



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO 26 OF 2017

ABDUL HAMID EBRAHIM.....PLAINTIFF

-VS-

HASSAN ABDUKADIR AZIZ.....DEFENDANT

RULING

1. By a Plaint dated 2nd February 2017 the Plaintiff, Abdul Hamid Ebrahim has brought this suit against Hassan Abdulkadir Aziz (as administrator of the Estate of Abdulkadir Hassan Abdulaziz) , the Defendant seeking the following reliefs:

- a. A declaration that the deceased had sold **PLOT 14663/II/MN** to the Plaintiff prior to his death.
- b. A declaration that the deceased was a trustee of the Plaintiff over **PLOT 14663/II/MN** prior to his death and upon his death the trusteeship is to be taken up by the administrator of the estate of Abdulkadir Hassan Abdulaziz.
- c. Pending the appointment of the Administrator of the estate of Abdulkadir Hassan Abdulaziz, the Defendant by himself, his servants and/or agents be restrained from further intermeddling of the estate of Abdulkadir Hassan Abdulaziz and in particular **PLOT 114663/II/MN**.
- d. A declaration that the expense in paragraph 8 of the claim are due and owing to the Plaintiff from the estate of the deceased.
- e. Any other or further relief that this Honourable Court may deem fit to grant.

2. By a Notice of Motion dated 2nd February 2017, the Plaintiff is seeking a temporary order of injunction against the Defendant by himself, his agents, servant or employees restraining them from selling, leasing, transferring and in any manner interfering with the title and Plaintiff's peaceful occupation of **PLOT NO.MN/II/14663** and a mandatory order compelling the Defendant to release to the Plaintiff the Original Deed plan No.406577 for **PLOT NO.MN/II/14663** pending the hearing and determination of this suit.

3. The Plaintiff's claim is that sometime in 2003, he identified a vacant **PLOT NO.258/II/MN** in Kisauni which lay next to his residential house and proceeded to construct a temporary structure after he saw other

people occupying the then vacant land.

4. The Plaintiff states that in the year 2007, the deceased disclosed to him that the property he was squatting on belonged to him and showed him the original title deed for **PLOT 258/II/MN**. The Plaintiff avers that the deceased informed him that he wished to subdivide the land taking into account the structures erected by the squatters and that once the deed plans have been approved and signed he would give first priority to the squatters to purchase the portion each squatter occupied. It is the Plaintiff's case that the deceased disclosed to him that he had no money to undertake the exercise and upon discussion, the deceased floated an offer to the Plaintiff to consider assisting him to finance the sub-division process and over and above the cost of subdivisions, the Plaintiff to pay the deceased a sum of Kshs.300,000.00. That they orally agreed that the Plaintiff was to buy the portion of land he occupied as a squatter for a consideration of Kshs.300,000.00 which the Plaintiff alleges that he paid in 2007 and was issued with a receipt. The Plaintiff further avers that he also agreed to meet all the cost of survey and issuance of deed plan and recover the money from the squatters when they commenced the payments to the deceased for the portions they occupied.

5. It is the Plaintiff's contention that he was to remain in occupation and continue with his private developments awaiting to be issued with a title deed and that once the subdivisions was complete, the surveyor was to surrender to the Plaintiff the original deed plans for the whole property to hold a security until the Plaintiff is issued with a title deed and the money paid over and above the purchase price is refunded. The Plaintiff avers that he paid the surveyors who carried out the survey work and obtained the deed plans. It is the Plaintiff's contention that the Defendant has breached the agreement between the Plaintiff and the deceased as he has gone ahead and collected the original deed plans from the Director of Surveys of Kenya and the Plaintiff is apprehensive that the Defendant may act adversely to his interest by illegally selling leasing, transferring and/or interfering with the applicant's peaceful occupation of **PLOT NO.MN/II/14663**. The Plaintiff states that since there is no cooperation by the Defendant there is no guarantee that when he finally applies for full grant he will notify the Plaintiff as a creditor in view of the oral agreement with the deceased. The Plaintiff states that the challenge is how to get the information about the filing and prosecution of the probate proceedings relating to the estate of the deceased.

6. The Defendant opposed the application and filed a replying affidavit sworn by himself on 21st March 2017 and a Preliminary Objection dated 14th February 2017 raising three grounds of objection namely:

a. THAT the purported agreement for sale contravenes the provisions of Section 3(3) of the Law of Contract Act and therefore unenforceable.

b. THAT the suit contravenes the provisions of Section 4 (1) of the Limitation of Actions Act and is therefore untenable in Court.

c. THAT in the consequences, the Plaintiff's suit herein is incurably defective, incompetent, bad in law, a nullity and should be struck out with costs to the Defendant.

