



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 47 OF 2018**

**SHAIWAZ SADRUDIN JIWA .....PLAINTIFF**

**VERSUS**

**ABDILLAHI HASSAN ABDIRIHAMAN.....DEFENDANT**

**R U L I N G**

By a plaint dated and filed herein on 20<sup>th</sup> August 2018, **SHAIWAZ SADRUDIN JIWA** (the plaintiff herein) sought Judgment against **ABDILLAHI HASSAN ABDIRIHAMAN** (the defendant herein) in the following terms: -

- (a) **The defendant be ordered to surrender to the plaintiff all the original title deeds for land parcel numbers MALAKISI/TOWNSHIP/375, 413 and 419.**
- (b) **Costs**
- (c) **Interest**
- (d) **Further relief.**

The basis of the plaintiff's claim is that whereas he is the registered proprietor of the land parcels **NO MALAKISI/TOWNSHIP/375, 413 and 419**, the defendant picked up the title deeds thereof from the Land Registry Bungoma in 2016 on the pretext that he would forward them to the plaintiff but has failed to do so to – date hence this suit.

By his defence filed on 19<sup>th</sup> September 2018, the defendant admits that the land parcels **NO MALAKISI/TOWNSHIP/375, 413 and 419** are indeed the property of the plaintiff. However, he pleads that he has been the agent of the plaintiff since 2011 and incurred expenses including payment of adjudication fees, survey fees, stamp duty and other related expenses following an agreement that he would be paid for his services before the title deeds are released to the plaintiff. The plaintiff has however reneged on that agreement by failing to pay the defendant his dues. That this suit is incompetent, bad in law and discloses no cause of action and is only an attempt to defeat **BUNGOMA HIGH COURT CIVIL CASE No 2 of 2018** between **ABDILLAHI HASSAN ABDIRIHAMAN .V. SHAIWAZ SADRUDIN JIWA** and **SHANIF S. JIWA**.

In a reply to the defence filed on 2<sup>nd</sup> October 2018, the plaintiff denied that the defendant is the one who payed all the related expenses with respect to the land parcels **NO MALAKISI/TOWNSHIP/375, 413 and 419** or that he reneged on his part by failing to settle the defendant's dues.

By a Notice of Motion dated 11<sup>th</sup> November 2020 and premised on **Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 3A and 63(e)** of the **Civil Procedure Act**, the defendant seeks the following orders: -

1. **Spent**
2. **Spent**
3. **Spent**
4. **That the Honourable Court be pleased to order and issue an inhibition order and conservatory orders conserving and preserving land parcels known as MALAKISI/TOWNSHIP/375, 413 and 419 pending the hearing and determination of this instant suit and BUNGOMA ELC No 2 of 2018 (now BUNGOMA CHIEF MAGISTRATE'S COURT ELC No 424 of 2018 between ABDILLAHI HASSAN ABDIRIHAMAN .V. SHAIWAZ SADRUDIN JIWA and SHANIF SADRUDIN JIWA).**

5. That the Honourable Court be pleased to order the maintaining of the status quo obtaining as at the time of filing this instant suit on 20<sup>th</sup> August 2018 pending the hearing and determination of this suit.

6. That the Honourable Court be pleased to order the maintain of the status quo obtaining at the time of filing BUNGOMA ELC No 2 of 2018 (now BUNGOMA CHIEF MAGISTRATE'S COURT ELC No 424 of 2018 between ABDILLAHI HASSAN ABDIRIHAMAN .V. SHAIWAZ SADRUDIN JIWA and SHANIF SADRUDIN JIWA) pending the hearing and determination of this suit.

7. That an order be issued directing the Officer Commanding Police Station (OCS) MALAKISI POLICE STATION to ensure that there is compliance with the Court orders herein.

8. That the costs of this application be provided for.

The application is founded on the grounds set out therein and is also supported by the plaintiff's affidavit.

The gist of the application is that this suit relates to the property known as **MALAKISI/TOWNSHIP/376, 413 and 419** which the plaintiff, in an attempt to defeat the defendant's claim over the same, is purporting to transfer it to a third party. That the defendant will suffer loss and damage should the plaintiff be allowed to continue with his actions. That the defendant has filed **BUNGOMA ELC CASE No 2 of 2018** against the plaintiff seeking a sum of Kshs. 6,100,000/= in respect of work done in relation to the land parcels NO **MALAKISI/TOWNSHIP/375, 413 and 419** and was shocked to learn that the plaintiff has sold the said parcels of land to one **WAFULA WAMBANDA MZEE** yet the titles thereof are being held by the defendant as security for the money owed to him by the plaintiff. Annexed to the supporting affidavit are the pleadings in **BUNGOMA HIGH COURT CIVIL CASE No 2 of 2018** and other documents.

In opposing the application, the plaintiff filed a replying affidavit dated 18<sup>th</sup> January 2021 in which he has deponed, inter alia, that this application is frivolous vexation and an abuse of the Court process and ought to be dismissed since the defendant has no Counter – Claim. That the defendant cannot claim that he is in the process of transferring the said parcels of land yet he (defendant) is the one illegally holding the original title deeds. Further, the defendant has placed cautions on the title deeds which are still in place. Annexed to the replying affidavit are copies of the Certificates of Search in respect to the land parcels **NO MALAKISI /TOWNSHIP/375, 413 and 419** as well as pleadings in **BUNGOMA CHIEF MAGISTRATE'S COURT ELC CASE No E1 of 2020**.

The application was canvassed by way of written submissions filed both by **MR MAKOKHA** instructed by the firm of **MAKOKHA WATTANGA & LUYALI ASSOCIATES** for the defendant and by **MR BWONCHIRI** instructed by the firm of **OMUNDI BWONCHIRI & CO ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.

When the application was placed before **A. OMOLLO J** at **BUSIA COURT** on 12<sup>th</sup> November 2020 the Judge was hesitant to grant any ex – parte orders as the defendant had not disclosed the status quo obtaining as at the time of filing the suit. The Judge however in the interest of justice issued orders of inhibition to be registered against the titles **MALAKISI/TOWNSHIP/375, 413 and 419** **“pending the hearing and determination of this application.”**

My understanding of the defendant's Notice of Motion is that he seeks the following remedies pending the determination of this suit: -

1. **Conservatory order**
2. **Inhibition order**
3. **Maintenance of status quo.**

**CONSERVATORY ORDER: -**

In **GATIRAU PETER MUNGA .V. DICKSON MWENDA KITHINJI AND OTHERS 2014 eKLR**, the **SUPREME COURT** stated that: -

**“Conservatory orders bear a more decided public law contention: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”**

And although the defendant did not specifically seek an order for temporary injunction in his Notice of Motion, his Counsel appears to have made it an issue for determination. In paragraphs 8, 9 and 10 of his submissions, Counsel for the defendant has stated thus: -

**8: “Your Lordship, the principles for granting an injunction are well enumerated in the celebrated case of **GIELLA .V. CASSMAN BROWN AND CO E.A LTD** which include inter alia that the party has a prima facie case, that a party cannot be compensated by an award of damages and if the Court is in doubt of balance of convenience.”**

9: *“That a prima facie case has been defined in the case of MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS C.A CIVIL APPEAL No 39 of 2002 [2000 eKLR] as: -*

*“..... a case which on the material presented to the Court, a tribunal properly directing itself, will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

10: *“That the defendant has fulfilled all the conditions necessary for the grant of the prayers sought in the application dated 11<sup>th</sup> November 2020 and the Court should accordingly proceed to allow it as prayed.”*

#### **INHIBITION ORDER: -**

Section 68(1) of the **Land Registration Act** donates to this Court the power to issue inhibitory orders. It provides that: -

*“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”*

An order of inhibition is therefore similar to an interlocutory injunction as it prohibits a party from dealing with the land in dispute pending the hearing and determination of the suit in which the ownership of such land or other property is in issue.

#### **STATUS QUO: -**

This is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as follows: -

*“The situation that currently exists.”*

In paragraph 6 of his Notice of Motion, the defendant framed the order sought as follows: -

**6: “That the Honourable Court be pleased to order the maintaining of the status quo obtaining at the time of filing BUNGOMA ELC No 2 of 2018 (now BUNGOMA CHIEF MAGISTRATE’S COURT ELC No 424 of 2018 between ABDILLAHI HASSAN ABDIRHAMAN .V. SHAIWAZ SADRUDIN JIWA and SHANIF SADRUDIN JIWA) pending the hearing and determination of this suit.”**

However, as **A. OMOLLO J** observed in her orders issued on 12<sup>th</sup> November 2020, the defendant has not disclosed what status quo he had in mind and the Court cannot presume what a party has in mind. There must be clarity in any orders that a party seeks from the Court.

I shall therefore consider the prayers for conservatory and inhibitory orders together. And for the benefit of the defendants, notwithstanding that an order for temporary injunction was not specifically sought but was instead referred to in the submissions, and bearing in mind that such a remedy is akin to an order of inhibition, I shall also consider whether it is merited in the circumstances as this is really what I would refer to as a hybrid application.

