



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 9 OF 2016

BAKARI ABDALLA YUWA.....PLAINTIFF

-VERSUS-

RAMADHAN HAMISI.....1ST DEFENDANT

SHABAN RAMADHAN.....2ND DEFENDANT

RULING

1. By a Plaint dated 15th December 2016, and filed on 16th December 2016 the Plaintiff has brought this Suit against the Defendants seeking the following reliefs:

a. A permanent Injunction to restrain the Defendant whether by himself or by his servants or agents any of them or otherwise howsoever dealing with the property known as TITLE NUMBER KWALE/MKONGANI A/711 in any manner whatsoever by carving out a plot, trespassing, occupying, constructing, selling, alienating, disposing, charging, mortgaging, or creating a lien, charge, caveat or any other illegal encumbrance on the said property.

b. An order be issued to evict the Respondents from that property known as KWALE/MKONGANI A/711.

c. An order that the Plaintiff is the legal owner of all that property known as TITLE NUMBER KWALE/MKONGANI A/711.

d. Such other or further relief that this Honourable Court may deem fit and just to grant.

e. Costs of this suit.

2. By a Notice of Motion dated 15th December 2016, the Plaintiff is seeking a Temporary Injunction restraining the Respondents whether by themselves or their servants or agents or any of them or otherwise howsoever dealing with the property known as KWALE/MKONGANI A/711 in any manner whatsoever by trespassing, occupying, constructing, selling, alienating, disposing, charging, mortgaging, or creating alien, a charge, caveat or any other illegal encumbrance on the said property pending the determination of this Application and Suit. The Plaintiff is also seeking an order to evict the Respondents from the Suit property and wants the Officer Commanding Station, Kwale Police Station to assist in ensuring compliance of these orders. In addition, the Plaintiff is praying for costs of the Application to be borne by the Respondents. The Application is based on the grounds on the face of the motion and supported by the affidavit of Bakari Abdalla Yuwa, the Applicant sworn on 14th December 2016.

3. It is the Plaintiff's claim that he is the registered proprietor of the suit property having purchased it from the 1st Defendant Ramadhan Hamisi in the year 2007 for Kshs.175,000 which he paid in full and the 1st Resppondent transferred the land to him and was issued with a title deed. The Plaintiff has attached a copy of the Green Card showing he is the registered owner of the Suit Property. It is the Plaintiff's contention that the 1st Respondent did not leave the land immediately and asked him to give him time to migrate to Makamba. He states that when he went back, he found that the 1st Respondent had ploughed the land and that the 1st Respondent requested the Applicant to allow him to collect fasting coconuts which the Plaintiff accepted. The Plaintiff avers that he has been trying to have the Respondents give him vacant possession of the Suit Land but they have repeatedly refused and now allege that they never sold the land. The Plaintiff further avers that the 1st Respondent is now destroying the property by cutting down the Plaintiff's coconut trees and is erecting a new building on the suit land, hence this suit and Application.

4. The Defendants opposed the application and filed grounds of opposition dated 7th February 2017 and a Notice of Preliminary Objection

dated 29th June 2017 in which they aver that the suit is frivolous, vexatious and an abuse of the court process and that it is defective for failure to comply with the provision of Section 3 of the Law of Contract Act, Cap 23 and Section 34 of the Advocates Act, Cap 16 Laws of Kenya. The Defendants have also filed a defence and counter-claim in which they not only deny the Plaintiff's claim but also aver that the transfer of the land into the Plaintiff's name was fraudulent and want the sale rescinded.

5. The parties agreed to canvass the Preliminary Objection by way of Written Submissions. The Defendants filed their submissions on 21st November 2017 while the Plaintiff filed his submissions on 4th December 2017.

6. I have considered the pleadings filed, the Notice of Motion, the supporting Affidavit and annexures, and the Defendants Grounds of Opposition and Notice of Preliminary Objection and the Written Submissions filed by the parties. The issue for determination by the Court at this stage is whether the Preliminary Objection taken by the Defendants is sustainable or not.

7. In his ruling in **Garden Square Ltd –v- Kogo & Another (2000)KLR 1695**, Ringera, J (as he then was) said that what constitutes a true Preliminary Objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application, this was in line with the decision of the then court of Appeal for East Africa in the case **of Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (1969)EA 696** in which Sir Charles Newbold, the President of that Court stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by ways of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The improper practice must stop.”

8. The Preliminary Objection by the Defendants is mainly that the suit is frivolous, vexatious and/or an abuse of the Process of Court and that it violates the express provisions of Section 3(3) of the Law of Contract Act and Section 34 of the Advocates. Section 3(3) of the Law of Contract Act deals with contract for the disposition of land. It provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and is signed by all the parties and the signature of each party signing has been attested by a witness. It is the Plaintiff's case that he purchased the land and also paid the sum of Kshs.15,000 for a toilet and a mudhouse on the land.

9. In the defence and counter-claim, the Defendants contend that the Plaintiff circumvented the law and obtained a title deed in his name. The Defendants allege that they rescinded the sale and transfer and registered a caution against the title.

10. From the pleadings filed, these issues are contested. In the circumstances and considering that the issue of the precise agreement, if at all, that the parties entered into cannot be ascertained at this stage, I find and hold that the Notice of Preliminary Objection dated 29th June 2017 does not raise a pure point of law as it requires investigation of some facts. Instead these are matters that are fit and proper for arguments in the substantive suit.

11. For the foregoing reasons, I am inclined to dismiss the Notice of Preliminary Objection dated 29th June 2017. Each party to bear own cost.

12. I have also considered the value of the subject matter herein. The Plaintiff claims he purchased it for Kshs.140,000. I am of the view that this is a matter that falls within the jurisdiction of the Magistrate's Court. Accordingly, I *suo moto* transfer this matter forthwith to the Magistrate's Court, Kwale for trial and determination.

Delivered, signed and dated at Mombasa this 19th March, 2018.

C. YANO

JUDGE