



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 20 OF 2017

MAALIM KHAMISI JEFWA.....PLAINTIFF

VERSUS

MBARAK AWAADH OMAR.....1ST DEFENDANT

HINDU MOHAMED AMUR (THE ADMINISTRATOR OF THE ESTATE OF

MOHAMED BIN AMUR EL-KAILI EL KINDY).....2ND DEFENDANT

RULING

1. Before me for determination is a Notice of Motion application dated 5th September 2018. By the said application, one Hindu Mohamed Amur styling himself as the proposed 2nd Defendant and the Administrator of the Estate of Mohamed Bin Amur El-Kaili El Kindy prays for orders:-

2). That with the leave of this Court the proposed 2nd Defendant/Applicant be enjoined in this suit as the second Defendant.

3). That the consent orders recorded on 1st March 2017 before the Court in favour of the Plaintiff and the Defendant be set aside and/or stayed pending the hearing of this Application inter partes and/or pending the hearing of this suit.

4.) That there be issued a temporary injunction restraining the Plaintiff and the 1st Defendant their agents, assignees, servants and/or third parties from constructing, clearing, disposing, transferring, selling, dealing and/or interfering in any manner with all that property known as sub-division No. 72 Section IV Mainland North measuring approximately 911.0 acres situated north of Kilifi County pending the hearing and determination of this Application inter-partes and/or the suit.

5.) Costs of the Application be provided for.

2. The said application is supported by an Affidavit sworn by Leila Mohamed Abdallah and is premised on the grounds that:-

i. There exists a transfer of title in the name of the 2nd Defendant over Plot No. 72/IV/MN for the 911 acres in issue made in 1956 and duly registered in the lands office;

ii. There have been various unsuccessful attempts by third parties including the parties herein to divest the Estate of the said Mohamed Bin Amur Bin Kaili El Kindy of the ownership of the said land on Plot No. 72/IV/MN;

iii. The consent Order of 1st March 2017 is a further and explicit attempt to interfere with the suit property comprising of 911 acres in Junju, Kilifi and

iv. That the 1st Defendant has no interest capable of being extinguished as per survey Plan No. 21305 and the Registrar ought not to be allowed to cause an entry to that effect in favour of the Plaintiff.

3. In response to the said application, on 10th December 2018 the Plaintiff filed a Notice of Preliminary Objection opposing the Proposed 2nd Defendant's application on the following grounds:-

1. That the Court herein is functus officio

2. That the application is filed in contravention of the enduring principle of law that a Court cannot re-open what it has already made a final decision on.

3. The application dated 5th September 2018 herein is brought irregularly, an abuse of Court process and ought to be dismissed for waste of Court's time;

4. The subject matter herein having already been determined, this Court is prevented by law from re-opening the matter as it had already rendered the final decision thereon;

5. Further and absolutely without prejudice to the foregone, the Applicant is without appeal nor review simply asking this Court to shut its eyes and propel an injustice through entertaining a matter that the court had already made a logical conclusion to;

6. Equity allows the law and cannot allow its glow of grace upon a litigant whose hands are already soiled and/or fraught with deliberate misrepresentation of law and fact and who is guilty of indolence and laches; and

7. The Plaintiff's application dated 5th September 2018 is absolutely frivolous, vexatious and constitutes a gross abuse of the process of Court.

4. As it turned out, on the date set for hearing, the Plaintiff's Advocate did not attend Court and the Preliminary Objection was not therefore argued. I have however considered the application dated 5th September 2018 as well as the grounds set out in the Notice of Preliminary Objection.

5. The Plaintiff, Maalim Khamisi Jefwa filed this suit against the sole Defendant Mbaraka Awadh Omar on 3rd February 2017 praying for a mandatory injunction to issue permanently restraining the Defendant from constructing on, clearing, disposing, transferring, selling, dealing with and/or interfering in any manner with all that property being 200 shares of the Parcel of land known as Subdivision No. 72 Section IV Mainland North.

