



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO.87 OF 2013

KESREC AGENCY LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

1. KHALID BADI BWEDI

2. MOHAMED ALI ALAUSI

3. HALIMA HUSSEIN AHMED

4. ARBI MUSANI.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. Before me is the Plaintiff's Notice of Preliminary Objection dated 8th July 2013 and an Application for injunctive orders dated 29th May 2013. The Plaintiff is praying in his Preliminary Objection that the court should determine in limine that the counsel appearing for the 3rd Defendant, Mr. Maurice Kilonzo does cease to act for the 3rd Defendant.

2. According to the said Notice, Mr. Maurice Kilonzo Advocate witnessed the execution of an Agreement dated 10th February, 2009 which has been annexed to the Supporting Affidavit of Joseph Gichuki Wambugu; that the said counsel is a potential witness to the proceedings and that by reasons thereof, there is a conflict of interest.

3. I will deal with the substantive Application first in view of the fact that the Preliminary Objection does not intend to have the pleadings before this court invalidated.

4. The Plaintiff's Application for injunctive orders restraining the Defendants from trespassing or interfering in any manner whatsoever with plot number 141 Malindi pending the hearing of the suit is based on the ground that the Applicant purchased the suit property on 11th June, 2008 and on 10th February 2009; that the Plaintiff is in the process of registering the indenture of three quarters portion of the suit property and that the Defendants have moved to sub-divide the suit land into eleven portions and are in the process of registering the subdivision and that the Defendants are trespassers on the Plaintiff's parcel of land.

5. According to the Supporting Affidavit of the Plaintiff's director, the Plaintiff has moved and obtained

the relevant consent to transfer the suit property from the Land Control Board.

6. The 3rd Defendant filed her Grounds of Opposition and stated that the Plaintiff's Preliminary Objection does not satisfy the established guiding principles for raising a Preliminary Objection.

7. The 3rd Defendant also filed a Replying Affidavit on 10th June 2013 and deponed that she is one of the registered owners of Plot number 141 Malindi of $\frac{1}{4}$ share of the undivided 68.58 acres.

8. The 3rd Defendant deponed that she has never sold her share in the suit property to the Plaintiff as alleged and that she has never attended any Land Control Board for the transfer of her share in the suit property. The 3rd Defendant denounced the Agreement annexed on the Plaintiff's Supporting Affidavit.

9. According to the Replying Affidavit of the 4th Defendant, he is registered as the owner of the suit property; that the suit property has since been sub-divided into various portions as indicated in the Plaintiff's annexure and that plot number 141 ceased to exist when the sub-division was completed before this suit was filed.

10. The 4th Defendant finally deponed that the Plaintiff does not disclose any cause of action as against him and that he is not a party to the Agreement that the Plaintiff's claim is based on .

11. The parties filed their respective submissions which I have considered. I have also considered the authorities on record.

12. The principles upon which this court can grant an interim order of injunction are now well settled. The Applicant must show that it has a prima facie case with chances of success and the irreparable damage that it is likely to suffer in the event the injunctive order is not granted. If the court is in doubt about the above two principles, it ought to decide the Application on a balance of convenience.

13. The Applicant has annexed on its Supporting Affidavit two sale agreements in respect to parcel of land number 141 Malindi. The first agreement is dated 11th June 2008 between the 1st and 2nd Defendants on the one hand and the Plaintiff on the other hand.

14. According to the said Agreement, the 1st and 2nd Defendants (the vendors) were the registered owners of plot no. 141 Malindi measuring 17 acres out of 68.58. The Plaintiff bought the 17 acres from the 1st and 2nd Defendants for a consideration of Kshs. 3,400,000. The Plaintiff was to pay the 1st and 2nd Defendants Kshs.500,000 upon execution of the agreement and a further deposit of Kshs.500,000 on or before 25th June 2008 and after the 1st and 2nd Defendants fence off the 17 acres. The balance was to be paid within 90 days from 25th June 2008.

15. The Plaintiff has annexed an acknowledgment slip purportedly signed by the 1st and 2nd Defendants and another person called Athman Badi of Kshs.26,300 being payment towards 30 acres in title number 141. The acknowledgment slip is not for the 17 acres as per the agreement of 10th February 2009 neither is it for the entire purchase of Kshs.7,000,000. There is no indication, either by way of affidavit evidence or documents that the Plaintiff honoured the agreement of 11th June 2008.

16. The 2nd Agreement that the Plaintiff is relying on is the one dated 10th February, 2009 between the 1st, 2nd, 3rd Defendants and another person known as Hassan Athmani Serenge on one part and the Plaintiff on the other part. According to the Agreement, the Plaintiff was to purchase 30 acres out of 68.58 acres of plot number 141 for Kshs.7,000,000.

17. The Plaintiff was required to pay a deposit of Kshs.1,350,000 to the vendors' advocate before execution of the agreement. Kshs.750,000 was supposed to be paid within 30 days from the date of execution of the agreement and the remaining balance of Kshs.4,900,000 was to be paid in 7 months in

installments of Kshs.700,000 on or before the 10th day of every month until payment in full. The Plaintiff has not annexed any evidence to show that he paid any amount to the Defendants as agreed. The Plaintiff has instead annexed the consent of Malindi Land Control Board for the transfer of $\frac{3}{4}$ undivided shares in the suit property.

18. The Plaintiff has not placed before this court any evidence to show that it is entitled to the suit property to enable this court exercise its discretion in its favour. There is indeed no explanation from the Plaintiff why it has never registered the indenture annexed on the Supporting Affidavit at the lands office if it indeed purchased the suit property.

19. In any event, the Plaintiff has annexed a survey plan showing that the suit property has since been sub-divided and new numbers issued, and the orders being sought cannot be issued. This court, being a court of law and equity, does not issue orders in vain.

20. For the reasons I have given above, I find that the Plaintiff has not established a prima facie case with chances of success. The Plaintiff has not also shown the irreparable loss that it will suffer that may not be compensated in damages considering that it is not in possession of the suit property. Consequently, I dismiss the Plaintiff's Application dated 29th May 2013 with costs.

21. On the question as to whether Maurice Kilonzo Advocate should not appear for the 3rd Defendant in this matter, I can only state that that is an issue which should be raised at the hearing of the main suit and not at this stage. The Preliminary Objection as worded has nothing to do with the Application that is currently before me.

Dated and Delivered in Malindi this 6th Day of **March 2014**

O. A. Angote

Judge