From the onset, it is clear to me that the defendant, at least in this suit, does not appear to have any claim on the land parcels **NO MALAKISI/TOWNSHIP /375, 413 and 419**. That is why I have deliberately refrained from referring to those land parcels as the suit property. In his defence, he admits that the said parcels of land are registered in the names of the plaintiff. His case is that he was appointed as an agent of the plaintiff for the purposes of acquiring the said land and paid the necessary statutory fees including the stamp duty pursuant to a “written agreement” by which “the plaintiff was to pay the defendant for the services rendered before the title deeds are officially handed over to the plaintiff” – see paragraphs 3 and 7 of the plaint. However, the defendant has not Counter – Claimed either for any sum of money owed to him as fees or for any portion of the land parcels **NO MALAKISI/TOWNSHIP/375, 413 and 419**. In the absence of any Counter – Claim, there is no basis upon which the defendant can be entitled to any interlocutory orders such as conservatory or injunctive reliefs. Such orders cannot be granted in vacuo since there is even no prima facie case worth considering.

The defendant has in paragraph 4 of his Notice of Motion sought the issuance of conservatory and inhibitory orders conserving and preserving the land parcels **NO MALAKISI/TOWNSHIP/375, 413 and 419** pending the hearing and determination of this suit **“and BUNGOMA ELC No 2 of 2018 now BUNGOMA CHIEF MAGISTRATE’S COURT ELC No 424 of 2018.”** Since the ownership of those parcels of land are not the subject of this dispute, no such orders can issue in this case. Secondly, any such conservatory or inhibitory orders can only be issued in the suit in which those parcels of land are in dispute. Therefore, if those parcels of land are the subject in issue in the matter pending before the **CHIEF MAGISTRATE’S COURT CASE No 424 of 2018**, then that is the proper forum in which those orders should be sought. In any event, the plaintiff has annexed to his replying affidavit the Certificates of Search in respect to the land parcels **NO MALAKISI/TOWNSHIP/375, 413 or 419** showing that on 25<sup>th</sup> March 2019, the defendant placed cautions thereon which are still in place. The plaintiff is therefore correct when he avers in paragraph 3 of his replying affidavit that: -

*“..... The application is frivolous, vexatious and an abuse of the due process of the Court and the same is for dismissal with costs to me.”*

Having considered the pleadings in this matter, it is clear to me that this suit ought to have been filed in the Subordinate Court. In paragraph 8 of the plaint, it is pleaded as follows: -

**8 “This Honourable Court has jurisdiction as the value of the suit titles and developments are over Kshs. 64,000,000.”**

However, the plaintiff’s claim is contained in paragraph 5 of his plaint where he has pleaded as follows: -

**5 “The plaintiff’s claim thus against the defendant is for an order that the defendant do surrender to the plaintiff all the original title deeds for land parcels number MALAKISI/TOWNSHIP/375, 413 and 419”**

The ownership of those parcels of land is not in issue and is even conceded by the defendant who has pleaded in paragraph 3 of his defence as follows: -

**3 “In response to paragraph 3 of the plaint, the defendant admit that the plaintiff is the registered owner of land parcels number MALAKISI/TOWNSHIP/375, 413 and 419 and state that he is the agent of the said parcels of land on behalf of the plaintiff herein since 2011 when he was formerly appointed through a written agreement.”**

The defendant then makes it clear in paragraph 7 of his defence that he is holding the title deeds to the aforesaid parcels of land pending payment of his fees for the services rendered in processing them. And even assuming that the defendant amends his defence to Counter – Claim for those fees, they will not exceed the jurisdiction of the **CHIEF MAGISTRATE’S COURT**. This is because in paragraph 27 of his witness statement, he has stated as follows: -

**27 “That I confronted the Land Registrar concerning the same and it was duly changed and reverted to the original owner. That the two brothers owe me a lot of money over Kshs. 5 million which they are trying to evade to pay me.”**

This suit ought to have been filed in the Subordinate Court and I shall be making appropriate orders shortly.

Ultimately, however, and having considered the defendant’s Notice of Motion dated 11<sup>th</sup> November 2020, I make the following orders: -

- 1. The application be and is hereby dismissed.**
- 2. The plaintiff shall have the costs of the application.**
- 3. This suit is hereby transferred to the CHIEF MAGISTRATE’S COURT BUNGOMA for hearing and final disposal. It be mentioned before the CHIEF MAGISTRATE on 8<sup>th</sup> June 2021 for further orders.**

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2021.**

Ruling dated, signed and delivered at **BUNGOMA** this 27<sup>th</sup> day of May 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2021.**