



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 324 OF 2017**

**IBRAHIM MUSA MOHAMED.....PLAINTIFF**

**-VERSUS-**

**MWANATUMU ATHMAN ATHUR.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff/applicant moved this Court vide a notice of motion dated 11<sup>th</sup> September 2017 brought under the provisions of Order 40 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act asking the Court to grant the following relief:

**(a) Spent**

**(b) That this honourable Court do hereby issue orders restraining the defendants from transferring the land parcel CR. No. 70339 pending the hearing and determination of this application inter parties.**

**(c) That this honourable Court do hereby restrain the defendants from transferring the land parcel CR. No. 70339 pending the hearing and determination of this suit.**

**(d) That costs be in the cause.**

**(e) Costs in the cause**

2. The motion is premised on the facts listed on the face of the application inter alia that the applicant will suffer immensely as he paid for the suit property in 2012. In the supporting affidavit, Mr Mohamed deposed that he purchased plot No 592/III/MN No 17493 and annexed the sale agreement as “**IM – 1**”. That the 1<sup>st</sup> Respondent refused to transfer the same instead opting to sell to other parties. That the suit plot has since been subdivided into two with plot No 70339 registered in her name. That the applicant has reliable learnt that the 1<sup>st</sup> Respondent is in the process of transferring this plot hence the need for the orders sought to issue.

3. The 1<sup>st</sup> Respondent opposed the application by filing a 23 paragraph replying affidavit dated 19<sup>th</sup> February 2018. The 1<sup>st</sup> Respondent deposed that the property was jointly owned together with Juma Omar – deceased. The 1<sup>st</sup> Respondent deposed that she is not the legal representative of the estate of the late Juma Omar. The 1<sup>st</sup> Respondent denied the sale agreement and stated that plot No 70339, MN/III/11333 is non-existent to warrant the issuance of the orders sought.

4. The 1<sup>st</sup> Respondent deposed further that on 6<sup>th</sup> March 2015, Malindi Environment and Land Court in case No 64 of 2007 nullified all the subdivisions which had been undertaken on plot No 592/III/MN ordering the plot to be re – subdivided afresh. A copy of the judgment was annexed as “**MAA 5**”. That the applicant herein attempted to join that suit vide an application dated 18<sup>th</sup> March 2015 to enable him challenge that decision but which application was dismissed. The copy of this ruling was also annexed as “**MAA 6**”. The 1<sup>st</sup> Respondent accuses the applicant of non-disclosure of material facts in obtaining the ex parte orders on 12<sup>th</sup> September 2017 and urged the Court to discharge them.

5. The Applicant has pleaded that he purchased a portion of land from the 1<sup>st</sup> Respondent which sale the 1<sup>st</sup> Respondent denies. At this interlocutory stage, it is not possible for the Court to make a determination on whether there was a sale transaction between the applicant and the 1<sup>st</sup> Respondent. Further the fact that the Applicant has annexed copies of the sale agreement and transfer forms said to have been

executed by the 1<sup>st</sup> Respondent which in my mind sets a basis for a prima facie case with a probability of succeeding.

6. The 1<sup>st</sup> Respondent on her part deposed that the orders cannot be given because the plot CR No 70339 does not exist, the subdivisions having been nullified by the Court of concurrent jurisdiction in Malindi Environment and Land Court case No 64 of 2007. In rebutting this allegation, the Applicant did file a supplementary affidavit in which he annexed a copy of postal search as at 14<sup>th</sup> March 2018 showing the suit plot is registered in the name of Mwatum Athuman Athur. The plot number is given as 11333/III/MN with the exparte order issued in this matter on 12<sup>th</sup> September 2017 registered on the said title under the encumbrance section. The judgement in ELC No 64 of 2007 did nullify the subdivisions earlier undertaken by the 1<sup>st</sup> Respondent. However the 1<sup>st</sup> Respondent did not annex documents to support her averment that the subdivisions earlier nullified was the one that had created the No CR 70339 and comprised of plot No 11333/III/MN.

7. Consequently on account of the fact that the CR No 70339 is still in existence as the land records the prayer for an order to stop dealings on it cannot be said to be made in vain. Further in order to have the applicant secure her interests on the portion belonging to the 1<sup>st</sup> defendant pending determination of the question on whether there was a sale between the applicant and 1<sup>st</sup> Respondent, it is just and equitable that the order of temporary injunction do issue.

8. On the submission that granting the orders amount to sitting on an appeal, I do not agree as the issues before this Court are independent of the issues that were for determination in ELC case No 64 of 2007. In the result, I find the application as meeting the threshold for granting an order of injunction pending the conclusion of the suit. Consequently I do grant the orders in terms of prayer (b), (c) & (d) of the motion.

**Dated, signed & delivered at Mombasa this 15<sup>th</sup> February 2019**

**A. OMOLLO**

**JUDGE**