7. The Defendant depones that he was granted letters of administration ad litem of the estate of the deceased in **Probate and Administration Cause NO.106 of 2016** limited for purpose of defending existing legal proceedings, instituting, prosecuting and/or defending any other necessary proceedings and collecting and preserving the estate of the deceased until further representation is granted by the Court. He denies the Plaintiff's allegations that he incurred costs of subdividing **PLOT NO.258/II/MN** on the deceased's account. The Defendant states that in line with collecting and preserving the estate of the deceased he requested all the surveyors involved in the survey and subdivision exercise to release to him all the documents related to **PLOT NO.258/II/MN**. The Defendant contends that the Plaintiff has not established a genuine arguable case.

8. The application and the preliminary objection were argued simultaneously and were canvassed by way of written submissions. The Plaintiff filed his submissions on 19th April 2017 and the Defendant filed his on 8th June 2017. The advocates for both parties highlighted their respective submissions on 30th October 2017 and relied on some authorities.

9. I have considered the application, the affidavit in support and against and the rival submissions filed and the authorities placed before me. It is clear that what the Plaintiff is seeking are both a prohibitory temporary injunction as well as interlocutory mandatory injunction. The principles to be applied when considering an application for temporary injunction are well settled. In the case of **Giella –V- Cassman Brown & Co Ltd (19730EA 358,** the Applicant must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage and in the event the Court is in doubt, it will decide the matter on a balance of convenience. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in the Giella case for the standard of approach is higher.

10. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) I ALL 901,** it was stated:

“A Mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for a prohibitory injunction.”

In the case of **Lucy Wangui Gachara –v- Minudi Okemba Lore (20150eKLR,** the Court of Appeal stated:

“It has been stated time and again that although the Court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the Court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the Court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage”

11. In this case, the Plaintiff’s claim is based on an alleged oral agreement between him and the Defendant’s deceased father that is said to have taken place in the year 2007 over a portion of **PLOT NO.258/II/MN.** The Defendant has raised a preliminary objection to the Plaintiff’s suit on the grounds that the purported agreement for sale contravenes the provisions of Section 3(3) of the Law of Contract Act and therefore unenforceable and that the suit contravenes the provisions of Section 4(1) of the law of Limitation of Actions Act. The Plaintiff has however submitted that the Suit is in respect to a resulting/implied trust. Besides seeking for a declaration that the deceased had sold him the Suit Plot, the Plaintiff is also praying for a declaration that the expenses he incurred in facilitation of the survey and sub-division of the Suit Property are due and owing to him from the estate of the deceased. In my view, these are matters of fact that require to be proved in evidence. According to the Plaintiff, the transactions as pleaded were ongoing and predicated on the completion of survey and sub-division of the Suit Property. In my view, the Preliminary Objection raised cannot be seen as raising pure points of law as it, requires some evidence as to when the cause of action arose. I therefore overrule it.

12. The Defendant is the son to the deceased and hold limited letters of Administration ad litem in respect to the estate of the deceased. I believe it is on this account that the Plaintiff has sued him. In his application, the Plaintiff is seeking an order compelling the Defendant to release the original deed plans to him. In my view, the Plaintiff has not shown that he has better title to the suit property and the said deed plans than the Defendant who is in fact a son and administrator of the estate of the deceased. The Plaintiff’s apprehension that the process of obtaining letters of administration for the estate of the deceased may be processed clandestinely by the Defendant without his knowledge is, in my view unfounded because under the Law of Succession Act, there is a clear procedure on how a creditor can

approach the Court where the heirs have refused and or declined to take out letters of administration.

13. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has not been made out. No special circumstances have been shown by the applicant and the case is not one that I can consider a clear one that can be decided at once or in a summary manner. I am also not satisfied that the Plaintiff has established a *prima facie* case with a probability of success to warrant the injunction orders sought. Moreover, Plaintiff has also not shown what irreparable injury he will suffer in the event the injunction is not granted. In my view, no irreparable injury will be occasioned as the amount the Plaintiff alleges he paid can be ascertained. The balance of convenience, if I was in doubt, clearly tilts in favour of the respondent who, as an administrator of the estate of the deceased, is performing his lawful duties of collecting and preserving the estate of the deceased.

14. The upshot of this is that the Notice of Motion dated 2nd February 2017 lacks merit and the same is hereby dismissed with costs to the Defendant.

15. I have also considered the value of the subject matter herein. The Plaintiff alleges that he paid the sum of Kshs.300,000.00 as purchase price for the plot besides other expenses amounting to Kshs.463,398.00 I am of the view that this a matter that falls within the jurisdiction of the Magistrate's Court. Accordingly, I *suo moto* transfer this matter to the Chief Magistrate's Court, Mombasa for trial and determination.

Delivered, signed and dated at Mombasa this 7th March, 2018.

C. YANO

JUDGE