



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 62 of 2010

IN THE MATTER OF: PLOT NO. 246 SECTION II MN(TITLE NO. C.R. 2012)

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE APPLICANTS
HAVE OBTAINED OWNERSHIP OF FIVE DECIMAL FOUR EIGHT (5.48) HECTARES OF
THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

MATANO KITSAO & 24 OTHS ..PLAINTIFF/APPLICANTS

V E R S U S

1. ALI MOHAMED ALI
2. ZAINABU MOHAMED ALI
3. AHMED MOHAMED ALI
4. ABDULLATIF MOHAMED ALI
5. SHUIKHA MOHAMED ALI
6. RUKIA MOHAMED ALI
7. BASHIR SHUKRI SALAH
8. MOHAMED KHALIF GODANA
9. AHMED H.MOHAMED.DEFENDANTS/RESPONDENTS

RULING

1) This Court is asked to determine the application dated 7th March 2012 in terms of prayer 5 therein which seeks that-

“5. That the Honourable Court do issue a temporary injunction restraining AHMED HABIB MOHAMED, his agents, servants, employees by himself or any other person acting through him from transferring, dealing, constructing, continuing, constructing, meddling or in any manner whatsoever in wasting the parcel of land known as PLOT NO. 246 SEC II MN, until the hearing and final determination of the Originating Summons filed herein.”

Plot No. 246 Sec II MN is hereinafter referred to as **“the property”**.

2) The Plaintiffs commenced these Originating Summons on 9th March 2010. At that time there were 6 Defendants (the 1st – 6th Defendants). On 19th July 2010 this Court granted leave to the Plaintiffs to serve the 6 Defendants by way of substituted service. The Plaintiffs Counsel told Court that the Originating Summons was advertised on 29th July 2010.

3) On 12th August 2010 the six (6) Defendants entered appearance through the firm of Nabhan Swaleh Advocate and in an affidavit sworn by the 1st Defendant, the Defendants informed Court that they were no longer the registered owners of the suit premises. Attached to the application was a copy of the Certificate of Ownership showing that the land had been transferred to **Bashir Shukri Salah** and **Mohamed Khalif Godana**.

4) In reaction to this development the Plaintiffs filed an application dated 1st December 2010 seeking to enjoin the new owners. Leave was granted by Ojwang, J (as he then was) on 7th February 2011. The two were joined as the 7th and 8th Defendants respectively. It later turned out that the two had sold the property to **Ahmed Habib Mohamed**. This called for further joinder. The Plaintiffs were granted leave on 7th March 2012 to join Ahmed Habib Mohamed as the 9th Defendant. The orders sought in the application before Court are directed against this 9th Defendant.

5) When the 9th Defendant responded to the application through an affidavit sworn on 22nd June 2012 he revealed to the Court that he had subdivided the property and sold the sub plots to other parties. He annexed a copy of the Title in support of this. There were now 27 or so sub plots with various owners. The Plaintiffs may need to enjoin these new owners and they have indeed filed the necessary application. That application dated 29th June 2012 is yet to be heard. I shall come back to this later.

6) In the course of arguing the application Counsel for the Plaintiff made much about how quickly the property had changed hands since the commencement of these proceedings. He thought that there was a fraudulent scheme to put the property beyond the reach of Plaintiffs. Counsel pointed out entry No. 6 in the Certificate of Ownership to the property as proof of this. Counsel asked the Court to compare this entry on the copy of the Certificate of Title displayed on the affidavit of the 1st Defendant sworn on 1st September 2010 and a Certified true copy he obtained from the lands office on 13th June 2012.

7) This Court was told to note that in the copy of the Title the consideration paid was omitted while that was shown in the certified extract from lands office. I overruled an attempt by Counsel for the Defendants to introduce, midstream in the arguments, an affidavit by Renson Igonga, The Land Registrar to explain this apparent difference. I did so because I thought the clarification to be wholly unnecessary for purposes of determining the application before Court. I promised to give my reasons in this Ruling. I shall start with that.

8) A copy of the Title with Entry No. 6 was first introduced into these proceedings vide the affidavit sworn by the 1st Defendant on 1st September 2010. Entry No. 6 is the transfer dated 24th April 2010 from the 1st – 6th Defendants to the 7th and 8th Defendants. At that time, no issue of its irregularity was raised by the Plaintiffs. The Plaintiffs did not seek to impeach it on account of fraud or irregularity. Infact it was on the basis of the revelation of the transfer that the Plaintiffs enjoined the 7th and 8th Defendants. And when doing so no allegations of fraud or irregularity were made against the 7th and 8th Defendants in respect to the entry. In paragraph 6 of the affidavit in support of the application for joinder Counsel for the Plaintiffs stated-

“6. That having filed and served the suit herein, in a surprising and shocking turn of events, we learnt that the Defendants/Respondents secretly and in a bid to defeat the cause of justice, transferred the property to one BASHAIR SHUKRI SALAJ and MOHAMED KHALIF GODANA which transfer was duly registered by the Land Registrar on 24th September 2010. Annexed hereto and marked “STA-1” is a copy of the Certificate of Ownership No. 3209”

The Plaintiffs raised a concern of secrecy and speed of the transaction but not of fraud or irregularity.

9) Then there are the affidavits of the 2nd Plaintiff sworn on 7th March 2012 (in support of the application before Court) and the affidavit of the Plaintiffs Counsel sworn on 15th June 2012. In neither of the affidavits is the issue of an irregular or fraudulent insertion of the consideration raised. The allegation

taken up by the Plaintiffs at the time of arguments is an allegation that a forgery has been committed. That allegation was raised from the bar and not in the affidavit evidence presented. The allegation is of a serious nature as it is an allegation that a crime has been committed. It is my view that by failing to raise this matter in the affidavits, the Plaintiffs did not give the Defendants a fair chance to respond to it. For this reason I did not and do not consider the allegation of forgery as properly raised.

10) As I turn to determine the application it needs to be pointed out from the start that the injunction sought is directed at the 9th Defendant who has since subdivided the property and transferred the resultant subplots to other persons. It would seem obvious that a prohibitory order would be futile because the 9th Defendant is no longer the owner of the property and that it has in fact ceased to exist. That notwithstanding the Plaintiffs Counsel asked this Court to use its inherent jurisdiction to stop further transfers. Counsel also sought to rely on the Doctrine of **lis pendens**.

11) The Transfers that have concerned the Plaintiffs can be placed in three sets. The Transfer from the 1st – 6th Defendants to the 7th and 8th Defendants. The Transfer from the 7th and 8th Defendants to the 9th Defendant. Lastly the subdivision and subsequent transfers from the 9th Defendant to various third parties. Let us examine these transfers.

13) The first transfer happened on 24th April 2010. Although this suit had been filed the Defendants had not been served with the Summons. Summons was served on them by advertisement on 29th July 2010. This would be about 90 days after the transfer. It may be difficult to criticize this transfer unless the Plaintiffs show that the 1st – 6th Defendants somehow had knowledge of these proceedings even though they had not been served.

14) The second transfer is somewhat curious. From the 8th Defendant's own documents the transfer from the 7th and 8th Defendants to the 9th Defendant was prepared by the firm of Nabhan Swaleh Advocate on 13th August 2010. This was done exactly one day after the said firm had entered appearance herein on behalf of the 1st – 6th Defendants. There was a commonality of advocates between the firm acting for the Defendants in these proceedings and those acting in the transaction between the 7th, 8th and 9th Defendants and it needs to be explained whether in fact the 7th, 8th and 9th Defendants were not aware of these proceedings when they contracted on 13th August 2010 and subsequently had the transfer effected ten days later (on 23rd August 2010).

15) The matter gets a little more complicated because the property was subsequently subdivided and new titles issued to other people. These persons have not been joined to this suit and although the Plaintiffs have filed an application dated 29th June 2012 for their joinder they are yet to prosecute it.

16) It was the view of the Plaintiffs Counsel that all these transfers were done contrary to Section 52 of The Transfer of Property Act 1982 (now repealed) and would be caught up by the doctrine of *lis pendens*. Section 52 provides-

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

If the doctrine was available, then it would assist the Plaintiffs as all the transfers would be caught up by the doctrine and they would be subject to the outcome of these proceedings.

17) But this may not be so because that doctrine only bars a person or persons who are party to a suit or proceedings from transferring or otherwise dealing with the suit property. The 1st to 6th Defendants

transferred the property to 7th and 8th Defendants on 24th April 2010 which was about 90 days before they were served with summons herein. They cannot be said to be parties before they had been served. Similarly the second transfer by the 7th and 8th Defendants was on 13th August 2010 which was 6 months before the 7th and 8th Defendants were joined into these proceedings. Then the subdivision was done and resultant Titles registered on 9th February 2012 by the 9th Defendant. Henceforth Title to the property ceased to exist. At the date of registration of the subdivision the 9th Defendant was yet to be joined to the suit. He was enjoined vide leave granted on 7th March 2012.

18) Quite clearly then the doctrine of les pendens does not protect the Plaintiffs as the transfers at each stage were effected before the transferors had been party to the proceedings. Where does that leave them? Their claim is founded on adverse possession. It is a claim that survives all transfers (including the subdivisions) as long as the possession of Plaintiffs is not disrupted. So, although the multiplicity of transfers means that the Plaintiffs must continue to enjoin new transferees (and this undoubtedly is vexing) their claim cannot be defeated merely by change of ownership. This would be a consolation to the Plaintiffs.

19) The prayers as sought by the Plaintiffs are not efficacious as the owners of the subplots are not party to these proceedings. I am reluctant to give any orders that would affect them as the Plaintiffs were aware of these as early as 29th June 2012 when they filed an application for their joinder. They chose not to prosecute that application and instead engaged their energy on the application against the 9th Defendant. The Plaintiffs must now suffer the consequences of barking up the wrong tree. The application of 7th March 2012 is declined with costs. The Plaintiffs should, if advised, expeditiously prosecute the application for joinder of the new parties.

Dated and delivered at Mombasa this 26th day of November, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Ambwere for Plaintiffs

**Mbito for Swaleh for Defendants
Court clerk - Moriasi**

**F. TUIYOTT
JUDGE**