



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 46 OF 2020

ABDULRAHMAN SHEIKH HASSAN

(Suing as the Special Attorney for ENRICO QUERCIOLI).....PLAINTIFF

VERSUS

MARIA ANGELA DEFABIANIS.....1<sup>ST</sup> DEFENDANT

THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE LAND REGISTRAR MOMBASA.....3<sup>RD</sup> RESPONDENT

RULING

1. By this Notice of Motion dated 25<sup>th</sup> June 2020, Abdulrahman Sheikh Hassan suing in his capacity as the Special Attorney for Enrico Quercioli (the Plaintiff/Applicant) prays for orders: -

(a,b,c,d).....

d) That pending the hearing and determination of this suit, an order of injunction do issue restraining the 3<sup>rd</sup> Defendant, its servants, agents and/or any persons acting under the Defendant's authority from revoking the Applicant's title over (land) portion No. 1040- CR 46208, Watamu

e) That pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the 1<sup>st</sup> Defendant, her servants, agents and/or any persons acting under the 2<sup>nd</sup> Defendant's authority from trespassing, encroaching, selling, alienating, damaging, wasting, disposing off and or in any manner whatsoever interfering) with the suit property referenced as Portion No. 1040- CR 46208, Watamu. The said order do especially restrain the 1<sup>st</sup> Defendant from proceeding with any actions as may lead to the revocation of the Plaintiffs title with regards to the grounds floor title issued to the Plaintiff with respect to Portion No. 1040- CR 46208, Watamu (sic).

f) That the costs of this application be in the cause.

2. The application which is supported by an affidavit sworn by the said Enrico Quercioli is based on the grounds:

a. That the Plaintiff is the lawful owner of the suit property consisting of a two-bedroomed ground floor house having acquired the same from one Maria Copo on 2<sup>nd</sup> December 2017;

b. That the said Maria Copo sold her half-share of the property which she had co-owned with one Dafabians Lucio in common;

c. That the 1<sup>st</sup> Defendant has now without any right of claim moved the 3<sup>rd</sup> Defendant to revoke the Applicant's sub-lease on the purport that the transfer was obtained fraudulently;

d. That the Applicant acquired his title as an innocent purchaser for value without any notice of defects in the Vendor's title and no fraud has been proved in the acquisition thereof by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents;

**e. That matters of fraud can only be established and proved in a competent Court of Law and not (by) the registrar of titles, the Police or otherwise;**

**f. That the Defendants have threatened to further on (sic) with the intended illegal acts of revocation of the Plaintiff's title; and**

**g. The Defendants/Respondents have issued an illegal notice to the Plaintiff to surrender his title over the property for purposes of cancellation.**

3. Maria Angela Defabians (the 1<sup>st</sup> Defendant) is opposed to the application. By her Grounds of Opposition dated 4<sup>th</sup> August 2020, the 1<sup>st</sup> Defendant asserts: -

**1. That (the) application is hopelessly misconceived and a non-starter as:**

**a. There is no sound and or proper cause of action as against the 1<sup>st</sup> Defendant;**

**b. The letter referred (to) in the application and forming the gist of the case as against the 1<sup>st</sup> Defendant did not emanate from the 1<sup>st</sup> Defendant but from the Criminal Investigations Department;**

**c. The injunctive orders (sought) as against the 1<sup>st</sup> Defendant are not tenable as it would be in violation of Section 16 of the Government Proceedings Act as read together with Order 29 Rule 2(2) (d) of the Civil Procedure Rules;**

**2. That the injunctive orders sought as against the 1<sup>st</sup> Defendant are not tenable since the Applicant has not in any way demonstrated any threat occasioned by the 1<sup>st</sup> Defendant;**

**3. That (the) Applicant has not met the threshold of granting injunctive orders.**

**4. The entire Application and suit is a tactic employed by the Applicant to shelf(sic) the 3<sup>rd</sup> Defendant from executing his administrative mandate under the law;**

**5. That the application is further hopelessly incompetent as the Applicant seeks to persuade the Court to make decisions based on mere speculations and impede (the) 3<sup>rd</sup> Defendant from acting in accordance with the law; and**

**6. That in the interest of justice, the said application should be dismissed with costs.**

4. In addition to the Grounds of Opposition and by a Notice of Preliminary Objection dated the same 4<sup>th</sup> day of August 2020, the 1<sup>st</sup> Defendant objects to both the suit and the application on the grounds: -

**a. That the Plaintiff's application and the entire suit is fatally defective, null and void and the same ought to be struck out with costs in that both raise no triable issues as against the 1<sup>st</sup> Defendant;**

**b. That (the) prayers sought in the Application and the Plaint as against the 1<sup>st</sup> Defendant are not tenable as there is no cause of action against the 1<sup>st</sup> Defendant;**

**c. That some of the orders sought are only tenable in a Judicial review cause and not through the instant application and suit.**

5. Just like the 1<sup>st</sup> Defendant, both the Honourable the Attorney General and the Land Registrar Mombasa sued herein as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively are opposed to the application. In their Joint Grounds of Opposition dated 15<sup>th</sup> July 2020 and filed herein on 27<sup>th</sup> July 2020, they oppose the application on the grounds: -

**1. That the application seeks orders of injunction against the Government grant of which is expressly prohibited under Section 16 of the Government Proceedings Act.**

**2. That the applicants have not met the threshold for granting of an injunction as sought by the Applicant.**

**3. That the forum is not proper as the complaint herein with respect to the letter of 5<sup>th</sup> February 2020 belongs to the realm of public administrative law to be canvassed by way of Judicial Review.**

**4. That the actions by the 3<sup>rd</sup> Defendant were proper and fully within his powers and mandate as provided under Section 14 and 79 (2) of the Land Registration Act.**

**5. That the Application is premised upon mere speculation as there is no decision made by the 3<sup>rd</sup> Defendant herein.**

**6. That the suit filed against the Honourable the Attorney General is premature and intended to curtail ongoing**

**investigations with respect to the suit land.**

6. In addition to the Grounds of Opposition and by a Notice of Preliminary Objection also dated the same 15<sup>th</sup> day of July 2020, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants object to the entire suit on the grounds: -

**1. That the Plaintiff as drawn and filed discloses no reasonable cause of action as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, is bad in law, incompetent, fatally defective and the same ought to be struck out;**

**2. That the validity of the decision by the 3<sup>rd</sup> Defendant in the letter dated 5<sup>th</sup> February 2020 pursuant to the provisions of Section 14 and 79(2) of the Land Registration Act belongs in the realm of public administrative law and the same can only be addressed by way of Judicial review; and**

**3. That there is no decision made by the 3<sup>rd</sup> Defendant herein and the orders sought are untenable and a nullity.**

7. When the application came up for hearing, it was agreed that both the Motion and the two Preliminary Objections be disposed of together by way of written submissions. I have considered the Motion, the Objections and responses thereto. I have similarly considered the rival submissions and authorities placed before me by the Learned Counsels representing the respective parties herein.

8. What constitutes a Preliminary Objection was set out in the case of *Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 696* where it was held that: -

**“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.**

**A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.**

9. The first two grounds of objection raised to the suit by the 1<sup>st</sup> Defendant are that the suit is fatally defective as it does not raise any triable issue as against the 1<sup>st</sup> Defendant and that the orders sought are not tenable as there is no cause of action against the 1<sup>st</sup> Defendant.

10. I did not think that these are grounds capable of disposing of the suit on a preliminary point. In order to ascertain whether or not the suit discloses no cause of action against the 1<sup>st</sup> Defendant, this Court would be required to exercise its discretion to strike out the suit after ascertaining a number of facts arising from the pleadings. That is therefore not a matter that can be raised as a preliminary point.

11. That position equally holds for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants first ground of objection to the effect that the Plaintiff as filed does not disclose a reasonable cause of action as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

12. The other issue raised by all the Defendants as a preliminary point is that the dispute herein arises from a letter addressed by the 3<sup>rd</sup> Defendant to the Plaintiff seeking to revoke his title to the suit property. It is the Defendants' contention that the nature of the complaint belongs therefore in the realm of public administrative law and that the same can only be addressed by way of judicial review and not in the manner sought herein by the Plaintiff.

13. At paragraph 7 of the Plaintiff, the Plaintiff accuses the 1<sup>st</sup> Defendant of prompting the 3<sup>rd</sup> Defendant to commence the process of revoking his title on the purport that the same was acquired on the grounds of fraud. I was unable to find a Statement of Defence filed by the 1<sup>st</sup> Defendant and it is unclear at this stage whether or not she denies prompting the Land Registrar as claimed by the Plaintiff.

14. At paragraph 4 of their Statement of Defence filed herein on 20<sup>th</sup> July 2020 however, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly state that they are strangers to and do not admit the contents of paragraph 7, 8, 9 and 10 of the Plaintiff. In the 3<sup>rd</sup> limb of their preliminary objection, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further assert that this suit is untenable as the Land Registrar did not make any decision in regard to the matter in dispute.

15. That being the case, it was clear to me that there is no basis for the assertion that the Plaintiff should have instead sought an order of judicial review and not the injunctive orders sought herein. Accordingly, I find and hold that the two preliminary objections as filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are without basis and must fail.

16. Turning to the issue of injunction, Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules provides thus: -

**“Where in any suit it is proved by affidavit or otherwise-**

**a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording**

**reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit;**

**The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the damage, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”**

17. The conditions for the grant of such an injunction were long settled in the case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 360*. These principles require that: -

**a. An applicant must show a prima facie case with a probability of success;**

**b. An Applicant must show that unless the injunctive orders are issued, he will suffer irreparable harm which would not be adequately compensated for by damages; and**

**c. If the Court is in doubt as to any of the above, it will decide the matter on a balance of convenience.**

18. The Plaintiff/Applicant herein has in support of his case produced a copy of a sale agreement of the suit premises between himself and one Maria Coppo. From the material placed before me, the said Maria is said to be the Widow and Administrator of one De Fabianis Lucio who is said to have passed away on 11<sup>th</sup> November 2009 in a place known as Vercelli in Italy.

19. By the Sale Agreement dated 22<sup>nd</sup> December 2017, Maria is said to have sold her half share of the property owned jointly in common with the late De Fabianis Lucio to the Plaintiff at a consideration of 95,000 Euros. The Plaintiff avers that immediately after the sale, he took possession of the half portion owned by the Vendor Maria Coppo.

20. While it was not clear to me as to what relationship existed between the 1<sup>st</sup> Defendant and the said Maria, it was apparent that the 1<sup>st</sup> Defendant is the daughter of the late De Fabianis Lucio and that there exists some disputes as to who is in-charge of the estate of the deceased.

21. From the material placed before me, it is evident that the Plaintiff took possession of the suit property pursuant to the sale by one of the disputants and that his interests were subsequently registered on the title. That being the case, it is obvious that he stands to suffer loss and damage unless the orders sought herein are issued.

22. Accordingly, I am satisfied that there is merit in the application dated 25<sup>th</sup> June 2020. I allow the same in terms of Prayer No. 'e' thereof.

23. The costs of the application shall be in the main suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF APRIL, 2021**

**J.O. OLOLA**

**JUDGE**