



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC NO. 197 OF 2018

MOSES WAWERU NDUNG'U.....PLAINTIFF

VERSUS

ALI MENZA MBOGO.....DEFENDANT

RULING

(Plaintiff and defendant having had a vendor purchaser relationship over the suit properties and plaintiff transferring the properties to the defendant; plaintiff in this suit seeking to have that transaction nullified and the titles of the defendant cancelled and the same to revert back to the plaintiff; plaintiff being resident in the disputed properties; plaintiff filing an application for injunction alongside the plaint; the application for injunction dismissed; defendant moving to evict the plaintiff; plaintiff filing another application seeking a mandatory injunction to be reinstated in the premises and to stop the defendant from evicting him; preliminary objection that the application is res judicata; clear that the current application is also one of injunction; the court having already pronounced itself on whether the plaintiff is deserving of an injunction; application res judicata; preliminary objection allowed; application struck out)

1. This ruling is in respect of a preliminary objection that has been raised on the application dated 1 November 2019. It is claimed that the said application is res judicata.

2. By way of background, this suit was commenced through a plaint which was filed on 30 August 2018. In his plaint, the plaintiff pleaded that in the year 2010, he sold to the defendant 6 parcels of land excised from the Subdivision No. 780 Section II Mainland North (the Utange Plots). The vendor was Moon Valley Ventures Limited, a company that the plaintiff had interest in and the purchasers were the defendant's nominees. The consideration paid was Kshs. 12,600,000/= and once titles were processed, they were transferred to the defendant's nominees. In the year 2014, the plaintiff sold to the defendant the land Subdivision No. 4667 Section III Mainland North (the Kikambala Plot) for the sum of Kshs. 17,500,000/= . It is pleaded that the documents of title were handed over to the defendant and the defendant paid stamp duty of Kshs. 400,000/= but for reasons unknown to the plaintiff, the defendant did not complete the registration process, returned the documents and demanded a refund of the purchase price and the stamp duty paid. The defendant also demanded a refund of the Utange plots because it was taking long for him to take possession. Due to the persistence of the defendant in demanding a refund, a settlement agreement dated 19 June 2015 was executed between the plaintiff and defendant. The settlement agreement provided that the defendant would return the Utange plots and the Kikambala plot in exchange for a refund of Kshs. 27,400,000/=. It was agreed that the Kikambala plot would be sold and the defendant paid Kshs. 7,900,000/= from the proceeds thereof. The balance of Kshs. 19,500,000/= was to be settled by the plaintiff selling to the defendant the land parcel No 4820/III/MN. It is claimed that the defendant refused to abide by the settlement agreement and instead demanded another property from the plaintiff. The plaintiff had some apartments in Shanzu area which were charged to Kenya Commercial Bank (KCB) and the defendant showed interest in purchasing and affirmed that he was ready to settle with KCB to facilitate a discharge of charge.

3. On 20 May 2016 the plaintiff and defendant entered into an agreement for the sale of the Shanzu apartments for Kshs. 32,000,000/= and the sale agreement provided that this money is fully paid. The plaintiff has pleaded that the indebtedness of the plaintiff to the defendant was extinguished since the purchase price was set off against the plaintiff's debt to the defendant. Through a letter of 17 August 2016, the defendant informed the plaintiff that the Land Registrar had placed a restriction on the property. The defendant also refused to take possession of the apartments until the issue of the restriction was resolved. The plaintiff has pleaded that the defendant requested for a property to simply hold as security while he pursued the removal of the restriction. He has pleaded that in good faith, he gave the defendant two title documents out of three titles of his matrimonial house and family property, and he has claimed that the defendant assured him that he will hold the titles and transfer as security only and will in fact not transfer the properties. According to the plaintiff, the conservative value of the matrimonial property is Kshs. 85 Million and it covers the titles No. 9527/I/MN, 9528/I/MN and 9529/I/MN, the first two titles being the ones handed over to the defendant and the plaintiff retaining the last. The plaintiff has pleaded that he was shocked that the defendant proceeded to effect transfer of the two titles. He made inquiries but was reassured that in spite of the transfer, the defendant will not do anything, but at the appropriate time will return the titles back to the plaintiff after resolving the issue of the restriction in respect of the Shanzu apartments.

4. The plaintiff avers that in January 2018, he informed the defendant that he had sold some properties and was ready to pay his debt and

hoped that the defendant would return the two titles over the matrimonial home. The defendant dismissed this proposal and on 17 July 2018, the defendant descended on the matrimonial house and threw out the plaintiff's household goods and workers. The plaintiff was then at work and he rushed to the scene and demanded a court order. None was available and the defendant's agents left. On 20 August 2018, the plaintiff came back with police officers and other persons and evicted the plaintiff. The plaintiff has pleaded that the defendant had calculated a move to fraudulently acquire the plaintiff's matrimonial property in the pretext of recovery of funds. The plaintiff contends that any refunds were settled by sale of the Shanzu apartments in terms of the agreement of 20 May 2016 and by the plaintiff handing over the transfer instruments of this property. The plaintiff avers that he does not owe the defendant any money and that he did not sell the matrimonial property to the defendant. He pleaded that unless the sale of the matrimonial property is nullified, he stands to suffer irreparable loss. In the suit he sought orders to have the defendant permanently restrained from the two properties comprising of the matrimonial home and for an order of rectification of the register.

5. Together with the plaint, the plaintiff filed an application for injunction seeking to restrain the defendant from the two suit properties.

6. The defendant replied to the application for injunction. He acknowledged the sale of the Utange properties but stated that the sale never went through because there was a problem with the title. So too the sale of the Kikambala land. He acknowledged that they agreed that the apartments in Shanzu would be transferred to him to settle the debt from the Utange and Kikambala land. However, this property ended up having a problem as well, as the National Land Commission and National Water and Pipeline Corporation, claimed that it was public land hived off the latter's staff quarters. He stated that it is then that the plaintiff offered the suit properties to settle his indebtedness and a sale agreement was drawn and executed to settle the sum of Kshs. 41 Million. Transfers were then registered in his favour. The plaintiff was given a grace period of 60 days to vacate but he never did and the defendant contended that he was then to pay rent of Kshs. 35,000/= per month but he failed to do so. The defendant thus engaged auctioneers to levy distress.

7. The application for injunction was heard and dismissed by my predecessor, A. Omollo J, in her ruling dated 28 March 2019.

8. On 6 December 2019, the plaintiff filed an application dated 1 November 2019 seeking the following orders :-

(i) That the application be certified urgent.

(ii) That this Honourable Court be pleased to issue a mandatory injunction compelling and or directing the defendant to forthwith restore and or reinstate the plaintiff into the suit premises known as Subdivision No. 9527 and 9528 Section I Mainland North pending the hearing and determination of the suit herein.

(iii) That this Honourable Court be pleased to issue a mandatory injunction compelling and or directing the defendant to forthwith restore all the plaintiff's movable goods which were removed and thrown out of the suit property on 20th July 2019 and 27th July 2019.

(iv) That this Honourable Court be pleased to issue a temporary injunction restraining the defendant, either by himself, agents, servants and or any person acting under the defendant's instructions from further entering upon, interfering with, evicting, leasing out to any third party and or otherwise interfering with the plaintiff's possession, occupation and use of the suit property without due regard to the law or at all, pending the hearing and determination of this suit.

(v) That the Officer Commanding Nyali Police Station, Mombasa be directed and or ordered to enforce, implement and or otherwise oversee compliance with the orders of this Honourable Court.

(vi) That the costs of this application be borne by the defendant.

(vii) That such other or further orders be made as this Honourable Court may deem just and expedient.

9. The application was based on grounds inter alia that on 20 July 2019 and 27 July 2019, the defendant accompanied by other persons, threw out the household goods, clothes, furniture and other personal effects out of the plaintiff's residence, effectively turning the plaintiff and his family into Internally Displaced Persons (IDPs). It is contended that the defendant evicted the plaintiff without any notice or court order.

10. To oppose the application, the defendant filed a replying affidavit and a preliminary objection and as I mentioned at the beginning, it is that preliminary objection which is the subject of this ruling.

11. The main issue raised in the preliminary objection is that the application dated 1 November 2019 is res judicata. In his submissions, counsel for the defendant submitted inter alia that the doctrine of res judicata also applies to applications and he referred me to various authorities. On the other hand counsel for the plaintiff submitted that the issues in the two applications are totally different. He submitted that the current application is in respect of the plaintiff's occupation and or tenancy whereas the earlier application was in respect of ownership and or possession of the suit property. He submitted that the instant application was triggered by the events that occurred on 20 July and 29 July 2019. He submitted that the defendant is not exempted from following due process in enforcing an eviction. He submitted that the issue of unlawful and illegal eviction was not raised in the first application.

12. I have considered the matter. It is clear that when the plaintiff filed this suit, he accompanied it with an application for injunction. I need not express the exact words used in the application, but what is clear is that the plaintiff wished to have the defendant prevented from interfering with the plaintiff's use and possession of the disputed properties until the case is heard and determined. That application was dismissed. What appears to have followed is an attempt by the respondent to take possession of the suit properties which has now brought back the plaintiff with the current application.

13. Irrespective of the words or expressions used in the application, whichever way you look at it, this is another application for an injunction, because the intended result is to have the plaintiff restored back into the suit premises and to remain there until the case is heard and determined. The issue of whether the defendant should be restrained from evicting the plaintiff was already canvassed in the first application. That being the position, the plaintiff is estopped from filing another application seeking more or less similar orders. Doing so would be in breach of the principle of res judicata.

14. I am thus of the opinion that the preliminary objection is merited and I allow it. The result is that the application dated 1 November 2020 is struck out with costs to the defendant.

15. Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF MAY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA