



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 246 OF 2016

MOHAMED MAHFUDH.....PLAINTIFF/RESPONDENT

-VERSUS-

AMINA SHEYUMBE MUHAJI.....DEFENDANT/RESPONDENT

MOHAMED OMAR SALIM...INTENDED INTERESTED PARTY/APPLICANT

RULING

1. For determination is the notice of motion dated 5th March 2018 brought under the provisions of Order 1 rule 3 & 10, Order 9 rule 9, Order 50 rule 6 and Order 40 rule 1, 2 & 3 of the Civil Procedure Rules. The application is brought by an intended interested party who is seeking the following orders:

1. Spent

2. Spent

3. That leave be granted to the Interested Party to be enjoined in the proceedings herein as a 2nd defendant.

4. That leave be granted to the Interested Party to appoint the firm of Khaminwa & Khaminwa Advocates to act for the Intended Interested Party.

5. That the Consent Order dated 3rd November 2016 be set aside and the suit be fixed for full hearing on the merits.

6. That leave be granted to the Intended Interested Party to file and serve defence and Counterclaim out of time.

7. That an Order consolidating the suit herein together with Mombasa ELC No. 363 of 2016 Mohamed Omar Salim v Amina Sheyumbe Muhaji, Mohamed Mahfudh Saad & County Land Registrar, does issue.

8. That pending the full hearing and determination of the suit herein, this Honourable Court does issue restraining Orders against the plaintiff and defendant, their servants, agents, employees or any person acting through them from alienating, transferring, selling, pledging, applying for provisional title or in any way transacting with the Subject Property known as Subdivision No. 2923 (Original Number 1365/2 Section 1 Mainland North) C. R 21868.

9. That costs of this application be provided for.

2. The application is premised on several grounds listed on its face inter alia:

(a) The Intended Interested Party claims purchaser's interest in the Subject property by a virtue of an Agreement of Sale dated 13th November 2009, has proof of payment of Kshs. 8,000,000/- in purchase price starting in that year 2009 to the defendant, as well as having later lodged an on-going caveat over the Subject Property in the year 2009.

(b) The plaintiff and the defendant were full aware of the Intended Interest Party's claim in purchaser's interest in the Subject Property prior to the date of filing of this suit on the 15th August 2016 but both appear to have collaborated to lock the Intended Interested Party from the proceedings.

(c) Additionally, several correspondences exist and were exchanged between the plaintiff and the defendant and the Intended

Interested Party and the Land Registrar regarding the parties competing claims prior to the plaintiff filing the suit herein.

(d) The Consent Order itself serves to defeat the Intended Interested Party's claim and his purchaser's interest in the Subject Property effectively denying him the right to be heard.

(e) In an effort to assert his claim, the Interested Party filed Mombasa ELC No. 363 of 2016 Mohamed Omar Salim v Amina Sheyumbe Muhaji, Mohamed Mahfudh Saad & County Land Registrar and seeks that the same be consolidated with the suit herein and fixed for full hearing on the merits.

3. The application is also supported by the affidavit of Mohamed Omar Salim. He deposed that he purchased the suit property via a sale agreement dated 13th November 2009 for Kshs 10,000,000= from the defendant. The applicant deposed that he has paid a total of Kshs 8 Million and only stopped when the defendant failed to transfer the property and surrender vacant possession. The applicant continued that in the year 2016, the defendant executed a transfer in his favour and handed to him the original title deed.

4. The interested party also pleaded that he had registered a Caveat on the title on 17th December 2009 and that the registration was confirmed by the land Registrar's letter dated 15th June 2016 (*annex "MOS 4"*). That before filing this suit, the Plaintiff/Respondent was aware of the applicant's interest as brought out in paragraph 11 (b) of the plaint where it is stated that the original title deed was in the hands of a 3rd party. That the consent dated 3rd November 2016 was solely intended to defraud him of his rights over the suit property. He thus urged for the orders to be set aside to enable him be heard on merits.

5. The application is opposed by the plaintiff vide a preliminary objection dated 16th April 2018. In the preliminary objection, the plaintiff raised the following grounds:

- 1. The Court is "Functus officio" in this matter having already entered a final decree issued on the 25th November 2016.**
- 2. The alleged interested party does not have "locus standi" to make this omnibus application. The said party is not on record and, apart from an application/leave for joinder, does not have any authority to make any further application interfering with the decree issued.**
- 3. The application is "Res Judicata" the grounds and reasons for stay having already been heard and finalized in ELC No. 363 of 2016 between the same parties and a ruling issued on the same.**
- 4. The Intended party is guilty of Laches, having failed to pursue their application dated the 21st November, 2016.**
- 5. Execution on the final decree dated 25th November, 2016 has already commenced.**

6. The plaintiff also filed a replying affidavit dated 20th April 2018. In summary, the plaintiff deposed that he has not colluded with the defendant to defraud the applicant of his interest in the suit land. He further deposed that he had no cause of action against the applicant thus he could not sue him. That he has always been in possession of the land he purchased from 1997 first as a tenant and subsequently as purchaser. He also states that the applicant is guilty of laches and lacks locus to bring the present application.

7. Further the plaintiff deposed that this application is res judicata case No. 246 of 2016 and that the Court is functus officio to grant the orders sought. According to the Respondent the interested party's application has not met the threshold for setting aside a consent order. He urged the Court to dismiss the application with costs.

8. The defendant also opposed the application by filing grounds of opposition dated 20th April 2018 and a preliminary objection dated 20th April 2018. The grounds and the preliminary objection essentially raised the following:

- 1. That the application is bad in law, misconceived and a waste of Court's time.**
- 2. That the application is res judicata the applicant having filed a similar application in ELC No. 363 of 2016 MOHAMED OMAR SALIM for which a ruling was delivered dismissing the same (find enclosed herewith).**
- 3. That the applicant is misusing Court processes and abusing Court's previous time by filing numerous applications raising same issues having filed another application with respect to the same matter at the Court of Appeal which is pending.**
- 4. That the applicant cannot be enjoined in these proceedings as the matter is already concluded and execution of the decree ongoing.**
- 5. That this honourable Court is functus officio hence cannot grant the orders sought in the application.**

9. In arguing the motion, the parties filed written submissions to highlight the issues raised in their pleadings. The applicant submitted that he has demonstrated evidence of collusion between the plaintiff and the defendant. To buttress the issue of functus officio and res judicata, the applicant cited the case of **Brooke Bond Liebig (T) Limited vs Maliya (1975) E. A 266** which held that a consent judgment is not a merit based judgment and can be set aside on inter alia proof of collusion. He added the cases of **KCB Ltd vs Specialised Engineering & Co Ltd (1982) KLR 485** and **Samuel Wambugu vs Othaya Boys High School (2014) eKLR** both of which discussed circumstances when a consent order can be set aside.

10. The applicant submitted that the issues raised in his motion are not res judicata as the same have not been determined before. He also submits that he has locus since he is claiming purchaser's interest and both parties knew but chose to exclude him from these proceedings. He urged the Court not to sanction the illegality between the two and put reliance on the decision of Uganda Court of Appeal in **Makuba International Ltd vs His Eminence Cardinal Nsubuga & Another (1982) HCB 11**.

11. The plaintiff on his part submits that the applicant brought the present motion only after withdrawing the earlier application dated 30th November 2016 and failing to get injunctive orders in case No 363 of 2016. The plaintiff proceeded to analyse the ruling given by Komingoi J in ELC 363 of 2016 and in particular the order made for compensation by way of damages. The plaintiff also submitted that there was no collusion and he had no privity of contract with the applicant. He cited several cases to support this averment inter alia **C A No. 21 of 2006; William Muthee Muthami vs Bank of Baroda**.

12. On whether the consent order should be set aside, the plaintiff cited the decision of **The Board of Trustees NSSF vs Michael Mwalo (2015) eKLR** where the Court held that the standard principle was set that "A Court cannot interfere with a consent judgment except in such circumstances as it would afford a good ground for varying or rescinding a contract between parties." He urged the Court to dismiss the application.

13. From the pleadings filed, it is apparent that the Applicant and the plaintiff is claiming the same parcel of land "sold" to them by the defendant. Both have annexed in their affidavits documents of contract executed as between them and the defendant. The defendant did not file a replying affidavit to contest issues of fact raised as between the applicant and himself.

14. It is also apparent that at the time of filing this suit, the dispute on transfer had been lodged with the Registrar of Titles. This is gleaned from the plaint dated 29th August 2016 at paragraph 11, 12 & 13 where the title is stated to have been in the hands of a 3rd Party. At paragraph 12, the plaintiff pleaded thus, "On 13th July 2016, all the parties met at the Land Registrar's office for purposes of hearing as to whether to remove the Caveat on the property. It came out at the hearing that one Mohamed Omar Salim had also lodged a Caveat on the property in pursuance of a sale agreement with the first defendant." At paragraph 13, "that the Land Registrar's decision was that, the Caveat of the said Mohamed Omar should be removed."

15. In the Land Registrar's letter dated 19th July 2016 and annexed by the plaintiff as "B", the Registrar having noted that both parties had purchased the suit, felt the Caveats should be removed to enable a proprietor enjoy his constitutional right to the property. The Registrar noted further that to protect the rights of the 1st Caveator (who is the applicant herein), he was going to register a restriction for 30 days to enable the Caveator pursue his rights in Courts of law and also to protect the proprietor and from anyone attempting to alienate her land.

16. The 1st Caveator proceeded to file ELC Case No 363 of 2016. In that suit, the applicant named 3 defendants two of which are the plaintiff and the defendant in the current suit. In the determination of the interlocutory application by Komingoi J annexed in the plaintiff's replying affidavit, the Judge found that the balance of convenience tilted in favour of the Respondent who was in occupation. The Judge also made reference to the impugned consent order where she stated that the applicant cannot ignore the same. The suit ELC 363 of 2016 is yet to be determined on its merits.

17. The Judge said she did not grant the applicant the orders of injunction because the plaintiff was not in occupation. The application only discussed the principles for granting an injunction. The issue of setting aside the consent order was not in dispute and was not addressed. The averment by the plaintiff/respondent and the defendant that the present application is res judicata thus does not lie.

18. Does the applicant have locus to bring this application? In the consent letter dated 13.10.2016 and adopted by this Court as a judgment on 23rd November 2016, paragraph 4 provided thus "the Registrar of Land is directed to make an endorsement. *"On the current title deed at the registry that the same be cancelled due to the said title being withheld by a 3rd party as per hearing before the Land Registrar and his ruling dated 19th July 2016 on page 77 and 78 of the plaintiff's list of documents filed on 30th August 2016 and further to remove all caveats on the same."*

19. The effect of this paragraph and paragraph 5 affected the validity of the documents held by the applicant which he has pleaded were given to him by the defendant. His rights were thus vitiated without making him a party to the consent and or giving him a hearing. The contents of these two paragraphs together with the Land Registrar's letter of 19th July 2016 gave the applicant a right to participate in the present proceedings and also challenge the impugned consent order.

20. It is true that there is no privity of contract between the Plaintiff/Respondent and the Interested Party/applicant. However to the extent that part of the clauses of the consent they entered into affected the applicant's right without his participation in my view is a good ground to set aside the Order/Contract entered into between the plaintiff and the defendant.

21. Is the Court functus officio to issue the orders being sought? The application is seeking to set aside the consent judgment. The basis for submitting that the Court is functus officio is not justified as the Court's jurisdiction to set aside an order or a judgment is unlimited as long as there are good grounds that have been put forward. This Court would only be functus officio if it was being asked to make orders of injunction after judgment without a prior prayer for setting aside having been made.

22. In conclusion, I am satisfied that the applicant has demonstrated good grounds on why he should be heard before the full implementation of the order of 23rd November 2016. Consequently I shall grant him the orders in his motion dated 5th March 2018 in terms of prayer (3), (4), (5), (6) and (7). Prayer 8 is also granted on terms that the plaintiff is directed not to transfer the title or part with possession of the suit land pending the hearing and determination of this suit. Costs of the motion shall abide the outcome of the main suit.

Dated, signed & Delivered at Mombasa this 5th April 2019

A. OMOLLO

JUDGE