



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 27 OF 2017

MOHAMED OMAR SALIM.....PLAINTIFF

VERSUS

1. EDWARD MZEE KAREZI

2. MERCY WAMBUI KIMANI

3. JANE NYAMBURA RAMA

4. LAND REGISTRAR –COAST REGISTRY(MOMBASA) .

5. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion application dated 14th September 2020. By the said application, Mohamed Omar Salim (the Plaintiff) prays for an order of injunction to issue against the Land Registrar –Mombasa (the 4th Defendant) restraining him from transferring and/or recording any transaction against the title of all that parcel of land known as Plot No. CR 17835/7 Kilifi pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds: -

i) That vide a Complaint dated 9th February 2017, the Plaintiff sought the nullification of the 1st Respondent's transfer of his proprietary interests in the suit property to the 2nd and 3rd Respondents as well as their registration as proprietors of the suit property.

ii) That the 1st Respondent had illegally transferred the property to the 2nd and 3rd Respondents even though he had previously entered into a sale agreement dated 14th January 2013 with the Plaintiff to sell the suit property at a consideration of Kshs 4,000,000/-;

iii) That the Plaintiff made payments amounting to Kshs 2,400,000/- to the 1st Respondent who then gave him the original title to hold as security;

iv) That prior to the completion of the transaction, the Plaintiff found out that the 1st Respondent had presented a fake title deed to the suit property at the Mombasa Land Registry to effectualize the transfer of the property to the 2nd and 3rd Respondents;

v) That upon institution of this suit, the Plaintiff sought to lodge a caution at the Mombasa Land Registry but the 4th Respondent rejected the same without providing any reason; and

vi) That it is in the interest of justice that the orders sought herein be granted as the 1st, 2nd and 3rd Respondents are known to be fraudulent and capable of transferring the suit property to other parties illegally.

3. Mercy Wambui Kimani and Jane Nyambura Rama (the 2nd and 3rd Defendants respectively) are opposed to the application. In their joint Grounds of Opposition dated 3rd November 2017 but filed herein on 6th November 2020, they oppose the application on the grounds: -

1. *That the Applicant's application is misconceived, mischievous and has been brought before this Honourable Court in bad faith;*
2. *That the Application is only aimed at delaying and scuttling the expeditious hearing and determination of this suit;*
3. *That the Honourable Court had on 26th September 2019 issued an order of status quo to all the parties, amongst others, which order still subsists to date;*
4. *That the suit herein was filed in 2017 and at the said time the Plaintiff did not file an application for injunctive relief;*
5. *That this application has been brought three (3) years after filing of the suit;*
6. *That the said delay is inordinate and inexcusable and the same has not been explained;*
7. *That the Applicants are guilty of laches as they have sat on their laurels;*
8. *That equity aids the vigilant and not the indolent and the Applicant herein has no equitable remedy;*
9. *That the Applicant's application is therefore untenable and a waste of previous judicial time;*
10. *That in the interest of justice, the said application should be dismissed with costs.*

4. Edward Mzee Karezi (the 1st Defendant), the 4th Defendant as well as the Honourable the Attorney General (the 5th Defendant) neither entered appearance nor responded to the application.

5. I have given full consideration to the Plaintiff's Notice of Motion as well as the grounds filed in opposition thereto by the 2nd and 3rd Defendants. I have equally given consideration to the written submissions and authorities placed before me by the Learned Advocates- Mr. Mwadilo for the Plaintiff and Mr. Gicharu for the 2nd and 3rd Defendants.

6. I have considered the entire record from which I have noted that vide a Notice of Motion application dated 9th February 2017, the Plaintiff had sought orders of injunction restraining all the Defendants from selling, leasing, developing or in any way dealing with Plot No. IR 17835/7(Original No. 17835) Kilifi. The 1st, 2nd and 3rd Defendants did not oppose the application. The 5th Defendant however did file Grounds of Opposition on its own behalf and on behalf of the 4th Defendant.

7. Having considered the said application and in a Ruling rendered on 25th May 2018, this Court determined as follows at paragraphs 22 to 24 of the Ruling: -

"22. Arising from the foregoing, I am satisfied that there was connivance between the 1st Defendant and the 2nd, 3rd and 4th Defendant to fraudulently transfer the suit property and to disentitle the Plaintiff/Applicant who had invested a considerable sum towards the purchase thereof.

23. In the result, I am satisfied that the Plaintiff has established a prima facie case with a probability of success. In addition, as none of the Defendants resides on and/or occupies the suit property, it is my view that pending the trial to establish how the 2nd and 3rd Defendants got the title to the property, the balance of convenience tilts in favour of the Plaintiff.

24. Accordingly, the application dated 9th February 2017 is hereby allowed with costs."

8. By the application before me, the Plaintiff has now returned to Court and now seeks a specific order of injunction against the 4th Defendant to restrain him from transferring or recording any transaction against the title to the suit property. While the 4th Defendant did not file any response to the application, the 2nd and 3rd Defendants contend that the same is a waste of precious judicial time as the Court had already dealt with the issues and granted an order of status quo to all parties.

9. Having perused the Plaintiffs application dated 9th February 2017 and the Ruling delivered herein on 25th May 2018 as aforesaid, I have no hesitation in agreeing with the 2nd and 3rd Defendants that the present application deals with the very same issues and that the same is nothing but a waste of precious judicial time. Section 7 of the Civil Procedure Act prohibits this Court against dealing with such matters and provides as follows: -

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issues has been subsequently raised and has been heard and finally decided."

10. This Court has already ruled on the question of injunction and granted the Plaintiff his wish. He cannot be allowed to argue his case in bits and pieces as and when he wants. This Court is in any event satisfied that the orders granted herein are sufficient to preserve the suit property.

11. In the premises, the Motion dated 14th September 2020 is misconceived and a waste of precious judicial time. It is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE