



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 190 OF 2018

SIMON WARUI KANOGA.....PLAINTIFF

VERSUS

VARIZONE LIMITED

DENNIS ABRAHAM KINARO Practising as

DENNIIS KINARO & COMPANY ADVOCATES.....DEFENDANTS

RULING

1. By this Notice of Motion dated 9th October 2018, Simon Warui Kanoga (the Plaintiff) prays for Orders that: -

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e) Pending the hearing and determination of this suit the 1st Defendant, by itself, directors, employees, servants and agents be restrained from selling or offering for sale or charging, leasing, sub-dividing, entering, or remaining upon property at Kilifi known as Plot No. V/508/3 in Kilifi County comprised in Certificate of Title No. CR 37174(hereinafter) referred to as the suit premises) and be restrained from interfering with the Plaintiff's quiet possession of the said suit premises.

f) Pending the hearing and determination of this suit the 2nd Defendant be restrained from withdrawing from or debiting by any means the sum of Kshs 7,000,000.00/- from his account No. 01148691784701 described in the agreement dated 26.7.2017 or account No. 746917847 disclosed in his Cheque Nos. 0000077 and 000008 dated 22.11.2017 at Co-operative Bank of Kenya Ltd Kilifi Branch and from paying to the 1st Defendant the sum of Kshs 7,000,000.00/- on account of the Agreement of sale dated 26.7.2017.

g) Pending the hearing and determination of this suit the 2nd Defendant be restrained from returning the Original Certificate of title No. CR 37174 and all other completion documents to the 1st Defendant.

h) The 2nd Defendant be restrained from entering appearance for and representing the 1st Defendant.

i) The costs of this application be provided for.

2. The application which is supported by the Plaintiff's affidavit is premised on the grounds that: -

i) The 1st Defendant sold the suit premises to the Plaintiff for Kshs 8,500,000/-. The Plaintiff paid the full purchase price, took possession and built a structure on the premises but the 1st Defendant subsequently demolished the structure and ordered the Plaintiff out of the property.

ii) The 2nd Defendant represented the 1st Defendant and the Plaintiff in that agreement and the purchase price was paid by the Plaintiff to the 1st Defendant through the 2nd Defendant.

iii) The 1st Defendant filed an incompetent suit in the Senior Principal Magistrates Court at Kilifi being ELC No. 347 of 2018 on 26th September 2018 and on 28th September 2018, the Principal Magistrate of that Court issued draconian orders of injunction

at an ex parte stage expressed to remain in force until the hearing and determination of the suit and without a return date for inter partes hearing thereby grossly violating the Plaintiff's right to be heard. The Plaintiff cannot file a Counter Claim in that suit as the Magistrates Court both under the Agreement, the Environment and Land Court Act and the Constitution has no jurisdiction.

iv) The 1st Defendant having received the full purchase price cannot keep both the suit premises as well as the consideration.

3. The two Defendants, Varizone Limited and Dennis Abraham Kimaro practicing as Dennis Kinaro & Company Advocates are opposed to the application. In a Replying Affidavit sworn by Christopher Dennis Wilson, a Director of the 1st Defendant and filed herein on 23rd October 2018, the 1st Defendant avers that it is the registered proprietor of the suit property situated at Mnarani area of Kilifi within Kilifi County.

4. While admitting that it entered into a Sale Agreement with the Plaintiff, the 1st Defendant avers that it was a term of the Agreement that the Plaintiff would pay a sum of Kshs 2000,000/- within 14 days from the date of execution and that the balance of Kshs 6,500,000/- was to be paid within six months in equal monthly instalments of Kshs 1,100,000/-.

5. The 1st Defendant asserts that contrary to the Agreement, the Plaintiff did not pay the deposit within 14 days as agreed. On 30th October 2017, the 1st Defendant instructed their Advocate Mr. Dennis Kinaro (the 2nd Defendant) to proceed and cancel the sale transaction. The 2nd Defendant proceeded as instructed and wrote a letter dated 8th November 2017 canceling the transaction and advising the Plaintiff to collect the sum of Kshs 1,875,000/- which the Plaintiff had then deposited at the Advocates' Offices.

6. Subsequently the parties held negotiations where they agreed that the payments period be extended by a further nine months and that in default of any instalment now agreed at Kshs 725,000/- per month, the 1st Defendant would immediately rescind the Sale Agreement.

7. The 1st Defendant avers that at the expiry of the extended period, the Plaintiff remained in arrears of Kshs 1,713,500/- and he proceeded once again to instruct the Advocate to cancel the transaction. Consequently, the 2nd Defendant Advocate wrote a letter dated 22nd August 2018 cancelling the transaction and advising the Plaintiff to collect the sum of Kshs 5,936,500/- from his offices. Some three weeks later on 29th August 2018 the Plaintiff deposited a sum of Kshs 863,500/- and an additional sum of Kshs 850,000/- on 13th September 2018.

8. It is the 1st Defendants case that the last two payments were made way after the deadline which stood at 30th June 2018 and after the transaction had been cancelled. The 1st Defendant further avers that the Plaintiff proceeded to trespass into the suit properties thereafter and started clearing the bushes with a view to commencing construction. As a result, the 1st Defendant moved to Kilifi Law Courts and filed the said ELC Suit No. 347 of 2018 to restrain the Plaintiff from using the land.

9. On 28th September 2018 the Court granted Orders of injunction which orders have not been set aside or stayed to-date. The Plaintiff has however filed an application at the said Court challenging the Orders.

10. On his part Dennis Abraham Kinaro Advocate (the 2nd Defendant) concedes that he prepared the Sale Agreement which was executed by the parties on 26th July 2017. Counsel avers however that the transaction could not proceed due to the Plaintiff's breach and reiterates the contents of the 1st Defendant's Replying Affidavit as outlined hereinabove.

11. The 2nd Defendant further avers that the Plaintiff ought to have challenged the orders issued by the Lower Court instead of filing another suit involving the same parties and subject matter before this Court.

12. I have considered both the application and the response thereto. I have equally perused and considered the written and oral submissions as canvassed before me by the Learned Advocates for the respective parties.

13. Both the Plaintiff and the Defendants before me concede that prior to the filing of this suit, the 1st Defendant had through the 2nd Defendant Advocate filed Kilifi SPMCC No. 347 of 2018 against the Plaintiff herein. The parties also concede that following an application made by the 1st Defendant in that matter the Honourable R.K. Ondieki, SPM proceeded to issue orders of injunction against the Plaintiff on 28th September 2018. Those orders have to-date neither been stayed nor set aside.

14. The Plaintiff avers that the Kilifi Case was an incompetent suit and that the Presiding Magistrate went ahead to issue draconian orders of injunction at an ex-parte stage expressed to remain in force until the hearing and determination of the suit thereby denying him the right to be heard as guaranteed under Article 25(C) and 50(1) of the Constitution. The Plaintiff further asserts that he could not file a Counter Claim in that suit as the Magistrates Court had no jurisdiction under the Sale Agreement executed by the parties, the Environment and Land Court Act and/or the Constitution.

15. Urging his client's case before me, Mr. Kinyua Kamundi, Learned Counsel for the Plaintiff submitted that the people of Kenya denied the High Court power to deal with matters under Article 165(5) of the Constitution and urged the Court to find that by implication, the people could not have intended the Magistrates Court which is subordinate to the High Court to have jurisdiction to deal with the same matters listed under Article 162(2) of the Constitution.

16. With respect to Counsel, similar arguments were raised in the Court of Appeal in the now famous case of ***Law Society of Kenya Nairobi Branch –vs- Malindi Law Society & 6 Others (2017) eKLR***. In a unanimous decision rendered by a Five-Judge Bench of that Court on 19th October 2017, the Court after examining the provisions of Article 162(2) and other relevant Articles in the Constitution delivered itself thus:

“63. We are unable to construe that Article as limiting the power of Parliament to confer jurisdiction on the Courts already established by the Constitution under Article 169(1) (a) (b) and (c). Article 169(2) provides that Parliament shall enact legislation conferring jurisdiction, functions and powers on the Courts established under Clause 169(1). A distinction should thus be drawn between the power given to Parliament under the Constitution to establish Courts which in this case is restricted, and the power to confer jurisdiction on Courts. It is acknowledged in the preamble to the Magistrates Courts Act, that it is an Act of Parliament to give effect to Article 169(1) (a) of the Constitution “to confer jurisdiction, functions and powers on the Magistrates Courts”. We do not consider that in doing so, Parliament in any way exceeded its mandate or acted ultra vires.”

17. By that decision, the Court of Appeal validated the provisions of Section 9 of the Magistrates Courts Act, Act No. 26 of 2015 which granted the Magistrates Courts power to deal with certain matters under the Environment and Land Court Act subject to the Courts pecuniary jurisdiction. The contention that the Kilifi Senior Principal Magistrates Court was incompetent and lacking jurisdiction to handle the case filed by the 1st Defendant before me is therefore without any foundation.

18. In order to avoid a situation where two Courts competent to hear a matter end up with different decisions and/or results, Section 6 of the Civil Procedure Act provides as follows: -

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

19. Having established that the Magistrates Court at Kilifi has jurisdiction to handle the suit before it, this Court shall not proceed with the trial hereof. Where the Plaintiff were aggrieved by any orders granted by that Court, the recourse would be to come to this Court by way of appeal and not to open up fresh proceedings while the matter is still pending before the Subordinate Court.

20. Accordingly, I decline to grant any of the orders sought in the application before me. Instead, this suit is hereby stayed pending the hearing and determination of Kilifi SPMCC No. 347 of 2018.

21. The Defendants will have the costs of the application.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE