

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 44 of 2006

ROBERT WAMITHIPLAINTIFF

VERSUS

JUMA MASUDI OMARIRESPONDENT

R U L I N G

The basis of this ruling is a chamber Summons filed pursuant to order XXXIX rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 159 of the Registered Act. In the summons, Robert Wamithi, the plaintiff/applicant herein, is seeking for an order of injunction restraining Juma Masudi Omari (defendant) from selling, mortgaging, transferring, leasing disposing of, entering upon or interfering in any way with the suit premises known as Kwale/Galu Kinondo/465 pending the hearing and determination of this suit. The defendant filed a notice of preliminary objection to resist the application. The application is supported by the affidavit of Robert Wamithi sworn on 16th March 2006.

In the plaint the plaintiff seeks for three main prayers namely :

- (a) *An order of declaration that the title in possession of the defendant is null and void hence does not confer any legal rights to the defendant.*
- (b) *An order directing the Land Registrar Kwale to cancel entries No. 8 and 9 in the register in respect of the suit premises.*
- (c) *A prohibitory order of injunction as in the summons. It is the averment of the plaintiff that the defendant colluded with the Land Registrar, Kwale and the Resident Magistrate, Kwale to have the aforesaid title fraudulently revoked and registered in the name of the defendant.*

The principles of granting or refusing the orders of injunction are well settled namely:

- (i) that an applicant must show a prima facie case with a probability of success. On this ground, the applicant has argued he will be able to prove that the Land Disputes Tribunal had no jurisdiction to issue orders canceling title. The applicant has also annexed to his affidavit a copy of the title deed over the suit property to establish that he had proprietary interest before the same was illegally revoked. It is admitted from the bar the defendant obtained title to the suit premises through proceedings filed before the Kwale Land disputes Tribunal vide Land Dispute No. 13 of 2002. I have perused the decision and it is clear that the panel of elders sitting at Kwale deliberated over a complaint filed by Juma Masudi Omari against the plaintiff and 4 others. The panel of elders did not make any conclusive findings but instead referred the matter to the District Land Registrar to hear the dispute. The Land Disputes Tribunal's decision was adopted as the order of the Resident Magistrate's Court, Kwale on 21st June 2005. One of the orders extracted read as follows:-

“That it is hereby ordered and directed that the Land Registrar do determine the ownership of the said piece of Land No. Kwale/Galu Kinondo/465 and transfer the same to the right owner.”

It would appear the Land Registrar acted on the basis of this order and proceeded to hear the dispute.

This action gave rise to the title in possession of the plaintiff being cancelled and the name of the defendant put in his place. There is of course the question as to whether the tribunal had jurisdiction to direct the Land Registrar to do what happened in this matter. This is a matter which in my view can only be determined in a substantive hearing. Without much ado I am satisfied that the plaintiff has shown that he has a prima facie case with a probability of success.

The second principle is that the applicant must show that he might suffer irreparable injury unless the order of injunction is granted. There are allegations which have not been controverted that the defendant is in the process of marketing for sale the suit property. It is clear in my mind that the applicant is likely to suffer irreparable loss should the defendant be allowed to deal with the land freely.

The third principle is to the effect that when the court is in doubt, the balance of convenience should be considered. I have carefully considered the matter and I am satisfied that the balance of convenience tilts in favour of the plaintiff. I say so because at the moment the applicant's title has been cancelled and it will greatly inconvenience the plaintiff if he is subjected to filing another suit or to amending his plaint to accommodate a third party who may purchase the property without notice of this dispute.

The end result is that the summons dated 16th March 2000 is allowed as prayed with costs to the plaintiff/applicant.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E