



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 66 of 2012

NAFTALLY MURIITHI NJUKIPLAINTIFF

VERSUS

ABDIRAHMAN ABDILAHI

BEATRICE MULI

ROBERT MONG'ARE

ABDALLAH SAASI

MUTUA NZIOKA

THE DISTRICT LAND REGISTRAR, LAMU

HON. ATTORNEY GENERAL.....DEFENDANTS

R U L I N G

1. The Plaintiff/Applicant filed a Notice of Motion dated 7th May, 2012 supported by his affidavit dated 7th May, 2012. The application is brought under Order 40 Rules 1,2,3, and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and Sections 128, 129 and 130 of the Registered Land Act, Cap 300 Laws of Kenya. The Applicant seeks against the defendants a temporary injunction and an order of inhibition in respect of land Parcel No. LAMU/MAGOGONI/361 principally to restrain the 1st Defendant/Respondent from disposing of or dealing with the suit property pending the hearing and determination of the main suit.

2. The Application is predicated upon the grounds *inter alia*, that he is the lawful owner of the suit property and its title bearer and on the alleged discovery that it had been fraudulently transferred to the 1st Defendant/Respondent. That the 1st to the 5th Defendants/Respondents were involved in the that illegal transaction and in particular in coercing him to sign a document he did not understand and to give out his title deed. He further states that he has occupied the land since 1994 with his family and has planted seasonal and other crops that unless the orders are granted he is likely to suffer irreparable damage which cannot be compensated by an award of damages. Annexed to his affidavit is copy of title deed in his name, a deed of acknowledgment and certificate of official search (marked NFNI-3).

3. The Applicant subsequently filed further affidavits through Rose Wangu Muriithi, his wife and Syombua Mwikya their neighbour, both dated 25th July, 2012. These deponents have supported the depositions in the plaintiff's affidavit. The Applicant also filed a further affidavit erroneously referred to

as a Supplementary Affidavit dated 25th July, 2012. Annexed thereto is a copy of the List of Allotees in the title deeds HINDI MAGOGONI SETTLEMENT SCHEME, minutes of Land Control Board, and a letter to the Attorney General's office. He avers that he did not sign the application form to the Land Control Board and that the 3rd Respondent is a principal adjudication /settlement officer at the Ministry of Lands and Settlement. He also states that a fake or false title deed cannot be made good by transfer.

4. The 1st, 2nd and 3rd Respondents filed grounds of opposition and replying affidavits. The grounds include, that the Applicant lacks *locus standii* not being the owner of the suit property. That he has not come to court with clean hands and has concealed vital information. In the alternative, the title held by Applicant was obtained by fraud as no letter of offer or other relevant documents have been disclosed. That the suit is fatally defective.

5. The 1st Respondent's affidavit dated 5th June, 2012 avers that the Applicant voluntarily signed a Deed of Acknowledgment "NFN 2" and gave him the title deed at Alfred Omwancha's (Advocate) office, that he gave the Applicant Kshs. 150,000.00, as compensation and that he is in possession of the land. He filed a further supplementary replying affidavit dated 4th August, 2012, stating that the current market value of the material land portion now stands in the region of Kshs. 20 million, that he is in the business of buying and selling land that the appreciated value of the land explains why the plaintiff now claims the land. That he will incur a major loss if the injunction is granted.

6. The 2nd Respondent filed an replying affidavit dated 5th June, 2012. She states that she was involved in the material transactions on behalf of the 3rd Respondent, that the Deed of Acknowledgement was interpreted in Kiswahili language and all including the Plaintiff understood. That the Plaintiff was given khsh. 150,000.00, and parted with the original title deed and that he stated he understood he ought to vacate the land, which he did. That the Land Control Board consent was obtained. She also filed a supplementary replying affidavit dated 2nd August, 2012, stating that the 3rd Defendant was not in Lamu on the material dates, that the affidavits of Rose Wangu Muriithi, Syombua Mwikya are an afterthought, that the annexure marked as NMN-7 being minutes of the land consent board had a missing page and therefore incomplete.

7. The replying affidavit of the 3rd Respondent is dated 5th June, 2012. He avers that he was the owner of the suit property from the Ministry of Lands before he sold it to 1st Defendant in year 2010. That the 2nd Respondent was acting on his behalf, that the 1st, 2nd and 3rd Respondent did not perpetrate fraud. Annexed thereto is copy of letter of offer, charge document, bundle of development loan documents, minutes of the land consent board in respect of the suit property.

He filed a supplementary affidavit dated 2nd August, 2012. Therein, he states that the annexure marked as NMN-7 being minutes of the land consent board had a missing page, that he is aware that the letter dated 16/12/2009 in the Plaintiff's Supplementary affidavit was issued when the "irregular title" issued to the Plaintiff was being validated. He further stated that the said letter could not have been issued in 2006 as the Plaintiff was not the allottee of the suit land. He denies being in Lamu on the material dates.

8. The 4th to 7th Respondents have not filed any replying affidavit, grounds of opposition. However, Mr. Kiamba for the 4th and 5th Respondents was represented by and relied on the submissions made by Mr. Waihiga, Counsel for the 1st and 3rd Respondents. Written and oral submissions were made by the applicant and the 1st and 5th respondents therefore.

Whether the applicant has established a prima facie case with a probability of success.

9. The principles governing the grant of temporary injunctions were set out in Giella Vs. Cassman Brown & Co. Limited (1973) EA in which the court stated that the applicant must show a *prima facie* case with a probability of success, secondly, the Applicant must show that he will suffer irreparable damage that cannot be compensated by an award of damages and if the court is in doubt it ought to consider the balance of convenience.

10. The Kenyan jurisprudence on temporary injunctions borrows heavily from the decision in

America Cyanamid Co v Ethicon Ltd [1975] All ER 504 where the court held that the purpose of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages, if the uncertainty were resolved in his favour at trial. The law is clear that at the interlocutory stage, the court in determining probability of success ought to only to gauge the strength of the Applicant's case and not determine the main suit.

11. The Applicant claims he has occupied the suit land since 1994 together with his family and has grown subsistence and other crops. His annexure "NFN-1" is a title deed in his name. The Respondents have acknowledged this save to allege that it is a fraudulent title. The 1st Respondent has not claimed to be in possession of title documents, whilst the 3rd Defendant has claimed to have been the owner who had permitted the Applicant to remain on his land. Section 52 of the **Registered Land Act** provides that the rights of a proprietor shall not be liable to be defeated except as provided in the Act. (See **Municipal Council of Garissa V Aden Kehir Aden & 2 Others [2005] eKLR** where court held that prima facie the respondents were the registered owners based on the title in their name and section 27 and 28 of the Registered Land Act.) On the face of it no privity of contract exists between the Applicant and the 1st Respondent with regard of the sale of land to the 1st respondent. Besides, the circumstances in which the applicant "ceded" his title to the suit property to the 3rd respondent is riddled with serious controversy, which can only be resolved through a trial.

12. The Applicant's annexure NKN-5 is a letter dated 25th August, 2006 from the Ministry of Lands and Settlement to the Director of Land Adjudication and Settlement in regard to the Hindi Magogoni Settlement Scheme No. 487. The said annexure reflects the names of the fully paid allottees at the time. Page 8 shows that plot 361 the suit property herein was allotted to one Naftali M. Njuki and not to the 3rd Respondent. The Deed of Acknowledgement annexed as 1st Defendant's annexure "AA1" which the Applicant states he was coerced to execute, is not on the face of it a sale agreement capable of facilitating transfer of land.

13. The Respondents claim that the Applicant's title deed is a fraud, yet at the same time they state that they followed the due procedure in causing the transfer of the property to the 1st Respondent by the Applicant, including obtaining the requisite consent from the Land Control Board. It is trite law that if one does not have a good title they cannot pass a good title (**Margaret Wanjiku Kamau v John Njoroge & another [2005] eKLR**). Are the Respondents acquiescing to having a bad title?

14. The Respondents have further claimed that the Applicant is guilty of laches. The Applicant alleges that he made the discovery that his property had been transferred to the 1st respondent. He does not state when he made the discovery. The Respondents however challenge him as to his averment that he was coerced in year 2009 to give up his title and he did nothing about it until year 2012. The Applicant has stated that he did not understand the nature and import of the deed and of the demand by persons in authority of his title deed. I may have my reservations on that assertion but it will be tested at the trial. Be that as it may, in light of all the foregoing, I am satisfied in terms of the definition of a prima facie case in **Mrao Ltd vs First American Bank & Another** that the Applicant has established a prima facie case.

Whether or not the Applicant shall suffer irreparable damage that cannot be compensated by an award of damages

15. The Applicant claims he has been on the land since 1994 together with his family and has grown subsistence and other crops. He is, as aforementioned, the *prima facie* first registered owner of the suit property. The 1st Respondent's claim of the estimated value of the land remains unsupported as no valuation report is annexed. However, a monetary value may not easily or always balance squarely against the sentimental value attached to a home by its alleged owner.

16. The application is allowed with costs in terms of prayer 2 and 3 pending the determination of the suit.

Delivered signed and dated at Malindi this **23rd** day of **October, 2012** in the presence of Mr. Waihiga

for 1st, 2nd and 3rd respondent. Mr. Tindika for plaintiff/applicant – absent

Mr. Wasunna for 4th and 5th Respondent – absent

6th and 7th Respondent- absent

C. W. Meoli
JUDGE