



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 27 OF 2017

MOHAMED OMAR SALIM..... PLAINTIFF

VERSUS

EDWARD MZEE KAREZI

MERCY WAMBUI KIMANI

JANE NYAMBURA RAMA

LAND REGISTRAR-COAST REGISTRY (MOMBASA)

ATTORNEY GENERAL DEFENDANTS

RULING

1. By a Notice of Motion application dated 9th February 2017, the Plaintiff Mohamed Omar Salim is seeking Orders that:-

3) Pending the hearing and determination of this suit, this Court do grant an injunction restraining the defendants/respondents personally or through their employees, servants and/or agents from selling, leasing, developing or in any way dealing with Plot No. IR 17835/7(Original No. 17835) Kilifi;

4) That the costs of this application be awarded to the Plaintiff/Applicant.

2. The application is supported by the Plaintiff's affidavit sworn on the same day 9th February 2017 and is premised inter alia, on the grounds:-

i) That vide an agreement dated 14th January, 2013, the applicant agreed to purchase the suit property from Edward Mzee Karezi, the 1st Defendant herein at an agreed price of Kshs 4,000,000/=;

ii) That pursuant to the said agreement the Applicant paid an agreed deposit of Kshs 600,000/- and made further payments to the 1st Defendant amounting to Kshs 1,800,000/=.In return and as security, the 1st Defendant deposited the original title document with the Applicant after signing duly executed transfer documents which were deposited with the Applicant's Advocates pending completion of the transaction;

iii) In February 2013, the Applicant's advocate was served with a Court Order directing him to release the original title document, the agreement and transfer to the Criminal Investigations Department after the 1st Defendant made a complaint to the police that he did not sign the agreement and transfer. The Advocate complied and after sometime the 1st Defendant withdrew the complaint upon which the documents were returned to the Applicant for safe custody;

iv) Subsequently, the 1st Defendant informed the Applicant that he was unable to deal with the property as he had been served with an Order in Mombasa High Court Misc JR Application No. 74 of 2013 consolidated with Misc Case No. 75/2013;

v) The said cases were determined on 30th January 2013 and thereafter the 1st Defendant started avoiding the Applicant and completely refused to pick his calls;

vi) **Alarmed by the turn of events, the Applicant conducted a search at the Lands Registry in Mombasa and was shocked to find that the 1st Defendant had unlawfully transferred the suit property to Mercy Wambui Kimani and Jane Nyambura Rama (the 2nd and 3rd Defendants herein.) From his own investigations the Applicant established that the transfer to the 2nd and 3rd Defendants was done with the collusion of the Land Registrar Mombasa(4th Defendant);**

vii) **That the Applicant was always ready to complete his part of the Agreement. The 2nd and 3rd Defendants have now threatened to commence developments on the suit property in complete disregard to the Applicant's interest therein; and**

viii) **That the Defendant shall not suffer any prejudice if the orders sought are granted but unless they are restrained, the Applicant shall continue to suffer loss and irreparable damage.**

3. The 1st, 2nd and 3rd Defendants have neither entered appearance nor responded to the application despite service by the Applicant.

4. The Honourable the Attorney General(5th Defendant) has filed Grounds of Opposition on its behalf and on behalf of the 4th Defendant in which they oppose the Application on the grounds that:-

1. The application has not met the threshold for grant of the orders of injunction;

2. The actions by the 4th Defendant were proper and within his powers and fully within his mandate;

3. The applicant has failed to demonstrate ownership of the suit property to disentitle the 4th Respondent from registering a transfer over the suit property.

4. The Applicant has failed to demonstrate acts of fraud against the 4th Respondent hence the Applicant is not entitled to the orders sought; and

5. That the application is otherwise an abuse of the Court process.

5. I have considered the Application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Counsels for the Applicant and for the 4th and 5th Defendants.

6. As was stated in *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358*, an applicant for the grant of an injunction should first satisfy the Court that he has a prima facie case with a probability of success. Secondly he must demonstrate that he stands to suffer irreparable loss or injury which cannot be compensated by damages. If the Court is in doubt, it will decide the case on a balance of convenience.

7. In the matter before me, the Applicant avers that he entered into a Sale Agreement dated 14th January 2013 in which he agreed to purchase the suit property from the 1st Defendant at an agreed price of Kshs 4,000,000/= It is further his case that after he paid to the 1st Defendant a sum of Kshs 1,800,000/= the 1st Defendant deposited the original title documents and the signed transfer documents as security to be kept by the Applicant's Advocate.

8. It is further his case that during the pendency of the agreement, the 1st Defendant represented to him that he was unable to proceed with the transaction due to certain Orders from the Court but even after the cases in issue were determined the 1st Defendant started playing hide and seek forcing the Applicant to carry a search at the Lands Registry in Mombasa.

9. It is the Applicant's case that it is only then that he was shocked to learn that the 1st Defendant had, with the connivance of the 4th Defendant, transferred the suit property to the 2nd and 3rd Defendants. The Applicant avers that the said transfer was fraudulent as at the time the transfer was done, the Applicant was in possession of the original title documents which he retains in his possession to-date.

10. From the material placed before me, it is evident that indeed the Applicant entered into the said Agreement with the 1st Defendant for the sale of the suit property at the price of Kshs 4,000,000/= Upon payment of the deposit of Kshs 600,000/= paragraph 42 of the Agreement provided for payment of the balance of the purchase price as follows:-

“The balance of the Purchase Price of Kenya Shillings Three Million Four Hundred Thousand (Kshs 3,400,000) shall be paid by the Purchaser to the Vendor by way of monthly instalments of Kenya Shillings One Hundred Thousand (Kshs 100,000/=) per month with effect from 5th of February 2013 and thereafter on or before the 5th day of every succeeding month until payment in full.”

11. It is clear from the annexed documents that this schedule was not strictly adhered to as sometimes the Applicant would pay more than the agreed sum either in arrears or in advance. Whatever the case, if the said clause on the balance was adhered to, the balance of the purchase price should have been cleared within the next 36 months from the date of the Agreement.

12. As it were, it would appear that there were a number of intervening factors including two Court cases and as at the time of filing this suit on 9th February 2017, the Applicant had only paid a sum of Kshs 1,800,000/=. That he was left holding the original documents for the suit property has not been denied as the 1st Defendant has not filed any documents and/or response herein.

13. Given the uncontroverted evidence of the Plaintiff/Applicant, it is apparent that the 1st Defendant received money from him intending to sell to him the suit property. At some point however, it does appear that the 1st defendant changed his mind and decided to dispose of the property to the 2nd and 3rd Defendants herein. It is further clear that as at the time this happened, the Applicant had neither completed payment of the purchase price nor had he registered any caveat on the parcel of land to prohibit its transfer to third parties.

14. As it were the 2nd and 3rd Defendants exploited this loophole and proceeded to obtain title for the suit property on 4th April 2016. Under Section 26(1) of the Land Registration Act, the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrance, easements restrictions and conditions contained or endorsed in the certificate. Such title is however liable to challenge on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

15. As I have stated, from the Supporting Affidavit, the Applicant has not demonstrated that he attempted or made any effort to register a caveat and/or caveat on the property. This was of course on the comfort that he held the original documents to the land and it was known that the same were in his custody.

16. From the material exhibited herein, it is indeed true that the two cases cited as contributing to the delay were related to the land in question. Annexure 'D' to the Supporting Affidavit is a Court Order issued in Mombasa CMCC Misc Application No. 35 of 2013. Paragraphs 2 and 3 of the Orders granted by the Honourable V. Kachuodho, R.M at the behest of the Police on 12/2/2013 read as follows:-

2. That Godfrey Mutubia & Company Advocates and Mohamed Omar Salim hand over or lease the original Certificate of title number 46306 Plot No. 17835/7 Kilifi and the alleged original land sales agreement and transfer alongside any original instruments not specifically stated purportedly used in relation to the said parcel of land to Mombasa Police Divisional Criminal Investigation Officer or his appointed investigators for investigation.

17. Similarly annexure 'E' of the Affidavit indicates that the 1st Respondent was sued in Mombasa JR Application No. 74 of 2013 as an Interested Party wherein he was accused of defrauding the Ex parte Applicant therein of the disputed parcel of land herein. By a decision rendered on 5th June 2015, the Honourable Justice M.J. Anyara Emukule granted orders prohibiting the National Land Commission from claiming the land. It is apparent that the 1st Respondent seized the opportunity after the end of the case in June 2015 to re-sell the suit property.

18. While the 2nd and 3rd Defendants could be said to be bonafide purchasers for value without notice, it is clear to me that Section 26 of the Land Registration Act seeks to protect a proprietor only where the title is procured legally, procedurally and where there is no corrupt scheme.

19. I note from the material placed before me however that the Land Registrar Mombasa (4th Defendant) does not deny that he registered the transfer of the suit property to the 2nd and 3rd Defendants regardless of the fact that the Applicant was in possession of the Original Title. From the Grounds of Opposition filed on his behalf, there is nothing to show that he relied on a report or an application for lost or a destroyed certificate of Title made to him that the title to the suit property was lost. There is nothing to show that the Registrar advertised, gazetted and/or issued a duplicate certificate of title. The failure to advertise and gazette the loss of the original title was in my view not only unprocedural but illegal.

20. Thus while the 2nd and 3rd Defendants may purport that they were not partly to any fraud or misrepresentation and that their title is valid, I concur with Mutungi J in *Esther Njiru & Another –vs- Leonard Gatei (2014) eKLR* where the Learned Judge stated thus:-

“ While it is clear the title held by the Plaintiffs cannot be impugned under Section 26(1) of the Act as they were not party to any fraud or misrepresentation the title is nonetheless impeachable under Section 26(1) (b) as the title transferred to them by the 2nd Defendant was obtained illegally and unprocedurally.

Whereas the law respects and upholds sanctity of titles, the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search...”

21. It is indeed telling that while the Applicant was buying the suit property in January 2013 for a sum of Kshs 4,000,000/= the same is indicated in the transfer of Lease (Annexure G) kept at the 4th Defendant's office of having been disposed of to the 2nd and 3rd Defendants on 4th April 2016 at a consideration of Kshs 1,800,000/=.

22. Arising from the foregoing, I am satisfied that there was connivance between the 1st Defendant and the 2nd, 3rd and 4th Defendants to fraudulently transfer the suit property and to disentitle the Plaintiff/Applicant who had invested a considerable sum towards the purchase thereof.

23. In the result, I am satisfied that the Plaintiff has established a prima facie case with a probability of success. In addition as none of the defendants resides on and/or occupies the suit property, it is my view that pending the trial to establish how the 2nd and 3rd Defendants got the title to the property, the balance of convenience tilts in favour of the Plaintiff.

24. Accordingly, the application dated 9th February 2017 is hereby allowed with costs.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE