



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 218 OF 2004

ATHMAN JUMA MWAKUANDIKAPLAINTIFF

VERSUS

MARTHA WANGUI MURIITHI.....1ST DEFENDANT

ELIJAH WAICHANGURU MURIITHI 2ND DEFENDANT

R U L I N G

By a plaint dated 20th September 2004, Athman Juma Mwakuandika the plaintiff herein, sued Martha Wangui Mureithi and Elijah Waichanguru Muriithi, the 1st and 2nd defendants herein, in which he claimed for judgment jointly and severally against the defendants as follows:

- (a) An order of declaration that title No. Kwale/Galu Kinondo/51 belongs to the plaintiff.
- (b) An order cancelling and revoking the title deed issued to the defendants over title No. Kwale/Galu Kinondo/51.
- (c) The Land Registrar Kwale be compelled to issue a title document in respect of Kwale/Galu Kinondo/51 to the plaintiff.
- (d) Costs plus interest of the suit.

It would appear from the record that the defendants each filed a memorandum of appearance on 1st October 2004. The ones on record appear to be undated though duly signed.

The record further shows that the parties compromised the suit in favour of the plaintiff in terms of the plaint in a written consent order duly executed by the parties dated 4th October 2004 and filed in court on

6th October 2004. The record further shows that the Deputy Registrar adopted the order as the order of this court on 6th October 2004.

The defendants have denied having participated in settling the suit by compromise as alleged. They have now come to this court seeking for various orders in exercise of its inherent jurisdiction expressed under Section 3A of the Civil Procedure Act. The subject matter of this ruling is the Notice of Motion brought under Section 34 of the Civil Procedure Act, Order L rule 1 and Order XLIV rule 1 of the Civil Procedure Rules. In this motion the defendants seek for:

(a) A temporary order of injunction to restrain the plaintiff by

himself, his agents and or agents from selling, transferring, leasing, charging, alienating or from in any way whatsoever dealing in the property comprised in title No. Kwale/Galu Kinondo/51.

(b) An order striking out the memorandum of appearance filed

on 1/10/04 and consequently the consent dated 4/10/04, filed in court and on 06.10.2004 and issued by the court on 15.10.2004 be set aside and the defendant be allowed to enter appearance and file their respective defences and the suit be heard on merit.

(c) In the alternative the order issued herein on 15.10.2004 be reviewed and set aside.

When this motion came up for hearing, the defendants' advocate reserved the remaining grounds for determination at substantive hearing of the matter. The motion is supported by the affidavit of Elijah Waichanguru Muriithi sworn on 12th October 2005. It is the submission of the defendants that they were never served with the summons to enter appearance hence the memorandum filed therein were forgeries. The defendants aver that in the month of May 2005 they discovered that the register in respect of Kwale/Galu Kinondo/51 had been altered in that title had been issued to the plaintiff in their place upon a consent order allegedly signed by the parties to this dispute. That is when they came to this court and found out what happened as earlier explained. For the above reasons the defendants urged for issuance of the aforesaid temporary orders pending the hearing of the suit.

The plaintiff resisted the application by relying on a replying affidavit he swore and the grounds of opposition. The plaintiff claimed that there is a pending criminal investigation over the contentious memorandums of appearance and the consequent consent. He claimed that he no longer has interest over L.R. No.Kwale/Galu Kinondo/51 because he had transferred the proprietary interest to Yvonne Muinde and Mark Muinde. The plaintiff is of the view that the application has been overtaken by events.

My understanding of the dispute expressed in the motion is that the defendants heavily rely on two grounds namely:

(a) That they were not served with summons to enter appearance.

(b) That the consent order dated 4/10/2005 comprising the suit is a forgery.

On the other hand the plaintiff has urged this court to dismiss the motion because the same has been overtaken by events and on the further ground that the allegation of forgery is pending investigations.

I have carefully considered these rival submissions. Let me clearly state that the fact that there are criminal investigations going on in respect of the complaint relating to the forging of the memorandum of appearance and the consent order is bar to this court making a finding on the issue on a balance of probabilities. It is not alleged that there is a pending civil or Criminal case so that the principle of sub-judice may apply. In view of that, I now venture to consider the dispute. It has been claimed that the summonses to enter appearance were not served upon the defendants. The plaintiff did not deny nor rebut this allegation by filing an affidavit of service from a process server or from the person who served the summonses and the plaint. My conclusion is that the plaintiff's silence over the allegation means that the plaintiff admits that the defendants were not served with the summonses to enter appearance. In the absence of any proof that service of summonses were effected upon the defendants then there is no way the defendants could have entered appearance by filing memorandums of appearance. The only inference this court can make is that the memorandum of appearance filed herein on 10th October 2004 and the consent order of 4/10/2004 were forgeries which cannot be used to confer any legal rights. Consequently I am satisfied that there was no genuine memorandums of appearance nor consent orders. In exercise of my inherent power I strike out the memorandums of appearance allegedly filed by the defendants on 1/10/2004. The consent order dated 4/10/2004 and adopted on 6/10/04 is set aside *ex debito justitiae*.

The plaintiff has raised a valid point that he has parted proprietary interest over L.R. No.Kwale/Galu Kinondo/51. It is evident from the annexures annexed to the replying affidavit of Athuman Juma Mwakuandika sworn on 16th November 2005 that as of 12th October 2005, the aforesaid title was registered in the names of Yvonne Muinde and Mark Muinde. These people are not party to this suit. I agree that the order for injunction as prayed in paragraph 3 of the motion will serve no useful purpose because whatever it was intended to safeguard has already taken place. In other words the plaintiff has already transferred the proprietary interest over the suit land to third parties. As to whether or not these third parties were innocent purchasers for value is a matter which remains unsettled at the moment. However, in the circumstances of this case this court cannot just sit and say that because proprietary ownership has passed from the plaintiff to third parties who may be complicit with forgery there is nothing it can do. This court must use its inherent power to do justice as required by law. The real questions in dispute cannot be determined without involving Yvonne Muinde and Mark Muinde. In exercise of my discretion under Order I rule 10 of the Civil Procedure Rules and my inherent power under section 3A of the Civil Procedure Act and direct the defendant to have the names of Yvonne Muinde and Mark Muinde included as third parties. Consequently the pleadings have to be amended to include the aforesaid parties. In order to maintain the status quo for purposes of preserving the suit property I direct that a prohibitory order do issue to prohibit the Land Registrar from effecting any transfer or any interference with title No. Kwale/Galu Kinondo/51 pending the hearing and determination of this suit. For the avoidance of doubt, the aforesaid title No. Kwale/Galu Kinondo/51 should remain in the names of Yvonne Muinde and Mark Muinde pending the hearing and determination of this suit.

Costs of the motion is given to the defendants.

Dated and delivered at Mombasa this 19th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Odera h/b Buti for the Defendant and N/A for the plaintiff.