6. In addition he sought orders directing the Land Registrar to proceed and reconstruct the records to reflect that he had acquired proprietary and beneficial interest over the property for an Estate in fee simple being 200 shares of the suit property. Further and in addition to the foregoing, the Plaintiff sought an order directing the Land Registrar Mombasa to issue a provisional title document in his favour for all that property for an Estate in Fee Simple being 200 shares of the suit property as delineated on land Survey Plan No. 21305, without gazettement.

7. On or about 20th February 2017 some three weeks after the suit was filed, the Defendant filed a Memorandum of Appearance in person. Another Memorandum of Appearance was however filed by Messrs Odindiko & Company Advocates for the Defendant on 1st March 2017. On the same date, the said Advocates and Messrs Marende Necheza & Associates for both parties adopted a 7-paragraph consent contained in a letter dated 24th February 2017 printed on the letter-head of the said Odindiko & Company Advocates as follows:-

BY CONSENT

1. That this Honourable Court do hereby declare that the Defendant either by himself, his agents, assignees, servants, and/or third parties from (sic) constructing, clearing, disposing, transferring, selling, dealing and/or interfering in any manner with all that property being 200 shares of parcel of land known as sub-division No. 72 Section IV Mainland North measuring approximately 911.0 Acres situated north of Kilifi County in the Republic of Kenya, and delineated on Land Survey Plan No. 21305 permanently.

2. That the Honourable Court do and hereby order/ declare that the interests of the Defendant herein in the property being 200 shares of parcel of land known as subdivision No. 72 Section IV Mainland North measuring approximately 911.0 acres situated North of Kilifi County in the Republic of Kenya, and delineated on Land Survey Plan No. 21305 be and is hereby extinguished and the Land Registrar Mombasa, do cause an entry to that effect;

3. That the Honourable Court do hereby order/direct/declare that the Plaintiff/Applicant has acquired legal, proprietary and beneficial interest over the property for an Estate in fee simple being 200 shares of land known as sub-division No. 72 Section IV Mainland North measuring approximately 911.0 acres situated North of Kilifi County in the Republic of Kenya, and delineated on Land Survey Plan No. 21305;

4. That the Land Registrar Mombasa do dispense with the production of the original title document and all other legal documents to be produced by the defendant herein and without gazettement;

5. That this Honourable Court do hereby direct the Land Registrar Mombasa to issue a Provision Title Document of Land in favour of the Plaintiff/Applicant for all that property for an estate in fee simple being 200 shares of land known as subdivision No. 72 Section IV Mainland North measuring approximately 911.0 acres situated North of Kilifi County in the Republic of Kenya, and delineated on Land Survey Plan No. 21305 without gazettement;

6. That this Honourable Court be pleased to order/direct the Land Registrar at Mombasa Land Registry to proceed and reconstruct the records/register of the property being 200 shares of land known as subdivision No. 72 Section IV Mainland

North measuring approximately 911.0 acres situated North of Kilifi County in the Republic of Kenya, and delineated on Land Survey Plan No. 21305, without gazettment;

7. That the matter be marked as settled and each party to bear its own costs.

8. It is these Orders that the Proposed 2nd Defendant seeks to set aside in the application before me. It is amazing that in response to the detailed affidavit of the Applicant herein and the clear averments that the sole Defendant sued by the Plaintiff had no interests in the suit capable of being extinguished as purported in the consent, it is only the Plaintiff who filed an objection herein while the Defendant did not file anything to demonstrate its interest in the property.

9. A casual glance at the grounds set out in the Preliminary Objection which was abandoned without argument reveals that the Plaintiff's protests were based on alleged lack of jurisdiction on the part of the Court on the purport that the Court was *functus officio* having recorded the impugned consent. As it were, there is absolutely no attempt to address the serious accusations of fraud on the part of the parties as contained in the Applicant's affidavit.

10. In the circumstances herein, I am persuaded that the Applicant before me is a proper party to be enjoined in the proceedings. I am also persuaded on the material placed before me that the Applicant has a great interest in the suit property which was the subject matter of the consent by the Plaintiff and the Defendant.

11. Accordingly, I hereby allow the application dated 5th September 2018 in terms of Prayers 2, 3 and 4 thereof erroneously listed in the said application as 5, 6, and 7.

12. The Applicant shall also have the costs of this application.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE