



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

ELC 320 OF 2016

CHARLES AKOYI AMAYI.....PLAINTIFF

=VERSUS=

UTUMUHI INVESTMENT LIMITED

LAND REGISTRAR LAMU DISTRICT

THE HON. ATTORNEY GENERAL.....DEFENDANT

R U L I N G

1. Before me is a notice of motion dated 23rd November 2016. The same is brought under Order 40 Rules 1 and 4 and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 3 and 3A of the Civil Procedure Act and “Section” 159 of the Constitution. The Applicant Charles Akoyi Amayi prays for Orders:

1. **SPENT**

2. **SPENT**

3. **THAT** this Honourable Court be pleased to issue a temporary injunction against the Defendants, their agents, servants, nominees or any such persons from dealing, selling, disposing, dissipating(sic) and/or in any manner whatsoever interfering with plot Number Lamu/Hindi/Magogoni/645 pending the hearing and determination of this case.

4. Costs of this application be to the Plaintiff/Applicant.

2. The application is supported by the plaintiff’s affidavit sworn on 23rd November 2016. It is the Plaintiff’s case that he is the legal owner of all that parcel of land measuring approximately 15acres and more particularly known as Lamu/Hindi/Magogoni/645 having acquired the same in 1988 vide a letter of allotment dated 1st June 1998 and upon payment of a deposit of Kshs 700/= being 10% of the consideration required. The letter of offer is annexed to the said affidavit and marked “CAA1”. The plaintiff state that having made the said payment, he immediately entered into an agreement with some people to clear the bushes and prepare the land for development. The agreement dated 20th October 1988 is also annexed to his Affidavit. As it turned out however, in January 1989, before he could develop the land, he received a letter from the Office of the President under which he worked at the time in Lamu immediately transferring his services to the Nyayo Bus Services in Nairobi.

3. The Plaintiff avers that upon receipt of the Letter of transfer (also annexed to his affidavit) he immediately moved to Nairobi. It is his case that there followed widespread insecurity in Lamu which made it difficult for him and his family to settle and continue with development in the subject land. As he was still waiting for the insecurity to subside so that he could return and continue with the development he had started he found out through the Newspapers that his parcel of land had been “grabbed” and was illegally taken over by Utumish Investments Ltd, the 1st Defendant herein. Accordingly, he is now seeking a declaration that the said land belongs to him and an interlocutory injunction to restrain the 1st Defendant from dealing with the Suitland pending the hearing and determination of the case.

4. The application is opposed. In a Replying Affidavit sworn on 16th December 2016 by its Director, One Augustine Kimantirira, the 1st Defendant depones that at some particular point in time the company identified certain properties which it desired to purchase in Lamu. One of these properties was the suit property herein which they found to be registered in the name of one Changawa Katana Mbogoh. The 1st Defendant then conducted a search on the title and it was confirmed that the same was indeed registered in the name of the said Changawa Katana Mbogoh. The parties then entered into an agreement on 5th January 2010 in which the 1st Defendant acquired the Suitland for a consideration of Kshs. 1,776,000. The sale agreement annexed to the Affidavit in Reply and marked “AKN5B”, among other things, required the purchaser to settle outstanding arrears owed to the District Lands Adjudication & Settlement Department amounting to Kshs. 96,000/-. The 1st Defendant cleared the amount as agreed upon which the property was discharged and the transfer documents were then prepared and executed. Upon successful registration of the transfer document, the 1st Defendant was issued with a Title Deed dated 24th May 2011.

5. The 1st Defendant further depones that sometime in 2012, the District Officer – Hindi invited them for a meeting to discuss compensation due to the LAPPSET Project and it resolved to sub-divide the suit property and sell the portions but retain the portion which was to be acquired by the said LAPPSET Project, which land after sub – division is now parcel No. Lamu/Hindi/Magogoni/1270. However, when they submitted details of the land to the National Land Commission (NLC) for compensation, they were informed that the Plaintiff herein had lodged a complaint alleging ownership of the land. The matter before the NLC is still pending determination and it is the 1st Defendant’s case in any event that the Plaintiff’s application is baseless and should be dismissed.

6. The Honourable the Attorney General (AG) representing the Land Registrar Lamu District (2nd Defendant) has equally opposed this application. In Grounds of Opposition filed on 31st January 2017. The A-G contends that the application is a non-starter as contrary to Section 14 of the Government Proceedings Act it is seeking orders of injunction against the Government. It is further the A-G’s position that the Applicant has exhibited extreme indolence in establishing his claim and that the application has been overtaken by events as the suit property was lawfully and procedurally allocated to the 1st Defendant.

7. I have carefully perused the application, the Replying Affidavit and the Grounds of Opposition filed. I have also considered the rival submissions filed and the authorities referred to by the Learned Advocates appearing for the parties herein. The principles for the grant of an interlocutory injunction have been laid out in renowned case of **Giella -vs- Cassman Brown Co. Ltd (1973) EA 358**

“.....First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

8. It is accordingly incumbent upon this Court at the very onset to consider whether the Plaintiff has established a prima facie case with a probability of success. In **Mrao -vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR125**, The Court of Appeal observed that: -

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is 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 in rebuttal from the latter”.

9. As I have outlined herein above, the Plaintiff relies on a letter of allotment dated 1st June 1988 together with a receipt for payment of a deposit of Kshs. 700 in support of his case. The sum paid was said to be 10% of the consideration required. It is apparent from paragraph 2 of the letter of Allotment that the offer was subject to certain conditions imposed thereon by the Settlement Fund Trustees (SFT) Accordingly, the offer required the applicant to report to the District Land Adjudication and settlement Officer Lamu to be shown the plot boundaries and to be issued with the S.F.T conditions. The offer was indicated at paragraph 3 thereof to be valid for a period of 90 days and failure to meet the conditions thereon would lead to its cancellation “without further reference” to the offeree.

10. Other than indicating that he entered into a contract with some three people to clear the land, the Plaintiff does not reveal much on what the SFT conditions were and whether or not he fulfilled them. From his documents, it would appear that the plaintiff proceeded on transfer to Nairobi and forgot about the Suitland until he was awakened by the announcement of the impending LAPPSET project to be carried out in Lamu. Thus, for more than 20 years, he neither advanced his quest to acquire the land nor did anything else to improve it. His claim that the area in which the Suitland is located was insecure for all those years is not backed by any evidence.

11. On the other hand, the 1st Respondent has enumerated the process through which it obtained title documents to the Suitland. They have annexed documents indicating that when they developed interest in the Suitland, it was already registered in the name of a third party who has not been enjoined in these proceedings. Having conducted a search on the land they acquired the same at a consideration which included payment of an amount which was said to be outstanding to the Settlement Fund Trustees. Upon successful registration, they were issued with a Title Deed on 24th May 2011.

12. Section 26(1) of the Land Registration Act, 2012 provides that a certificate of Title shall be taken by all Courts as prima facie evidence that the person name as proprietor of the land is the absolute and indefeasible owner thereof and that such a title is not Subject to challenge except: -

- a. On the ground of fraud or misrepresentation to which the proprietor is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

13. While the Plaintiff accuses the 1st Defendant of colluding with the 2nd Defendant to fraudulently acquire his land, there is no evidence of illegality which has been attributed to the defendants. While it may as well be that the First Defendant bought the land for speculation purposes, it has clearly shown how it acquired the Suitland many years after the Plaintiff departed the scene.

14. Finally, it is evident from the evidence placed before this Court that the suit property Lamu/Hindi/Magogoni/645 was sub-divided by the 1st Defendant in 2012 and therefore ceased to exist. In **Eric -vs- J. Makokha & Others. Civil Application No. 20 of 1994 (12194 UR)** the Court of Appeal addressing itself to a request for a grant of injunction where the action sought to be restrained had already taken place, observed as follows:

“An application for injunction Under Rule 5 (2) (b) is an revocation of the equitable jurisdiction of the court. So, its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy of such order will be in vain. As is said, “Equity like nature, will do nothing in vain”. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or granted an injunction which will be ineffective for practical purposes. If it will be impossible to

comply with the injunction sought, the Court will decline to grant it.”

15. I agree with the Court of Appeal that the purpose of an injunction is to maintain status Quo pending the hearing and determination of the matter before it and therefore the Court cannot restrain what has already taken place. A temporary injunction is issued where the property is in danger of being wasted, damaged or alienated to the prejudice of the party seeking the orders. In this case, the suit property was sub-divided in 2012 and is no longer available for wastage, damage and/or alienation.

16. In the final result, I find no merit in the application. I dismiss the same with no order as to costs.

Dated, signed and delivered in Malindi this 12th day of May, 2017.

J.O. OLOLA

JUDGE