



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 87 OF 2013

SIMION OMANWA OSORO PLAINTIFF

VERSUS

BENSON OKENO OKIOMA 1ST DEFENDANT

GODFREY MOGENDI OKENO 2ND DEFENDANT

CO-OPERATIVE BANK OF KENYA 3RD DEFENDANT

THE LAND REGISTRAR 4TH DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 27th February 2013 claiming that on 9th April 1990, he sold to the 1st defendant a portion measuring 2 acres of all that parcel of land known as **LR No. Matutu/Settlement Scheme/280** (hereinafter referred to as “**the suit property**”) and that through acts of fraud, the 1st defendant caused the entire parcel of land comprised in the suit property which measures 5 acres to be transferred to his name. The plaintiff claimed that subsequent to that transfer, the 1st defendant sold and transferred the suit property to the 2nd defendant who proceeded to charge the same to the 3rd defendant to secure a loan. The plaintiff has claimed as against the defendants jointly and severally; a declaration that the transfer of the suit property to the 1st defendant, subsequent transfer of the same by the 1st defendant to the 2nd defendant and the charging of the suit property by the 2nd defendant to the 3rd defendant to secure a loan were fraught with illegalities, fraud and as such null and void, an order of mandatory injunction compelling the 1st and 2nd defendants to vacate the suit property and in default for them to be evicted there from, an order compelling the 4th defendant to cancel the charge registered against the title of the suit property in favour of the 3rd defendant and, general damages for trespass.

2. The 1st defendant entered appearance and filed a statement of defence on 10th April 2013. The 1st defendant denied the plaintiff’s claim in its entirety. The 1st defendant contended that he purchased the entire parcel of land comprised in title LR No. Matutu/Settlement Scheme/280 (“**the suit property**”) from the plaintiff at a consideration of Kshs. 344,000.00. The 1st defendant denied that he only purchased 2 acres of the said parcel of land. The 1st defendant contended that he followed all the necessary legal procedures to acquire the suit property before he sold and transferred the same to the 2nd defendant. The 1st defendant contended that he took possession of the suit property in 1990 soon after purchase of the same from the plaintiff and occupied the same until the year 2009 when he transferred the

same to the 2nd defendant. The 1st defendant denied the allegation of fraud leveled against him by the plaintiff and denied that the plaintiff only came to know that the suit property was registered in the name of the 2nd defendant in the year 2013. The 2nd defendant filed a defence denying the plaintiff's claim. The 2nd defendant contended that he is an innocent purchaser for value of the suit property without notice of the plaintiff's alleged interest in the suit property. Both the 1st and 2nd defendants contended that the plaintiff's suit is time barred.

3. On 24th June 2013, the 1st defendant filed an application by way of Notice of Motion of the same date seeking an order that the plaintiff do deposit in the joint names of the advocates for the plaintiff and the 1st defendant a sum of kshs. 500,000.00 security for costs. This is the application before me for determination. The 1st defendant's application which was brought under order 26 rules 1, 5 and 6 of the Civil Procedure Rules was brought on the grounds that the 1st defendant is desirous of obtaining a guarantee that the costs that he will incur in defending this suit would be recovered in full. The 1st defendant contended that the transaction in which he entered into with the plaintiff in relation to the suit property was above board and that the plaintiff's claim against him has no basis of whatsoever nature and that unlike the plaintiff who stand to lose nothing if the suit is dismissed, he stands to lose substantially in costs. The 1st defendant's application was opposed by the plaintiff who filed a replying affidavit sworn on 8th July 2013. In opposing the 1st defendant's application, the plaintiff contended that the 1st defendant's application has no basis. The plaintiff contended that the conditions upon which an order for security for costs can be made have not been met. The plaintiff maintained that he has a good case against the defendants and that the 1st defendant's apprehension that he will incur unnecessary costs has no basis factual or otherwise.

4. On 18th July 2013, the advocates for the parties agreed to canvass the 1st defendant's application by way of written submissions. The 1st defendant filed his written submissions on 17th September 2013 while the plaintiff filed his submissions in reply on 2nd October 2013. In his submission, the 1st defendant contended that the suit property was sold and transferred to him lawfully and that he occupied the entire parcel of land comprised in the suit property from the year 1990 upto the year 2009 when he sold the same to the 2nd defendant. The 1st defendant submitted that the plaintiff's suit is time barred and is an abuse of the process of the court. The 1st defendant submitted that the plaintiff's suit is frivolous and vexatious and there is no guarantee that he will recover his costs once the suit is ultimately dismissed. He submitted that this is an appropriate case to grant the order sought.

5. In his submission in reply, the plaintiff submitted that he has a constitutional right to bring this suit for determination by the court and that a plaintiff would be ordered to furnish security for costs only in limited circumstances such as, when a plaintiff is resident outside the jurisdiction of the court, where there is reason to believe that the plaintiff would not be able to pay the defendant's costs when ordered to do so, where the plaintiff's physical address or fixed abode is unknown and where the plaintiff has changed his physical address in the course of proceedings with the intention of avoiding or evading consequences of litigation. The plaintiff submitted that the 1st defendant has not demonstrated that any of these instances apply to the plaintiff herein who is a Kenyan and who has brought these proceedings for his own benefit. The plaintiff submitted that he has a good claim against the defendants and that the suit is not time barred.

6. I have considered the 1st defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed in opposition to the application and the respective submissions by the advocates for the parties. I am in agreement with the submission by the advocates for the plaintiff that an order for security for costs against a plaintiff is not made as a matter of course. Good reasons or basis must be put forward to justify such order. Access to justice is a constitutional right. An order for security for costs is a hindrance or an impediment to the enjoyment of such right. I am cognizant of the fact that like other rights guaranteed under the constitution, a right of access to justice is not absolute. A court of law cannot however impede or restrict the enjoyment of such right without valid reasons.

7. In the application before me, the only ground put forward by the 1st defendant to justify the order sought is that he has a water tight defence to the plaintiff's case. As I had mentioned at the beginning of this ruling, the plaintiff's claim has been denied in its entirety by the 1st defendant. The parties have joined issues in their pleadings and it is not possible by just looking at the pleadings to determine the issues raised by the parties. Whether the plaintiff sold to the 1st defendant the entire parcel of land comprised in the title of the suit property or only a portion thereof measuring 2 acres cannot be determined at this stage. The determination thereof must wait for the trial. I am not satisfied therefore that the plaintiff's case is frivolous and vexatious to justify an order for security for costs. The 1st defendant had also submitted that the 1st defendant is not sure whether he will be able to recover costs from the plaintiff when he is ordered to pay the same. I am once again in agreement with the plaintiff's advocate that the 1st defendant has not laid a basis for this apprehension. The 1st defendant has not shown or demonstrated that the plaintiff would not be in a position to meet the costs of this suit. The 1st defendant has not shown that the plaintiff has an intention of evading the consequences of this suit that he has brought for his own benefit. There is no dispute that the plaintiff is a Kenyan and that he is resident in Kenya. It has not been shown that he intends to leave the jurisdiction of the court or that he is disposing of his properties with a view to evade cost consequences that may flow from this suit. I am of the opinion from the foregoing that the 1st defendant has not laid a basis for granting the orders sought.

8. In conclusion therefore, I find no merit in the 1st defendant's application dated 24th June 2013. The same is accordingly dismissed with costs to the plaintiff.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Soire h/b for Minda for the Plaintiff

N/A for the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE