



**Salimu v Kamau & another (Environment & Land Case
E82 of 2021) [2022] KEELC 3626 (KLR) (8 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E82 OF 2021**

**MAO ODENY, J
AUGUST 8, 2022**

BETWEEN

OMAR SEIF SALIMU PLAINTIFF

AND

BARCLAYS BANK OF KENYA LIMITED 1ST DEFENDANT

JOHN MAINA KAMAU 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 24th September, 2021 by the Plaintiff/Applicant seeking the following orders: -
 1. That the Honourable Court be pleased to reinstitute the Plaintiff, the Legal Administrator to the estate of Seif Salim Athman (deceased) by virtue of Chief Magistrate Succession Cause No. 17 of 2020 Malindi where Letters of administration, Grant dated 30th July, 2020 and a Certificate of Confirmation of Grant dated 11th day of May, 2021 were issued in regard to the suit property parcel no. Kilifi/ Jimba/217 approximately 5.6 Ha.
 2. That this Honourable Court do issue an Order compelling the Kilifi Land Registrar to nullify the current title deed registered at Kilifi Lands Registry Entry No. 3.22.12.97 in the names of the 1st Defendant and the same be registered in the name of the Plaintiff who acquired ownership through Chief Magistrate Succession Cause No. 17 of 2020 Malindi where letters of administration, Grant dated 30th July, 2020 and Certificate of Confirmation of Grant dated 11th day of May, 2021 were issued to him.
 3. An Order compelling the 2nd Defendant to discharge the suit property unconditionally to the interest of the Plaintiff and that the 1st Defendant to find alternative ways of settling his loan arrears with the 2nd Defendant other than the suit property.



4. That this Honourable Court be pleased to order service of this application by way of advertisement on local newspapers at first instance.
5. That the costs of this Application be in the cause.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Plaintiff/applicant's Case

2. The application was supported by the grounds on the face of the application and the supporting of Omar Seif Salimu sworn on the 24th September, 2021. He deponed that he was the legal administrator to the Estate of Seif Salim Athman (deceased) having obtained letters of administration vide Chief Magistrate Succession No. 17 of 2020 Malindi through a Grant dated 30th July, 2020 and a Certificate for Confirmation dated 11th May, 2021. That the 1st Defendant illegally acquired and processed the title deed to the suit property on 22nd December, 1997 and that he is in possession of the original Title Deed registered in the name of Seif Salim Athman.
3. He also deposed that he was unable to transfer the same to his names due to the existing entry at Kilifi Land Registry and that the 1st Defendant illegally secured a loan of Kshs 500,000/ from the 2nd Defendant without their consent.
4. Further that the dispute between the 1st Defendant and the Plaintiff was before the National Land Commission and was primarily resolved through a Gazette Notice No. 21 dated 15th February, 2019 and that he has been living on the suit property at all material times.

Defendant/respondent's Case.

5. The 2nd Defendant opposed the application through a Replying Affidavit sworn by Michael Massawa on the 9th December, 2021 where he averred that the 1st Defendant applied to the Bank for a facility to be secured by the subject property Kilifi/ Jimba/217 and the 2nd Defendant perfected the said security. That the 2nd Defendant obtained the transfer document from the Lands office to confirm ownership of the subject property and established the entry in favour of the 1st Defendant. He further averred that the 2nd Defendant's counsel together with the 1st Defendant proceeded to apply for Land Control Board consent for purposes of charging the subject property and the same was dated 23rd April, 1998.
6. He also deposed that the 2nd Defendant then ensured the duly signed charge against the subject property was registered at the Kilifi Lands office on 23rd July, 1998 after payment of the requisite stamp duty thus creating a perfect security for the 2nd Defendant for the facility applied by the 1st Defendant.
7. He further deponed that the Deceased Seif Salim Athman died on 8th August 2002 as per the grant of letters of administration intestate issued on 30th July, 2020 nearly two (2) years after he had signed the transfer of land in favour of the 1st Defendant and that the property had been transferred to the 1st Defendant on 22nd December, 1998 and charged to the 2nd Defendant vide charged registered on 23rd July, 1998.
8. Further that at the time the deceased Seif Salim Athman transferred the said property to the 1st Defendant, he had legal capacity to do so being the sole registered beneficial owner to the subject property and as such the Bank acquired good security from the 1st Defendant.



Plaintiff's/ Applicant's Submission.

9. Counsel submitted that mere possession of certificate of title does not imply that the same cannot be challenged and relied on the cases of *Republic -vs- Minister for Transport & Communication & 5others Ex Parte Waa Ship Garbage Collector & 15 others* Mombasa HCMCA No. 617 of 2003 (2006) 1 KLR which was cited with approval in *Kenya National Highway Authority vs Shalein Masood Mughal & 5 Others* (2017) eKLR.
10. Counsel further relied on the case of *Alberta Mae Gacci -vs- Attorney General & 4others* (2006) eKLR and submitted that the 1st Defendant's right to the suit property cannot be upheld pursuant to Article 40(6) of *the Constitution* which stipulates that the rights to property do not extend to any property that has been found to have been unlawfully acquired and to uphold such titles.
11. Further, that Section 26 of the *Land Registration Act* provides that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally, illegally or through corrupt practices.

Counsel urged the court to allow the application as prayed.

2nd Defendant's Submissions.

12. Counsel filed submissions and identified the following issues for determination.
 - a. Whether the application is competent,
 - b. Grant of letters of Administration intestate issued after deceased had signed the transfer of land in favour of the 1st Defendant,
 - c. Who owns the valid and genuine title and who should bear the costs of the application.
13. Ms. Kaguri submitted that the application is incompetent since the orders sought therein are orders in finality and the application was not accompanied by a Plaint. And relied on the case of *Oksana Investment Supplies Ltd vs Alice Wanjiru Wamwea* (2019) eKLR where the court held that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.
14. On the second issue counsel submitted that the Deceased Seif Salim Athman died on 8th August, 2002 as per the grant of letters of Administration intestate issued on 30th July, 2020 two years after he had signed the transfer of land in favour of the 1st Defendant and therefore the applicant is estopped by law from laying claim over the suit property as the suit property had already been transferred to the 1st Defendant on 22nd December, 1998. Further that the Applicant has not pleaded fraud. Counsel urged the court to dismiss the application with costs.

Analysis And Determination.

15. This is an application that seeks final substantive orders which if granted the court will be left with nothing to adjudicate upon in the hearing of the suit. The application together with the submissions by counsel for the Applicant are in respect of the final orders which is supposed to determine ownership rights at an interlocutory stage.



16. In the case of *Ashok Kumar Bajpai V Dr. (Smt) Ranjama Baipai*, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:

... It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party”.

17. Further in the case of *Olive Mwibaki Mugenda & Another V Okiya Omtata Okiiti & 4 Others* [2016] eKLR the court held that:

Applying the decisions of this Court in *Vivo Energy Kenya Limited -V- Maloba Petrol Station Limited & 3 Others* (2015) eKLR and *Stephen Kipkebut t/a Riverside Lodge and Rooms -V- Naftali Ogola* (2009) eKLR it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the prayers in the Petition dated 21st October 2015. The Ruling of 18th December 2015 effectively granted final prayers in paragraph 62 (c), (d), (f), (g), (h) and (j) of the petition”

18. In this case there are no special circumstances that warrant the court to grant the orders sought at the interlocutory stage. The orders sought can only be granted after the cases has been heard and evidence tendered. I will not therefore belabor much on issues of ownership at this stage.

I find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF AUGUST, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

