probability of success. Even the green card of the property, that the plaintiff attached to his affidavit, failed to reveal that the plaintiff had ever been the registered owner of the property. He alleged that the defendant obtained registration of the suit property in his name by use of fraudulent power of attorney but that allegation was successfully countered by the defendant when he annexed the agreement for sale of the property.

The plaintiff having failed to show a prima facie case with probability of success leads this court to find that the application dated 8th February 2012 is without merit. It is dismissed with costs to the defendant. The injunction issued on 9th February 2012 is hereby discharged.

RULING BY:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 17th day of May, 2012.

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JUDGE