



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NUMBER 626 OF 2017

FRANCIS XAVIER C. SIRO MAYAKA

Suing as the registered donee of Power of Attorney from

DOUGLAS MAGETO NYAKUNDI.....PLAINTIFF

VERSUS

JEMIMA KEMUNTO MAGETO.....1ST DEFENDANT

GEOFFREY MBUNDE MARITA.....2ND DEFENDANT

RULING

This ruling is in respect of two applications dated 2/10/2017 and 31/10/2017. In the application dated 2/10/2017, the Plaintiff who is suing pursuant to powers donated to him under a registered power of attorney seeks an injunction to restrain the 2nd Defendant or his agents from claiming, entering, transferring, leasing, selling and or continuing to carry out any construction activities on Plot No. 2252 (“the Suit Property”) pending hearing and determination of the suit.

The application was brought under Order 40 Rules (1) and (2) of the Civil Procedure Rules and is based on grounds that in 1982, the donor of the power of Attorney, one Douglas Mageto Nyakundi purchased the Suit Property from Embakasi Ranching Company Limited which forms part of L.R. Number 10904/2 and was issued with certificate number 1202 and a letter of allotment. The 2nd Defendant who claims to have purchased the Suit Property from the 1st Defendant is said to have entered the land and constructed a house and refused to vacate thus denying the donor and his donee access to the suit plot.

The application was supported by the Plaintiff’s supporting affidavit in which he deponed that he had authority to commence the suit and annexed a copy of the registered Power of Attorney. He also annexed a copy of the donor’s share certificate issued for plot Number 22522, as evidence of ownership.

The 1st Defendant filed a replying affidavit in which she opposed the application. She deponed that the donor is her husband, and that they reside in Canada. She further deponed that on or about 1989, she took a loan of Kshs. 19,000/= from Afya Cooperative Society which is what they used to buy the Suit Property. She claimed that she allowed her husband to be registered in the certificate issued by the seller, because their custom dictated that land was to be held by the man of the house. She further deponed that together with the donor, they made a decision to sell the suit property, and in 2009, the donor travelled to Kenya from Canada and tried to sell the property but he was unsuccessful. She averred that with the authority from the donor, she sold the property for Kshs.1.2 Million to the 2nd Defendant and they agreed with the donor that they would use the money to offset mortgages they owed in respect of two other properties which they had acquired from the National Housing Corporation and National Social Security Fund (NSSF). She stated that the 2nd Defendant deposited the sum of Kshs. 360, 000/= into the donor’s bank account and the balance was paid in full through monthly instalments into mortgage account number 750-0002362 held with the Housing Finance Kenya Limited and account number 502338 held with NSSF towards settlement of the facilities stated above, both of which were in the donor’s name.

The 2nd Respondent filed a replying affidavit in opposition to the application for an interim injunction on ground that he bought the suit land and had paid the full purchase price as agreed, and that he built a storeyed house and a perimeter wall on the Suit Property.

The parties filled written submissions which the court has considered. The court has also considered the application, annexures, pleadings filed and the law applicable to this case.

In order to grant an injunction, the court needs to be satisfied that the applicant has a *prima facie* case with a probability of success, and be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy. If in doubt, the court will decide

the application based on the balance of convenience.

The Plaintiff claims that the 1st Defendant sold the suit property to the 2nd Defendant without his approval. The 1st Defendant is his wife, who deponed that she sold the Suit Property with the Plaintiff's full approval, and that the purchase price was paid to her husband. The 2nd Defendant annexed receipts which show that he paid the purchase price for the Suit Property through monthly installments towards clearing the donor's mortgage facilities. The donor of the power of attorney does not deny receiving the full purchase price. He has not demonstrated that he deserves the injunction sought because he has kept mum on the issue of whether or not he received the purchase price.

The 2nd Defendant has demonstrated that he has developed the Suit Property. This can be gleaned from the photographs of the developments annexed to his replying affidavit.

The court finds that the Plaintiff has not met the threshold for grant of an interlocutory injunction as he has not established a *prima facie* case with a probability of success. The application dated 2/10/2017 is therefore dismissed with costs to the 1st and 2nd Respondents.

Turning to the second application dated 31/10/2017, it was brought under Order 26 of the Civil Procedure Rules by the 2nd Defendant for orders that the Plaintiff deposits security for costs pending any further proceedings. The application is based on grounds that the Plaintiff is out of the jurisdiction of the court as he is currently resident in Canada where he relocated to, but lodged this suit through an attorney citing inability to prosecute the suit himself. The other ground is that the 2nd Defendant has a strong defence against the Plaintiff and should the claim against him by the Plaintiff be dismissed, he would not be able to recover his costs.

The application was supported by the 2nd Defendant's supporting affidavit. He deponed that the suit is brought under a power of attorney, which can be revoked anytime by the donor, and it would prejudice him in the event that the court determined the case in his favour.

The 1st Defendant did not oppose the application. The Plaintiff did not to file a response to the application, which would have shed light on whether the Plaintiff who resides in Canada has other properties in Kenya other than the Suit Property. Further, had an affidavit of means been filed, it would have helped the court to assess the Plaintiff's financial ability.

The Plaintiff has not denied that he received Kshs. 1.2 Million from the 2nd Defendant, whom he sued. The 2nd Defendant is incurring expenses defending this suit. The court is alive to the fact that considerable hardship would be caused to the 2nd Defendant in tracing the Plaintiff's whereabouts in Canada if the Plaintiff were to fail in his claim against the 2nd Defendant.

In the interest of justice and equity, the court agrees with the 2nd Defendant and allows the application dated 31/10/2017. The Plaintiff is directed to furnish the sum of Kshs 1.2 Million as security which is to be held in an interest earning account to be opened in a reputable bank in Kenya in the joint names of the advocates for the Plaintiff and the Defendants pending the hearing and determination of this suit. The sum of Kshs 1.2 Million is to be furnished by the Plaintiff within sixty (60) days of the date of this ruling to facilitate the opening of the bank account. If the Plaintiff fails to deposit the sum of Kshs. 1.2 Million within 60 days, the 2nd Defendant will be at liberty to move the court for further orders. The costs of this application shall be in the cause.

Dated and delivered at Nairobi this 26th day of March 2019

K.BOR

JUDGE

In the presence of:-

Ms. S. Makasi holding brief for Mr. O. Agina for the Plaintiff

Ms. S. Amwanzo holding brief for Mr. C. Maondo for the Defendants

Mr.V.Owuor- Court Assistant