

REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 12 of 2012

ABDULGAFUR ABDULGANI PASTAPLAINTIFF

VERSUS

HARRISSON MWARUMBA MBUIRESPONDENT

RULING

1. The Plaintiff/Applicant filed under certificate of urgency a Notice of Motion dated 1st February, 2012 supported his Further affidavit. The Plaintiff seeks temporary injunctive orders against the firm of Defendant, seeking to restrain the Defendant/his servants/agents and any persons from entering into, alienating or interfering with the Plaintiff's quiet possession of the subject property Plot No. 722 Takaungu. On grounds that he had purchased the property from the Defendant, that the Defendant intends to re-posses the property and will interfere with his quiet possession, that the plaintiff shall suffer irreparable damage as the suit is prime land. In his supporting affidavit he depones that he purchased the subject property from the Defendant who then donated to him a power of attorney as witness and has been in possession for 16 years, that a third party has claimed ownership and has threatened his workers whilst wielding a gun; a report of which he made to the police.

2. The Respondent filed a replying affidavit dated 16th February, 2012 and a further affidavit dated 11th July, 2012. He admits there was a sale of land agreement, but avers that the chief land registrar declined to register the name of the Defendant as the owner despite the outcome of **Mombasa HCCC 60 of 1994**, that the registrar declined doing so as there was another matter **Mombasa Misc. Appl, No., 134 of 1991** touching on the same property. The Defendant states that the matter is ongoing. He further avers that the Plaintiff's counsel should recuse himself and cease acting for the plaintiff as he also acted for him in **Mombasa HCCC 60 of 1994 touching** on the same property and hence fears he will be greatly prejudiced. He further states as adjudication is still ongoing, the special power of attorney is inconsequential as the title is non existent. He cites the existence of injunctive orders in **Mombasa Misc. Appl, No., 134 of 1991**. That he has revoked the special power of attorney and informed the Chief Land Registrar. That the Plaintiff did not give the mandatory notice to the Land Adjudication Officer before filing of the suit.

3. Trite law governing interlocutory injunctions was settled in the landmark case of Giella Vs. Cassman Brown & Co. Limited (1973) EA 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 court is in doubt it ought to decide on a balance of convenience. see, EA Industries v Trufoods [1972] EA 420

4. Is there a *prima facie* case? It is apparent that the intention of the parties, *a fortiori*, was to enter into and complete a land transaction over the subject property. The Defendant even donated to the Plaintiff a special irrevocable power of attorney to facilitate the same.

5. The sale agreement was entered into in the year 1994, the irrevocable power of attorney executed in the same year and registered. Case number **Mombasa Misc. Appl, No., 134 of 1991** was ongoing as at the time of entering the sale agreement and it was challenging the adjudication process as per annexure 'AAp 5'. It is however not demonstrated whether it is still pending or what its outcome is. The Defendant therefore may not raise it as a basis to rescind the contract.

6. The Defendant has revoked the power of attorney citing frustration of contract.. The

revocation document indicates that the revocation “*is due to the fact that the purpose for which the power was donated to donee is incapable of being enforced since the court order in Mombasa H.C.C.C No. 60 of 1994 could not afford registration of the said parcel of land in my own names.*” It however does not indicate the attempts by the Defendant to cause Mombasa H.C.C.C No. 60 of 1994 or any other recourse taken in order for the contract to have effect.

7. Can an irrevocable power of attorney be revoked by the donor? The property in issue is one registered under the Registered Land Act cap 300, repealed by act no. 3 of 2012. **Section 116 (3)** thereof provided that, “**The donor of a power of attorney registered under this section may at any time give notice to the Registrar in the prescribed form that the power has been revoked, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney.**” However in subsection (5) it provides, “**Subsections (3) and (4) do not apply to a power of attorney given for valuable consideration during any time during which it is, by virtue of the terms thereof, irrevocable.**” The applicant claims that the balance of the consideration was paid see annexures 'IAP 2 & 3'. The sale agreement indicates that the Defendant also received and acknowledged at its execution of payment of some monies. It goes without saying that there was valuable consideration, further, the power of attorney annexed as 'AAP 2' has no time limitation.

8. Some of the express terms of the power of attorney include, *inter alia*, (a) *To sign ,seal and deliver all necessary documents for survey, transfer ,subdivision,register.....to ABUDULGAFFUR ABDULGANI PASTA as the purchaser (Owner/Allotee) of the said parcel of land or nominee or assigns as he may chose or deem fit to do. It is evident that the donor intended to allow the donee to follow up on the registration of the parcel of land in the donee's name. The Defendant's averment that the completion date of 30th April, 1994 is on the face of it not supported by the contract that does not show that time was of essence. The sentiments of the chief registrar on the issue of registering of the Defendant's name or his nominee as the owner of the property are expressed in a letter dated year 1994. It is therefore surprising that the Defendant now wants to 'do the prudent thing' i.e to refund the monies received yet he has not demonstrated his attempts to cause the fulfillment of the transaction since 1994. Why did the Defendant not respond then or within a reasonable time thereafter? Why the change of heart by the Defendant after so many years? It is manifest that the Defendant has pulled/ is pulling away from the obligations of the contract citing frustration of the contract .The Plaintiff on the other hand has not claimed that the contract is so frustrated that it is beyond completion nor has he made a move to rescind it. He is still in possession of the suit property.*

9. Annexure **IMP 2** is a sale agreement dated **30th March, 2010** indicating that the Defendant had offered to sell the property to a third party though the Defendant has averred in the replying affidavit that the property title had become none existent due to the adjudication process. Why then did he not involve the Plaintiff in this transaction? The annexure **HMM 8**, the revocation, bears stamp duty dated **6.4.10** which is indicative of the fact that the Defendant had intentions to dispose off the property despite the fact that the power of attorney in favor of the plaintiff was still subsisting.

10. Who of the two parties would be prejudiced by the revocation ? The Plaintiff has averred that for the past 16 years he has been in possession of the property which the Defendant denies, further the property is prime land. One express term of the power of attorney was “ *(b) To occupy the said land as he may deem fit*”.It is apparent that the Plaintiff would stand to be prejudiced. The Plaintiff has demonstrated a *prima facie* case with a likelihood of success.

11. In the case of **America Cyanamid Co v Ethicon Ltd[1975] All ER 504** the court held that the purpose of interlocutory injunctions 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 eventually resolved in his favour at trial. Kenyan courts have borrowed from the English jurisprudence on this score. The question that now remains whether plaintiff's loss would be beyond damages? The Plaintiff has been in possession of the property in issue for about 16 years and in possession of an irrevocable power of attorney for the same number of years. This cannot be adequately quantified or compensated by damages. The court of appeal has before held that the “**The purpose of an injunction is to conserve or preserve**

the subject property pending determination of a suit concerning the property.” as held in **George Orango Orago Vs George Liewa Jagalo & 3 Others [2010] eKLR**. Hence failing to grant the interlocutory injunction will greatly prejudice the applicant and on a balance of probabilities the same swings to favour the Applicant. The application is granted with costs.

12. On the issue of representation by counsel, this does not affect the Plaintiff's prayers for injunction and the Defendant is at liberty to bring an appropriate application supported by affidavit before court.

Delivered and signed at Malindi on this **7th** day of **November, 2012** in the presence of: Mr. Bosire holding brief for Mr. Obara for the applicant.

Court clerk – Evans

C. W. Meoli

JUDGE