

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 2 of 2007

GEORGE P. MAICHIBU.....PLAINTIFF

VERSUS

ALINOOR MOHAMMED & 2 OTHERS.....DEFENDANT

R U L I N G

This is an application for injunction brought as usual under **Order 39** of the **Civil Procedure Rules**.

The plaintiff is the registered proprietor of those pieces of land situate in Mombasa and known as **L.R. Nos. MN/V/21** and **MN/V/343** (Plot No.21 and Plot No.343). He claims in his plaint and in the affidavit in support of this application that the 1st, 2nd and 4th defendants have illegally and fraudulently purported to acquire the road reserve fronting those pieces of land and are now in the process of constructing a perimeter wall fence which when completed will completely block ingress to and egress from those pieces of land and in particular Plot No. 21. He claims that a piece of land, which has now been designated as **Plot No. MN/V/2018** (the suit plot), was, in 1977, vide **Gazette Notice No.321 of 1977**, carved from his said two pieces of land and his neighbours' adjoining ones as a road reserve and there are now sewer and power lines constructed on it. He claims that the purported acquisition by the 1st, 2nd & 4th Defendants was fraudulent in that no or no valid Part Development Plans were submitted and or advertised and approved under the Physical Planning Act, Cap 286 of the laws of Kenya

quired. He therefore claims for *inter alia* a declaration that the suit plot is a road reserve and its purported acquisition by the 1st, and 2nd, defendants and the transfer to the 4th defendant were illegal and therefore null and void and permanent injunctions to restrain the 3rd defendant from approving any development plan and the 1st, 2nd, and 4th defendants from carrying out any developments on it on the grounds of the alleged illegality and blockage of his access to and from his said pieces of land. Contemporaneous with the filing of the suit the plaintiff filed this application and sought similar but interlocutory orders until this suit is heard and determined.

In response the 4th defendant filed a defence and a replying affidavit claiming that whilst the Government indeed acquired Plot No. MN/V/2018 in 1977 as a road reserve it subsequently abandoned that plan and allocated the same to the 1st, and 2nd defendants who in turn sold it in 1999 to the 4th defendant and executed a transfer in escrow which he registered on 11th January 2007. Accordingly, the 4th defendant claims, the plaintiff's suit does not disclose any cause of action against him and is therefore bad in law hence untenable.

By way of further defence the 4th defendant denies the alleged fraudulent acquisition of the plot and or his involvement in any impropriety in its acquisition and avers that the plaintiff's claim is in any case not only time barred under the Limitation of Actions Act and the Government Lands Act but also that the plaintiff has no *locus standi* in the matter as he is purporting to enforce a public right without the consent of the Attorney General.

The 1st, and 2nd defendants having sold the plot to the 4th defendant they appear to have no further interest in it and have not filed any pleadings in this case while the 3rd defendant has only filed grounds of opposition to the application for injunction alleging that this suit discloses no cause of action against it hence no orders of injunction should issue as against it.

I have considered the averments in the pleadings. This being an interlocutory application and having not heard evidence I refrain from making any definitive findings on the issues raised or commenting on the authorities cited by counsel for the parties which in, in my view, will be useful to the Judge who will try this case. However, having considered the averments in the affidavits in support of and in opposition to the application I am satisfied that the plaintiff has made out a prima facie case with a probability of success. This is because the 4th defendant does not dispute the fact that the suit plot on which are constructed the sewer and power lines fronts those of the plaintiff and admits that it was indeed originally acquired as a road reserve. He has also not exhibited any document showing any authority to alienate and allocate it to a private developer and or approval of the change of user as required under the Physical Planning Act. May be he will do that at the hearing.

The 4th defendant's contention that the plaintiff has an alternative access to Plot No.21 through Plot No. 343 cannot avail him if it is ultimately shown that there was no authority to alienate the suit plot or approval to change its user. If it is indeed a road reserve on which the sewer and power lines are constructed as contended by the plaintiff, then it is public land to which any party whose land adjoins and abuts is entitled as of right to have direct access to.

It is for these reasons that I find that the plaintiff has made a prima facie case with a probability of success and I accordingly grant him the orders of injunction in terms of prayers 2 and 3 of his amended chamber summons dated the 5th February 2007. I, however, decline to grant a temporary mandatory injunction as sought in prayer 4. Such prayer in the circumstances of this case can, in my view, only be granted after a full hearing of the matter. Instead I order the 4th defendant to forthwith remove the fence or scaffolding in front of the plaintiff's entrances to his said pieces of land and allow free access to those pieces of land.

DATED and delivered this 23rd day of October, 2007.

D.K. MARAGA

JUDGE.