



Kisemei v Mercbima International Ltd & 2 others (Environment & Land Case 1023 of 2015) [2022] KEELC 14607 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1023 OF 2015
SO OKONG'O, J
NOVEMBER 3, 2022**

BETWEEN

WILSON ANKAINI KISEMEI PLAINTIFF

AND

MERCBIMA INTERNATIONAL LTD 1ST DEFENDANT

EQUITORIAL COMMERCIAL BANK LTD 2ND DEFENDANT

JOE MUSYIMI MUTAMBU 3RD DEFENDANT

RULING

1. The Plaintiff brought this suit against the Defendants on 16th October 2015 seeking among others; an order of a mandatory injunction compelling Defendants to forthwith release to the Plaintiff the original title documents for all those parcels of land known as L.R No. Kajiado/Kitengela/46021 and L.R No. Kajiado/Kitengela/46022 (hereinafter referred to as “the suit properties”) and a permanent injunction restraining the Defendants from trespassing onto, remaining upon, developing, alienating, selling, auctioning, transferring or in any manner whatsoever interfering with the Plaintiff’s proprietorship and/or peaceful enjoyment of the suit properties. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 15th October 2015 seeking a temporary injunction to restrain the Defendants from trespassing onto, remaining upon, developing, alienating, selling, auctioning, transferring or in any manner whatsoever interfering with the Plaintiff’s proprietorship and/or peaceful enjoyment of the suit properties pending the hearing and determination of the suit.
2. The Plaintiff’s case against the Defendants was that without the Plaintiff’s knowledge, the 1st and 2nd Defendants caused the Plaintiff’s titles for the suit properties to be deposited with the 3rd Defendant as a security for a loan that the 3rd Defendant had advanced to the 1st Defendant. The Plaintiff contended that he had given the 1st and 2nd Defendants the title deeds for the suit properties at their request to



enable them show a bank the site where they were to undertake quarry mining operations. The Plaintiff contended that at no time did he approach the 3rd Defendant for a financial facility on the security of the suit properties. The Plaintiff contended that he had also never agreed to stand as a guarantor for the loan which the 1st and 2nd Defendants had sought from the 3rd Defendant. The Plaintiff contended that with a view to deprive him of the suit properties, the Defendants had attempted to create a fraudulent charge over the suit properties. The Plaintiff stated that on the strength of the purported guarantee which the Plaintiff was alleged to have extended to the 3rd Defendant for the said loan facilities advanced to the 1st and 2nd Defendants, the 3rd Defendant was making preparations to put up the suit properties for sale to recover the debt which was owed to the 3rd Defendant by the 1st and 2nd Defendants. The Plaintiff stated that apart from the lease and an aborted agreement for sale which he had entered into with the 2nd Defendant in relation to the suit properties, he had not entered into any other arrangements with the 1st and 2nd defendants concerning the suit properties. The Plaintiff stated that upon learning about the purported guarantee which he was said to have given to the 3rd defendant as a security for the 1st and 2nd Defendants' indebtedness to the 3rd Defendant, he made a complaint to the police.

3. The Plaintiff averred that he withdrew his claim against the 3rd Defendant on 28th October 2015 after the 3rd Defendant confirmed to the court that it had no charge over the suit properties and that it had returned the title deeds for the suit properties to the 2nd Defendant.
4. The Plaintiff's application for injunction was opposed by the 1st and 2nd Defendants (hereinafter referred to only as "the defendants" where the context so permits). The Defendants' case was that the title deeds for the suit properties were delivered to the 2nd Defendant by the Plaintiff on the strength of an agreement for sale dated 16th May 2014 between the Plaintiff and the 2nd Defendant. The Defendants averred that under the said agreement, the Plaintiff had agreed to sell to the 2nd Defendant the suit properties at a consideration of Kshs. 28,000,000/= of which the 2nd Defendant had already paid to the Plaintiff a sum of Kshs. 3,100,000/= as a deposit. The Defendants contended that the balance of the purchase price was to be paid by the 2nd Defendant through a bank loan and that the Plaintiff had agreed to have the suit properties charged to a bank as a security for the balance of the purchase price aforesaid.
5. The Defendants averred that the title deeds for the suit properties were given to the 1st and 2nd Defendants by the Plaintiff after they paid to the Plaintiff more than 10% of the purchase price for the suit properties. The Defendants averred that the Plaintiff failed to complete the said agreement for sale by refusing to provide the completion documents. The Defendants denied that the suit properties had been charged to the 3rd Defendant to secure a loan that had been advanced to the 1st and 2nd Defendants by the 3rd Defendant. The Defendants averred that the suit properties could not be charged to the 3rd Defendant because the 3rd Defendant was not able to trace the survey maps for the suit properties. The Defendants averred that the Plaintiff was well aware of the transaction and had even promised to look into the issue of the survey maps. The Defendants contended that the Plaintiff's application had no merit.
6. In a ruling that was delivered on 26th July 2017, the court granted an order of a temporary injunction restraining the 1st and 2nd Defendants from trespassing onto, remaining upon, developing, alienating, selling, auctioning, transferring or in any manner whatsoever interfering with the Plaintiff's proprietorship and/or peaceful enjoyment of the suit properties pending the hearing and determination of the suit.



7. In the ruling, the court stated as follows in part:

“The account given by the 1st and 2nd Defendants of the reasons they were given the title deeds for the suit properties and how the same ended up with the 3rd Defendant does not add up. I am satisfied that the Plaintiff has proved on a prima facie basis that the 1st and 2nd Defendant dealt with the title deeds for the suit properties contrary to the purposes for which the same were given to them and that their actions were aimed at depriving the Plaintiff of the suit properties. The Plaintiff’s apprehension that the 1st and 2nd Defendants may proceed and deal with the suit properties in a manner inconsistent with his interest in the said properties is therefore not farfetched.”

8. On 21st May 2020, the 1st and 2nd Defendants’ advocates filed in court a consent said to have been signed by the Plaintiff in person, the 2nd Defendant in person and the advocates for the 1st and 2nd Defendants. The consent was on the following terms:

“It Is Hereby Consented That:

1. The plaintiff to provide the parcel of land known as LR No. Kajiado/Kitengela/46021 and Kajiado/Kitengela/46022 to the 1st and 2nd defendants to do the business of stone crushing thereof.
2. That the defendant do resume the business of stone crushing at the plaintiff’s parcel of land known as LR No. Kajiado/Kitengela/46021 and Kajiado/Kitengela/46022 without any interference.
3. That the plaintiff and the 2nd defendant Joe Mutambu trading as Mercbima International Limited do business of stone crushing on the plaintiff’s parcel of land known as LR No. Kajiado/Kitengela/46021 and Kajiado/Kitengela/46022.
4. That the stone crushing business thereof should take a term of 5 years renewable.
5. That in every ton of the stone crushed and sold the plaintiff be paid Ksh.80/-.
6. That the Kshs. 2 (two) million that Mr. Joe Mutambu paid to the plaintiff Mr. Wilson Ankaine Kisemei towards the purchase of the two parcels of land shall be deducted from the 80/- per ton payment that Mr. Wilson Ankaine Kisemei was to receive till the entire money 2 million shillings is fully recovered.
7. That the 2nd defendant to return all the land titles of the parcel of land known as LR No. Kajiado/Kitengela/46021 and Kajiado/Kitengela/46022 to the plaintiff. The business of stone crushing shall be owned by the 2nd defendant alone.
8. That in default of any condition herein above the execution to issue.
9. That in line of the above consent the matter be marked as settled.

Dated at Nairobi this 20th day of May 2020.”

9. Before the consent was adopted as an order of the court, the matter was set down for mention for the parties to confirm the terms thereof. When the matter came up on 15th June 2021 for the confirmation of the consent, the Plaintiff’s advocate informed the court that the consent was not acceptable to the plaintiff as drawn. On their part, the 1st and 2nd Defendants’ advocate informed the court that the 1st and 2nd Defendants had performed their part of the consent. The court ruled that since the terms of



- the consent were not acceptable to the Plaintiff, the same could not be adopted by the court. The 1st and 2nd Defendants were given the liberty to move the court for whatever relief they felt was available to them for the Plaintiff's change of mind.
10. What is now before me is the 1st and 2nd Defendants' Notice of Motion application dated 26th August 2021 seeking the following orders;
 1. That the Plaintiff be ordered to return the two original title deeds for the parcels of land L.R No. Kajiado/Kitengela/46021 and L.R No. Kajiado/Kitengela/46022 that were released to him after executing the consent dated 20th May 2020 that the Plaintiff disowned.
 2. That in the alternative the Plaintiff be ordered to refund the sum of Kshs. 2,000,000/- being the down payment that he received pursuant to the aborted sale of parcels of land L.R No. Kajiado/Kitengela/46021 and L.R No. Kajiado/Kitengela/46022 expressly admitted in the consent agreement that the Plaintiff executed and filed in court on 21st May 2020.
 3. Costs of the application.
 11. The application is brought on the grounds that on 20th May 2020, the Plaintiff and the 1st and 2nd Defendants (the Defendants) executed a consent and the same was filed in court on 21st May 2020. Upon execution of the said consent and the filing of the same in court as aforesaid, the 2nd Defendant returned the original title deeds for the suit properties to the Plaintiff. The Plaintiff has since denied executing the said consent or having any dealings with the Defendants but has retained possession of the said title deeds. The 2nd Defendant paid a sum of Kshs. 2,000,000/- to the Plaintiff as a down payment for the purchase price of the suit properties. The Plaintiff is a dishonest person and wants to defraud the 2nd Defendant of the said sum of Kshs. 2,000,0000/-. The Defendants have averred that it is only fair, just and in the interest of justice that the application be allowed.
 12. The application is opposed by the Plaintiff through a replying affidavit sworn on 15th February 2022. The Plaintiff has contended that the agreement that he had with the Defendants was to the effect that the 2nd Defendant would return to him the original title deeds for L.R No. Kajiado/Kitengela/46021 and L.R No. Kajiado/Kitengela/46022 after which this suit was to be marked as settled. The Plaintiff has averred that the title deeds for the suit properties were returned to him on that understanding. The Plaintiff has averred that the Defendants' advocates, Katunga Mbuvi & Co. Advocates made him sign a consent that did not reflect the agreement that he had with the 2nd Defendant without the participation of the advocates that were acting for him in this suit. The Plaintiff has averred that the orders sought by the Defendants cannot be granted because the Defendants had attempted previously to fraudulently charge the suit properties. The Plaintiff has averred that the Defendants have also failed to complete the agreement for sale dated 16th May 2014.
 13. The Plaintiff has averred further that the Defendants have already moved out of the suit properties after their equipment were seized and sold by a financial institution. The Plaintiff has averred that the orders sought by the Defendants are substantive in nature and as such the same cannot be granted on an application not backed by pleadings.
 14. The application was heard by way of written submissions. In their submissions dated 20th April 2022, the Defendants submitted that they are entitled to the orders sought in the application. The Defendants have submitted that they are entitled to the return of the original titles deeds for the suit properties and in the alternative a refund of Kshs. 2,000,000/-. The Defendants have submitted that the Plaintiff entered into the impugned consent on his own free will and as such he is estopped from denying the same. The Defendants have submitted that the Plaintiffs should be compelled to return



the original title deeds for the suit properties for the purposes of completion of the agreement for sale between the parties.

15. The Defendants have submitted further that the fact that the Defendants paid to the Plaintiff a sum of Kshs. 2,000,000/- as a deposit of the purchase price for the sui properties is admitted. The Defendants have averred that since the sale of the suit properties has been rescinded through the Plaintiff's dishonesty, the Defendants are entitled to a refund of the said sum of Kshs. 2,000,000/- together with interest. Finally, the Defendants have submitted that they are entitled to the costs of the application since the same was necessitated by the Plaintiff's fraudulent conduct.
16. In his submissions in reply dated 7th April 2022, the Plaintiff has reiterated that the title deeds in dispute were returned to him after the Defendants abandoned the agreement for sale of the suit properties and an understanding was reached that the said title deeds be returned to the Plaintiff and this suit marked as settled. The Plaintiff has averred that following the return of the said title deeds to him, this suit was concluded. The Plaintiff has averred that the consent that was drawn by the Defendants' advocates that he was made to sign did not reflect the agreement between the parties and that is why it was not adopted by the court. The Plaintiff has submitted that the Defendants have no interest in the suit properties and as such they are not entitled to an order for the return of the said title deeds. The Plaintiff has submitted further that the alleged breach of the contract between the parties cannot form a basis for the orders sought since the orders sought are substantive and final in nature and as such cannot be granted on an application. The Plaintiff has submitted further that from their conduct, the Defendants are not entitled to the equitable remedies sought. The Plaintiff has urged the court to dismiss the application with costs.
17. I have considered the Defendants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the Plaintiff in support of the application. Finally, I have considered the submissions by the advocates for the parties. It is common ground that the consent dated 20th May 2020 filed herein on 21st May 2020 was not adopted by the court. It is also not disputed that when the consent was purportedly signed by the Plaintiff in person, the Plaintiff was represented herein by the firm of Ataka, Kimori & Okoth Advocates. The Plaintiff who had not filed a notice to act in person could not therefore enter into any valid consent with the Defendants. It follows from the foregoing that the purported consent was irregular and invalid. I am of the view that in the application before the court, the Defendants are seeking to enforce the said consent. I have a problem with this move, first, the consent was not adopted as an order of this court and as such it has no force of law. Secondly, as a contract between the parties, it is invalid as I have stated earlier. This court cannot lend its aid in the enforcement of an illegal contract.
18. In *Kenya Pipeline Company Ltd v Glencore Energy(UK)Ltd.* [2015] eKLR, the Court of Appeal cited with approval the statement that was made in the case of *Holman v Johnsons* [1775-1802] All ER 98 concerning an illegal act as follows:

The principle of public policy is this:

“Ex dolo malo non oritur actio. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”



19. In the same case, the Court of Appeal stated further that:

“There is a consistent line of decisions of this court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The court has refused to lend aid or succour and has refused to be an instrument of validation for such persons. We still refuse...it must also follow that the respondent’s plea that a rejection of its claim would be tantamount to an unconstitutional deprivation of property is also untenable. The Constitution cannot possibly protect rights supposedly acquired through violation of the law.”

20. I am also in agreement with the Plaintiff that the Defendants’ application is not anchored on the pleadings on record. There is therefore no basis upon which the orders sought which are substantive in nature can be granted by the court at interlocutory stage. In any event, even if the issue of the two title deeds that were returned by the 2nd Defendant to the Plaintiff was pleaded, the court would not have been in a position to determine on affidavit evidence the circumstances under which the 2nd Defendant released the said title deeds to the Plaintiff or whether it is the Plaintiff or the Defendants who have breached the agreement of sale dated 16th May 2014.

21. In the final analysis, I am not satisfied that a case has been made out for granting the orders sought by the 1st and 2nd Defendants. Consequently, the 1st and 2nd Defendants’ Notice of Motion application dated 26th August 2021 is dismissed with costs to be in the cause.

DELIVERED AND DATED AT KISUMU THIS 3RD DAY OF NOVEMBER 2022

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Keli h/b for Mr. Sankale for the Plaintiff

Mr. Katunga for the 1st and 2nd Defendants

Ms. J. Omondi-Court Assistant**

