



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 197 OF 2018

MOSES WAWERU NDUNG'U.....PLAINTIFF

-VERSUS-

ALI MENZA MBOGO.....DEFENDANT

RULING

1. The plaintiff has sued the defendant vide the plaint dated 30th August 2018 in which he sought several orders inter alia; for a declaration that he is not indebted to the defendant and for rectification of the register in respect of title no subdivision No 9527 and 9528 Section MN. Together with the plaint, he moved the Court via the notice of motion also dated the 30th August 2018.

2. In the motion, the plaintiff sought the following temporary reliefs:

(a) Spent

(b) Spent

(c) That pending the hearing and disposal of this suit, the defendant by himself, his servants and or agents or otherwise howsoever be restrained from blocking, stopping, evicting, ejecting, removing or in any other way denying the plaintiff from accessing his Matrimonial House and or enjoying quiet possession of his property.

(d) Spent

(e) That pending the hearing and disposal of this suit, the defendant, by himself, his servants and or agents or otherwise howsoever be restrained from charging, leasing, selling, transferring or in any other way or manner whatsoever and howsoever interfering with the plaintiff's possession of the parcels of land known as SUBDIVISION NUMBERS 9527 and 9528 SECTION I MAINLAND NORTH.

(f) Cost of the application be provided for.

3. The application is supported by the grounds on its face which included the following:

(i) That on Monday, August 20th 2018 at about mid-day the Defendant went to the plaintiff's matrimonial house, the suit property, in the company of a team of over 20 private guards and without any warning, reason or cause physically threw the plaintiff's children and domestic servants out of the house and locked the gate to the Matrimonial House.

(ii) That since the 20th August 2018 the plaintiff has been denied access to the house and his family, spouse and children have been out in the cold, without a change of clothes and cannot enjoy the comfort of their home.

(iii) That the Defendant has placed security guards round the clock at the main gate to the matrimonial house thereby completely denying the plaintiff and his family access to their home.

(iv) That the defendant has threatened to break and make a forceful entry into the house. The plaintiff is apprehensive that unless the Defendant is restrained by injunctive orders sought herein, he is likely to throw the plaintiff's household goods, property, files and documents out of the house. The Defendant did it on 17.07.2018 and is likely to do it again.

4. The motion is further supported by the plaintiff's lengthy affidavit sworn on 30th August 2018. In summary, the plaintiff deposed on his engagements with the defendant in regard to various properties over a period of time ranging between 2010 and 2014 over different parcels

of land within Mombasa, the suit land included. He annexed copies of the various agreements which they executed between them.

5. Amongst the said transactions is a Settlement of Debt agreement dated 8th March 2017 which forms partly the cause of action in this suit. The Applicant deposed that the Respondent was to hold the suit property title documents as security as he pursued the removal of the restrictions on the Shanzu apartments title. The applicant described the suit property as a matrimonial house comprised of a palatial five bedroom massionette in Nyali West Villas. The applicant deposed that he was shocked to learn that the Respondent had transferred the suit titles in his name. Subsequently in July 2018, the Respondent's agents went to the suit premises without any notice recklessly threw out the applicant's household items which exercise the applicant stated was later abandoned for lack of a Court Order.

6. The plaintiff continued that the defendant returned a month later on 20th August 2018 and this time evicted him. That the Respondent has put security guards at the gate, a move the applicant alleges is calculated to unlawfully acquire the suit premises. He denied owing the Respondent any monies or selling to him the suit titles. The applicant prayed that unless the transfers of the titles to the defendant are nullified, he will suffer irreparable loss. He also urged the Court to stop the defendant from blockage of his house by ordering removal of the guards forthwith.

7. The application is opposed by the Respondent via the replying affidavit dated 17th October 2018. The Respondent gave a background to the transactions which resulted into the drawing of the Settlement of Debt agreement. That pursuant to this agreement, the Respondent deposed that the Applicant executed transfer forms as well as giving him the spousal consent to transfer. That the applicant also agreed to give vacant possession within 60 days of the said agreement. The Respondent accused the applicant of failing to disclose to the Court the following:

(i) The plaintiff failed to disclose to this honourable Court the existence of the settlement of debt agreement dated 30/3/2017 which document is fundamental and key to any decision this honourable Court makes.

(ii) The plaintiff failed to disclose to this honourable Court the existence of a restriction registered against the Shanzu apartments a fact the plaintiff verily knew and was alive to.

(iii) The plaintiff failed to disclose to this honourable Court that title No. CR 1028C L.R. No. 780 (Original No. 383/13) Section II Mainland North Mombasa, had been found to be fraudulent and or fake in the face of the original genuine title owned by Shaco Investments Limited.

(iv) The plaintiff failed to disclose to this honourable Court that the conveyance in respect of property known as Subdivision No. 4667 (Original No. 284/185) Section III Mainland North could not be proceeded with because it had been caveated by the previous owner Mr Abdulmajid Nassor following the failure by the plaintiff to pay the outstanding purchase price as covenanted.

8. The Respondent avers that in August 2018, he sent auctioneers to distress for rent of Kshs 280,000 being mesne profits. It is the defendant's case that the applicant is not in physical and legal possession of the suit premises thus not entitled to the orders sought. In a supplementary affidavit, the applicant deposed that he signed the Settlement of Debt Agreement under duress and coercion by deposing that the Respondent took advantage of his precarious position and great distress to land his signature on his matrimonial property titles. Further that if the said agreement was to fully settle the debt, it failed to state how the debt arose or how the sum of Kshs 41 Million was arrived at. The applicant maintained that he was still in possession and occupation of the suit property as all his household goods are still inside the house. The applicant deposed that he submits himself to the protection of the Court on the basis of the maxim of "*equality before the law*".

9. The parties thereafter filed written submissions supported by case law annexed. I have had occasion to read the same. The cases cited by the Respondent have commonly discussed principles to be considered in granting of interlocutory injunctions. The cases cited include:

(i) Giella vs Cassman Brown (1973) E. A

(ii) Mrao Ltd vs First American Bank of (K) Ltd (2003) eKLR.

(iii) Devcon Group Ltd vs Tansales Ltd (2016) eKLR.

10. The plaintiff on his part submitted that he has established a prima facie case. He also cited the **Giella case supra; the Mrao case supra, Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2014) eKLR and Joel Kipkuri vs Alice Wambui Magandu & 3 others (2018) eKLR** which stated that the Courts are not bound by the three principles only while dealing with an application such as this.

11. From the plaint, it is clear that the suit titles are already registered in the name of the Defendant. This is evidenced by the prayer seeking cancellation of the titles bearing the defendant's. The Respondent also annexed copies of the titles registered in his name plus transfers executed in his favour in 2017. The plaintiff does not deny releasing the original titles to the suit properties to the defendant. He also does not deny signing some document on receipt of Kshs 3 Million from the defendant except that what he signed was a blank paper and not the settlement of debt agreement being exhibited.

12. Going by the paper trails exchanged between the applicant and the defendant right from the time the first land transaction was made in 2010 and payments made in respect of the said transactions demonstrate that there existed a relationship between the parties so that when the plaintiff was in dire need, he found it easy to rush to the defendant for help. It therefore creates doubt for this Court to believe the deposition that the plaintiff was coerced into signing the Settlement of Debt Agreement.

13. The Respondent in his further affidavit annexed the affidavit of one Job Juma Weloba advocate. Mr Weloba deposed that the parties

herein met in their firm's boardroom where the finer details of the Settlement of Debt Agreement was discussed before he was tasked with the responsibility of preparing the said agreement. He deposed that both parties executed the agreement and he witnessed their signatures.

14. That in view of the fact that the Settlement of Debt Agreement quantified the debt between the plaintiff and the defendant and in view of the fact that the titles are bearing the names of the defendant, I am not satisfied that the applicant has demonstrated that he has a prima facie case and or that he will suffer irreparable loss if the orders are not given.

15. Once the applicant offered the suit properties whether to be held as security or otherwise, he exposed the said titles as to the consequential risk that would ensue in case of default. Whether he held the suit premises with sentiments as his matrimonial home such sentimental value and or rights were extinguished the moment he chose to use these titles to settle the financial problems he was then facing. The titles whether used as security or sold thus obtained of value that is quantifiable and loss if any can be compensated by an award of damages. The balance of convenience in the instant case tilts in favour of the Respondent who is the current registered owner. In conclusion, I find the application dated 30th August 2018 as wanting in merit. The same is ordered dismissed with costs in the cause.

Dated, signed & delivered at Mombasa this 28th March 2019

A. OMOLLO

JUDGE