



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT

ELC NO. 45 OF 2013

ANNAN WARIMU MWANGI.....PLAINTIFF/APPLICANT

=VERSUS=

TIMOTHY MWINGA GACHERU

ALEXANDER JAMES KIMARI

DAVID KAMAU KIMANI.....DEFENDANTS/RESPONDENTS

R U L I N G

1. The Application before me is dated 23rd March 2013. The Application seeks for the following orders.
 - a. **THAT this Honourable Court do remove and order the Registrar of Lands Mpeketoni in Lamu County to remove the two cautions lodged by the 1st and 2nd Defendants on the 22nd June, 2012 and another lodged by the 3rd Defendant on the 27th June, 2012, respectively from land previously known as Title Number LAMU/HINDI MAGOGONI/386 now subdivided into four (4) portions and given new Titles numbers 1200/1201/1202 and 1203 respectively.**
 - b. **THAT an order of temporary injunction be granted restraining the 1st, 2nd and 3rd Defendants by themselves, their agent, assigns and/or employees or anyone claiming through them or otherwise howsoever from selling or purporting to sell or offering to sell, disposing off, charging, mortgaging, subdividing, pledging, entering into, remaining or lodging a caution against or at all or in any other manner interfering with the Plaintiff's ownership, quite or at all or in any other manner interfering with the Plaintiff's ownership, quite possession and enjoyment of the property previously known as Title Number LAMU/HINDI MAGOGONI/386 now subdivided into four (4) portions and given new Title numbers 1200/1201/1202 and 1203 together with the buildings and/or improvements, trees vegetation and/or crops thereon pending the inter partes hearing and further pending the hearing and determination of this suit or further orders on this Honourable court.**
 - c. **THAT the costs of this Application be borne by the Defendants**
2. It is the Plaintiff's/Applicant's averment that she is the owner of the parcel of land previously known as title number LAMU/HINDI MAGOGONI/386 measuring 4.0 Hectares which has since been subdivided and given new title numbers LAMU/HINDI MAGOGONI/1200, 1201, 1202 and 1203.

3. The Plaintiff has deponed that she entered into two separate sale agreements with the 1st and 2nd Respondents on 21st May 2010 for the purchase of 2.0 acres and another one with the 3rd Respondent on 9th February 2011 for the purchase of 1.0 acres respectively.
4. It is the Plaintiff's/Applicant's deposition that the Respondents frustrated the transaction; that the period within which the land board consent was to be obtained ought to have been within six (6) months after the signing of the two sale agreements which period subsequently lapsed rendering the said sale agreement null and void.
5. The Applicant finally deponed that the Respondents have cautioned the whole land measuring 12 acres while the two agreements were in respect of only 3 acres; that she had found a buyer to purchase one acre so that she can support her family and built a decent house.
6. The 3rd Defendant/Respondent filed his Replying Affidavit on 23rd May 2013 and deponed that he paid a deposit of Kenya Shillings 200,000/- upon execution of the agreement of sale of land with the Plaintiff.
7. The 3rd Defendant/Applicant has admitted in his Replying Affidavit that the Plaintiff/Applicant did not obtain the consent from the Land Control Board which was meant to frustrate the sale agreement; that the Plaintiff/Applicant refused to appear before the Registrar of Lands at Mpeketoni, Lamu to have the dispute resolved.
8. The 3rd Defendant/Respondent deponed that the Plaintiff/Applicant has demanded for an additional Kshs.800,000/- towards the purchase price and that he placed a caution on land parcel number LAMU/HINDI MAGOGONI/386 but it was cautioned to protect the deposit of Kshs.200,000/- that he had paid to the Plaintiff/Applicant.
9. When the Application came up for inter partes hearing on 23rd May 2013, the Plaintiff advocate informed the court that the Plaintiff had discontinued her suit as against the 1st and 2nd Defendants. The Application was therefore in respect to the 3rd Defendant alone.
10. Mr. Maura, counsel for the Plaintiff/Applicant submitted that this court should lift the caution that was registered by the 3rd Defendant.
11. According to counsel, though plot number 385 has been subdivided to create plot numbers 1200, 1201, 1202 and 1203, the titles for the subdivisions have not been issued because of the existence of the caution lodged by the 3rd Defendant.
12. The Plaintiff Advocate submitted that the 3rd Defendant/Respondent has no known legal interest in the suit property. According to counsel, the agreement between the Plaintiff and the 3rd Defendant dated 9th February 2011 fell through when the Land Control Board Consent was not obtained within 6 months. Consequently, it was submitted, the agreement became void in law. Counsel relied on the case of **Benard Kimeu Mutie vs Francisca Kavuli Mutavi & others [2004] e KLR** and **Peterson Marui Githinji vs James Murithi Gutu [2006] e KLR**.
13. In response, Mr. Keriga, counsel for the 3rd Defendant/Respondent submitted that the 3rd Defendant has filed a defence and counter-claim. According to counsel, the caution which was lodged by the 3rd Defendant should remain in place until the counterclaim for deposit that was paid by the 3rd Defendant is heard and determined.
14. It is also not in dispute that in fulfillment of the said agreement, the 3rd Defendant paid a deposit of Kshs.200,000/- to the Plaintiff/Applicant.
15. Considering that the suit property is agricultural land, a fact which has not been denied by the Defendant, the parties were under an obligation to obtain the consent of the Land Control Board of the area that the suit property is situated within six months. The period within which the consent of the land control board should have been obtained lapsed on 8th August 2011.
16. There is a long chain of decisions by the High Court and the Court of Appeal where it has been held that where the consent of the Land Control Board has not been obtained, the sale of agricultural land becomes void for all purposes.
17. In Malindi HCCC No. 118 of 2012; **Franciscar Mbuchu Tinga vs Changawa Baya Nyndo and 5 others**, I held as follows;

“The provisions of section 6(1) [of the Land Control act, Cap 302] are mandatory in nature, and this court, like all the other courts are bound by it. This section has been a subject

of many legal disputes owing to the fact that many people dealing in agricultural land have negligently or ignorantly failed to seek the consent of the board thus rendering the transaction void for all intents and purposes under the Act.”

18. In the same case, this court quoted the case of **Onyango and Another vs Luwayi (1986) KLR 513-516** in which the Court of Appeal defined what the phrase “void for all purposes” means as follows.

“An agreement that is held to be void for all purposes could not be the basis for a reference to a panel of elders. If a transaction is void for all purposes, nothing of it is left that could constitute a case of a civil nature. No complaints of any nature remain to be resolved after a transaction related to agricultural land is held to be void. For that reason, the appellant's case that there was an issue of trespass which could be referred to elders is unsuitable. The words “void for all purposes” must be interpreted to mean what they say.”

19. The 3rd Defendant is in agreement with the above position of the law. For that reason, he has filed a counter-claim in which he is seeking for the deposit that he paid to the Plaintiff. That is the only recourse that he has having failed to obtain the consent of the Board within six months after signing the sale agreement.

20. Having failed to obtain the consent of the Board within the requisite six months, the Defendant does not have any known legal claim to the suit property. He cannot therefore lodge a caution on the property as he has done, notwithstanding the fact that the Plaintiff has not refunded the deposit that was paid to her.

21. In the event that the 3rd Defendant's counter-claim succeeds, he shall enforce the Judgment in the manner prescribed by the Civil Procedure Rules. He cannot lay a lien over the suit property at this stage.

22. In the circumstances and for the reasons I have given above, I find and hold that the Plaintiff has established a prima facie case with chances of success. The Plaintiff should be allowed to deal with the suit property in the manner she deems fit, the agreement of sale having fallen through for want of the consent by the Board. I therefore allow the application dated 23rd March 2013 in the following terms:

- a. **THAT this Honourable Court do and hereby order the Registrar of Lands, Mpeketoni, in Lamu County to remove the caution lodged by the 3rd Defendant on the 27th June, 2012 from land previously known as Title Number LAMU/HINDI MAGOGONI/386 now subdivided into four (4) portions and given new Titles numbers 1200/1201/1202 and 1203 respectively.**
- b. **THAT an order of temporary injunction be and is hereby granted restraining the 3rd Defendant by himself, his agents, assigns and/or employees or anyone claiming through him or otherwise howsoever from selling or purporting to sell or offering to sell, disposing off, charging, mortgaging, subdividing, pledging, entering into, remaining or lodging a caution against or at all or in any other manner interfering with the Plaintiff's ownership, quite or at all or in any other manner interfering with the Plaintiff's ownership, quite possession and enjoyment of the property previously known as Title Number LAMU/HINDI MAGOGONI/386 now subdivided into four (4) portions and given new Title numbers 1200/1201/1202 and 1203 together with the buildings and/or improvements, trees vegetation and/or crops thereon pending the hearing and determination of this suit.**
- c. **THAT the costs of this Application be borne by the 3rd Defendant.**

Dated and Delivered in Malindi this 5th day of July, 2013

O. A. Angote

Judge