REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC LAND CASE NO. 233 OF 2017

BOAZ OGOLA ABIERO.....PLAINTIFF

-VERSUS-

1. JOAN ATIENO DIMA

2. MICHAEL A OCHOK

3. LANDS REGISTRAR, MOMBASA

4. NATIONAL LAND COMMISSION

5. KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANTS

RULING

1. For determination is the plaintiff's notice of motion dated 1st September 2017 and filed in Court on 26.9.2017. The application is premised on the provisions of section 68 of the Land Registration Act, section 63 of the Civil Procedure Act and Order 40 rule 1 of the Civil Procedure Rules. The applicant seeks orders:

1. Spent

2. Pending the determination of the application and suit, a temporary injunctive and inhibitory order do issue restraining/inhibiting the 1st and 2nd Defendants, their agents and or nominees from charging, leasing, transferring or in any manner parting with possession of land Title No. 2445/VI/MN (CR NO. 14503) and 2446/VI/MN (CR NO. 145050) situate at Port Reitz within Mombasa County hereinafter referred to as "suit land".

3. Overtaken by events by the withdrawal of the suit against the 4th & 5th defendants.

2. The application is supported by the grounds that there is a pending suit filed on 23rd June 2017 awaiting determination; the applicant has a pecuniary interest on the suit property which interest is in danger of being ignored and that it is in the interest of justice that the orders be granted. The application is supported further by the affidavit deposed to by the applicant.

3. The applicant admits that the 1st & 2nd defendants are the registered owners of the suit property. That they got into a sale transaction over the same as per the sale agreement dated 28.11.2012 and he paid a deposit of Kshs 9,100,000=. That the 1st & 2nd defendants did not provide all the completion documents more particularly the letter of clearance from Kenya ports Authority to enable the applicant obtain a credit facility to pay off the balance. That given the fact that the 4th & 5th defendants were in the process of acquiring the suit land, the plaintiff feared his interest may be ignored hence this application.

4. The suit as against the 4th & 5th defendants was withdrawn. The 3rd defendant stated that the orders sought do not affect it. Consequently it is only the 1st & 2nd defendants who have opposed this application. Mr Michael Ochok, the 2nd defendant filed a replying affidavit on 1st December 2017. He denied that the plaintiff signed the sale agreement or disbursed to them the sum of Kshs 9,100,000= but only paid Kshs 7 Million. That the agreement had a completion date of 90 days which date expired on 26.2.2013 and at that date the balance of the purchase price had never been paid.

5. The 1st & 2nd defendants deposed further that they made efforts to call for the balance by calling their mutual advocate Mr Nabhan Swaleh

but their calls were unanswered. They also wrote letters which they annexed as a bundle and marked as ***"MO 2".*** The deponent continued that in 2015 the parties engaged in negotiations which culminated in the understanding that the sum of Kshs 7 Million would be refunded. That the applicant does not exist and is a name being used to further fraudulent schemes of Taib Abdalla. In the circumstances of this case it would be unjust and contrary to law to issue the order of injunction. They urged the Court to disallow the application.

6. The applicant never filed any further affidavit to refute the facts as set out by the 2nd defendant in his replying affidavit. When the matter came out for hearing on 14.12.2017 Mr Olwande advocate holding brief for Mr Mogaka advocate for the applicant sought to have the parties file written submissions. The 1st & 2nd defendants filed theirs on 13.2.2018. There is none filed on behalf of the Plaintiff/Applicant. The 1st & 2nd defendant's submission is quite detailed and I have read and considered their issues while writing this decision.

7. From the onset, the orders sought herein is for temporary injunction for which the three principles to be considered are well established. For this case, I chose to consider this application on the principle of irreparable harm because on the basis of the existing sale agreement annexed, I hold the view that the applicant may have a prima facie case with a probability of success. Is the harm to be suffered irreparable in the event the orders are not granted? The applicant in his grounds stated that he has **a pecuniary interest** on the property which may be ignored. The pecuniary interest according to him is in the sum of Kshs 9.1 Million while according to the 1st & 2nd defendants it is the sum of Kshs 7 Million.

8. The pecuniary interest whether 9.1 Million or 7 Million is thus defined from the transaction document between the parties. The applicant did not plead that the said Respondents are incapable for refunding the money if at all. Further the applicant has not stated he is interested in the land being acquired other than the refund of the money he paid. In fact the prayer (g) of his plaint is worded thus ***"In the alternative, an order compelling the First and Second Defendants jointly and severally to refund to the Plaintiffs the deposit amount of Nine Million One Hundred Thousand (Khs. 9,100,000/=) plus interest thereon at the rate of 24% per month from the date of execution of sale agreement 28.11.2011 till full payment."*** In any event even if he was interested in the land, the law does not permit him to refuse the compulsory acquisition that already commenced as long as requisite compensation is paid out.

9. The 1st & 2nd defendants submitted that the applicant herein brought this application after undue delay. They buttressed this submission with the decision in the case of **Abigael Barmao vs Mwangi Theuri (20130 eKLR** where Munyao J. quoted Snell's Equity, 30th Edn at page 33 paragraph 3 – 16 **(**also quoting **Lord Camden L. C in Smith vs Clay (1767) 3 Bro C. C 639n at 640n.)** that a Court of equity has always refused its aid to stale demands where a party has slept upon his right and acquised for a great length of time. Nothing can call a forth this Court into activity but conscience, good faith and reasonable diligence; where these are wanting, the Court is passive and does nothing.

10. In the instant case, the sale transaction took place in 2012. There is no evidence annexed to show that the applicant has even demanded specific performance or refund of the money from the 1st & 2nd defendant. And as aptly put in the maxim of equity that ***"delay defeats equity",*** the order of injunction being an equitable relief, the Court has to consider the issue of delay before granting the order. The applicant is guilty of laches of about 5 years without proper explanation and like the Abigael case supra is not deserving of the injunctive reliefs.

11. The upshot of my finding is that the applicants' loss is quantifiable and the application is brought after undue delay. For this reason, I find no reason why the orders of injunction should be granted given that at the conclusion of this case, the plaintiff/applicant has the right to recover his money should his claim against the defendants succeed as laid out in the rules. The application is therefore found to be without merit & an abuse of the Court process. I hereby dismiss it with costs to the 1st & 2nd defendants.

Dated, signed & delivered at Mombasa this 20th March 2018

A. OMOLLO

JUDGE