



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

CIVIL SUIT NO. 50 OF 2003

1. MOHAMED K. ABDULAZIZ
2. MOHAMED E. ABDULAZIZ
3. MOHAMED I. ABDULAZIZ.....
.....PLAINTIFFS

VERSUS

1. THE COMMISSIONER OF LANDS being sued

thro' THE ATTORNEY GENERAL
2. KILIFI MTWAPA DISTRIBUTORS LTD
3. DAVID KIMEI SALAT
....DEFENDANTS

RULING

In a summons dated 13th August 2003 filed pursuant to the provisions of order XXIXIX rules 1,2,3 and 9 of the Civil Procedure rules and Section 63(e) of the Civil Procedure Act, the Plaintiffs herein, Mohamed Kassim Abdulaziz, Mohamed Ebrahim Abdulaziz and Mohamed Iqbal Abdulaziz sought for the following prayers inter alia:-

- (i) An order of injunction to restrain Kilifi Mtwapa Distributors Ltd., the 2nd defendant herein from interfering with or occupying or developing or constructing on or disposing of, selling, mortgaging. Leasing or charging the parcel of land known as plot no. 5244 Section I/MN pending the hearing and determination of this suit.
- (ii) An order of injunction to restrain the 2nd defendant from obstruction and or restricting the plaintiffs' access to plot No. 5244/Section I/MN.

(iii) An order directing the Commissioner of Lands not to register any transfer of further transfer or transfer of plot no. 5244/Section I/M.N. from the second defendant to third parties.

The summons is supported by the affidavit sworn by Mohamed Ebrahim Abdulaziz dated 13th August 2004. The Attorney General filed grounds of opposition to oppose the summons on behalf of the Commissioner of lands. The second defendant also resisted the summons by filing a replying affidavit of Wilfred Kimani sworn on 11th March 2005. There was no reply on the part of one David Kemei Salat, the 3rd Defendant herein.

Mr. Asige advocate appeared for the plaintiffs when the summons came up for inter partes hearing. The learned advocate urged this court to grant the orders sought in the summons on the basis that the plaintiffs have proprietary interest over plot no. 5244/Section I/MN hereinafter referred to as the suit premises. The plaintiffs annexed to the affidavit in support of a copy of an agreement between themselves and the 3rd defendant made on 31st July 1997 to show that they purchased the suit premises at a consideration of Kshs.1,800,000/-.

It is the submission of the plaintiffs that they did a postal search before purchasing the property. They claimed that upon executing the agreement, the 3rd defendant surrendered to them a duly executed transfer. The grant, copies of the grant and the postal search were annexed to the supporting affidavit. The title annexed to the affidavit of Mohamed Kassim Abdulaziz shows that the suit premises were transferred to the plaintiffs on 5th August 1997. The plaintiffs further claimed that C.I.D. officers forcefully took possession of their title documents at their Mwembe Tayari Shop. It is averred that this incident made the plaintiffs to inquire more about the property. Upon a postal search they discovered that the suit premises had been allocated to one John Metho on 30th September 1997 who later transferred the property to the 2nd defendant on 11th March 1998. the plaintiffs averred that they were able to recover their titles which had been forcefully taken from them at the Lands office. It is the submission of Mr. Asige learned advocate for the plaintiffs that since the title issued to the 2nd defendant was issued later than that of the plaintiffs then it must have been obtained fraudulently because by then there was nothing to grant.

The averments and submissions were vehemently opposed by Mrs Umara learned Senior Litigation Counsel for the 1st Defendant and Mr. Magolo learned advocate for the 2nd defendant. It is the submission of Mrs Umara that the plaintiffs did not establish what damage they would suffer if the orders were not granted. It was argued by the Attorney General's representative that an order of injunction did not lie against the government.

On his part Mr. Magolo was of the view that the summons should be dismissed because the plaintiffs could be compensated by way of damages. He also averred that the 2nd defendant had obtained title first in time as against the plaintiff's title.

This is a very tricky matter, in that, care must be taken because the substantive suit is yet to be heard. The findings at this stage must remain interlocutory and no final orders can be made. In that regard I will not determine at this stage as to whose title is valid or genuine as opposed to the other. The crux of the matter is that the plaintiffs have presented documents to this court to show that as of 23rd July 1997 title to the suit property was in the name of one David Kemei Salat, the 3rd defendant herein. They were also able to show that the 3rd defendant actually transferred the suit premises to them on the 5th day of August 1997. On the other hand the 2nd defendant has exhibited documents to prove that the suit premises were transferred to it on the 27th day of April 1998. The 2nd defendant even secured a loan of Kshs.1,750,000 for Barclays Bank of Kenya on the 19th of February 1999 upon pledging the title as security.

What I can state at this juncture is that the plaintiffs/applicants have at least established that they have a prima facie case. In my mind they have shown that they possess documents which show that they have proprietary interests over the suit property.

The question which must be determined now is; are they the entitled to the orders they sought for in the summons? The principles of granting injunctions are well settled. First, an applicant must show a prima facie case with a probability of success. Secondly, an applicant must establish that unless an order of injunction is granted he will suffer irreparable loss or injury. Thirdly, when the court is in doubt, it will decide the application on a balance of convenience.

I have already settled the position on the first principle. On the second principle, it was incumbent upon the plaintiffs to show that they would suffer irreparably unless the order of injunction is granted. I have considered the submissions of Mr. Asige advocate for the plaintiffs. I have also perused the grounds set out on the summons and the facts deponed in the affidavit of Mohamed Kassim Abdulaziz. The plaintiffs have completely kept mum as to when the 2nd defendant threatened to commit the acts complained of acts which they seek to restrain.

Paragraph 14 of the supporting affidavit alleges:-

“That it has come to my knowledge through several acquaintances, one of whom owns the land adjacent to plot no. 5244/Section 1/MN that the second defendant have approached buyers and intends to dispose of the said piece of land to a third party”.

In my humble view the allegation though not challenged cannot go down well in the rules of evidence and the law governing affidavits. The sources of information is not disclosed. The averments remain as hearsay and rumour. It offends the provisions of order XVIII rule 3(1) of the Civil Procedure rules. It is not enough to plead and allege, but one must strictly prove what is pleaded and alleged. The plaintiffs seem to acknowledge in paragraph 16 of the supporting affidavit that the 2nd defendant is doing some developments on the suit premises. The plaintiffs have not shown what damage they would suffer. They have only alleged that some fixtures put up on the suit premises would complicate matters and that irreversible and irreparable injury would be caused. I am not convinced that the plaintiffs would suffer irreparable loss.

Furthermore, the plaintiffs damage is likely to be compensated by way of damages. Annexed to the supporting affidavit is the agreement made on 31st July 1997. Clause (g) of the aforesaid agreement reads:

“The vendor shall be liable to refund the purchaser all the monies paid herein with interest at the rate of 20% per month in the event of the contract being frustrated by anything other than the mistake of the vendor.”

It is clear that the amount of damage is settled in the event that the agreement is frustrated. It is also evident that the plaintiffs have made an alternative prayer for a refund of the purchase price plus interest as against the 3rd defendant. It cannot be said that the plaintiffs will suffer irreparable loss. Injunctive orders cannot be issued where the damage or injury can be compensated in monetary terms.

The third principle mandates the court when it is in doubt to decide on the balance of convenience. The 2nd defendant has stated that it has been in occupation of the suit premises since 1999. This fact appears to be admitted by the plaintiffs in paragraph 16 of the supporting affidavit of Mohamed Kassim Abdulaziz. It is in my humble view that if the orders of injunction are granted to the plaintiffs at this stage, grave inconvenience will be caused to the 2nd defendant. It is not controverted by the plaintiffs that the 2nd defendant has pledged the title to the suit premises to secure a sum of Kshs.1,750,000/- from Barclays Bank of Kenya. There is no use restraining actions, which have taken place.

The final issue argued in this matter is whether or not an order of injunction can issue against the government. In this case, it is the submission of Mr. Asige that the order is available as against the commissioner of lands because such an office is sued and sues in its own name.

The office of the Commissioner of Lands is created pursuant to the provisions of Section 5 of the Government Lands Act Chapter 280 Laws of Kenya. In fact the plaintiffs have clearly stated in their

plaint that the Commissioner of Lands is being sued as the head of the department of Lands of the Government of Kenya. It is worthwhile to take note of the provisions of Section 8 of the Government Lands Act which provides as follows:-

“8(i) All actions, suits and proceedings by or on behalf of the government respecting

(a) Government land

(b) Any contract relating to government land or any breach of such contract or

(c) Any trespass on government land or any damages accruing by reason of such trespass

(d)

(e)

(f)

Shall be commenced, prosecuted and carried on by and in the name of the Commissioner who shall be represented by the Attorney General or by any public officer or other person appointed by the Commissioner in any particular case.”

The suit premises is government land granted to the combatants as a leasehold for 99 years. It is therefore clear that the Commissioner of Lands when suing or defending such actions does so through the Attorney General.

Section 16 of the Government proceedings Act (Cap. 40 Laws of Kenya) does not permit any order of injunction or order of specific performance to be issued against the government. I am in agreement with submissions of Mrs Umara that the order for injunction prayed against the government is not available to the plaintiffs.

My conclusion in this matter is that the summons has no merit. It is dismissed with costs to the 1st and 2nd defendants.

Dated and delivered at Mombasa this 24th day of February 2006.

J.K. SERGON

J U D G E

In the presence of Mr. Asige for the Applicant

Mr. Magolo for the 2nd Defendant

Mrs. Umara for the 1st Defendant

N/A 3rd Defendant