



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 412 OF 2017

OBUTU Z. A. OSORO PLAINTIFF

-VERSUS-

JUMA ABDALLA NGUZO & 5 OTHERS DEFENDANTS

RULING

1. The plaintiff/applicant has moved the Court under the provisions of article 40 of the Constitution, Section 1A, 1B & 3A of the Civil Procedure Act and Order 40 of the Rules in his application dated 9th November 2017 seeking the following prayers:

1. Spent

2. That a temporary injunction do issue against the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, their servants, agents or any person acting under their instructions restraining them from selling, transferring or interfering with the Applicant's quiet possession of the property subdivisions number 20440/I/MN – CR 60496 to 20455/I/MN – CR. 60511 (hereinafter together referred to as “the suit property”) pending the hearing and determination of this application and suit.

3. That a temporary injunction to issue against the LAND REGISTRAR Mombasa by themselves, their servants, agents or any person acting under their instructions restraining them from registering or executing transfers or any instrument, charge and or document in favour of any other party or dealing in any other manner adverse to the proprietary interests of the Applicant over the suit property being subdivisions number 20440/I/MN – CR 60496 to 20455/I/MN – CR. 60511 pending the hearing and determination of this application and suit.

4. That a stay of proceedings, execution and or any further action do issue to Kadhi's Court Succession Cause 112 of 2014 and or any other matter proceeding at the Kadhi's Court and dealing with the suit property.

5. That costs of the application be borne by the Respondents.

2. The application is premised on the grounds inter alia; that the applicant is the registered owner of the suit property. Secondly that the Kadhi's Court in Succession Cause no 112 of 2014 issued an order revoking all his titles for the subdivisions. Thirdly that the Kadhi's Court Order is pre judicial to his proprietary rights as he stands to lose his lawfully acquired property. The application is also supported by the facts contained in the affidavit in support of the application together with documents annexed thereto.

3. The application is opposed by the 1st – 5th Defendants/Respondents through the replying affidavit of Juma Abdalla Nguzo sworn on 6th December 2017. The 1st defendant deposed that he took out the succession proceedings before the Kadhi's Court and named all the beneficiaries of the estate. The court granted them the orders. The 1st defendant contends that he made an application to join the plaintiff in the proceedings before the Kadhi's Court but he declined stating that he is a Christian and he wished out.

4. The 1st defendant deposes further that the persons named as having sold the suit property are all strangers to the estate of the late Shibu Bin Suleiman and are imposters who had no right over that property. That the applicant has engaged in illegal activities criminal in nature by purporting to transfer the property of a deceased person and therefore should not be allowed to benefit from this illegality. That this application and the suit cannot stand in light of the decision of Succession Cause No 112 of 2014 as the parties who sold the property to the plaintiff had no powers to sell or transfer it. The defendants urged the Court to dismiss the application.

5. The parties filed written submissions in arguing this motion. The applicant filed his submissions on 5th February 2018 while the Respondents filed theirs on 2nd February 2018. They have both addressed the principles governing the granting of injunctive reliefs. I have

taken time to read the same. The applicant submitted as having demonstrated a prima facie case by putting reliance to the provisions of section 26 of the Land Registration Act on the effect of issuance with a title deed and article 170 (5) and article 47 of the Constitution on want of jurisdiction of the Kadhi's Court to deal with the matter. He also submitted that the provisions of section 106 of the Land Registration Act on revocation of titles was grossly violated.

6. The 1st – 5th Respondents on their part submit that the applicant failed to show how the process of how he acquired his title that it was done above board as he did not bring a copy of the transfer to Court. The 1st - 5th Respondents also submit that the applicant has lied when he states he was never made aware of the proceedings before the Kadhi's Court. They also submit that the decree in respect of the estate of Shibu Bin Suleiman is still intact and hence cannot be re – opened using this suit. That based on the back ground information they have provided, the application fails to meet the threshold of a prima facie case. That if the orders sought are granted, it will amount to staying a decree of another Court through an injunction. That the sanctity of Court orders ought to be upheld as was stated in the case of **Wildlife Lodges Ltd vs County Council of Narok & Another (2005) 2 E. A. 344.**

7. From the pleadings and the submissions, it is not in dispute that the plaintiff held a title to the suit property (*see annex OZ – 1 & OZ – 2*) before the Order from the Kadhi's Court was registered on the title. The Respondent avers and the same is not controverted that they applied to join the plaintiff to the proceedings before the Kadhi's Court but the plaintiff wished out. The plaintiff gave his reason for wishing out as he is not professing the Muslim religion. He states that he made this known to the Kadhi's Court by raising a preliminary objection and has currently cited the provisions of article 170 (5) which states thus;

“the jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Courts.”

8. The Respondents are questioning the manner in which the applicant acquired his title which they submit was in the name of a deceased person. This is a valid question which having learnt that the plaintiff was holding a title to the suit property ought to have been determined first before proceeding with the succession cause. The Court to question the title of the applicant in my view was not the Kadhi's Court since the jurisdiction of the Kadhi's Court is limited as set out in article 170 (5) of the Constitution stated above. Consequently the succession proceedings ought to have been stayed pending the determination of the question of how the applicant acquired his title in a Court of competent jurisdiction. Because of this lapse, I am satisfied that the applicant has demonstrated he has a prima facie with a probability of succeeding.

9. The 1st – 5th Respondents submitted that their decree is intact and the orders sought herein is an attempt to stay the execution of that decree through unprocedural means. The case of Wildlife Lodges Ltd supra dealt with an application for contempt of Court Orders. It did not obtain in circumstances similar to this case. There is nothing wrong in my view with staying an order which is alleged to have been issued without jurisdiction. The applicant cannot apply for stay of execution of that decree in the manner provided under the rules as he is not appealing the decision. The manner he has approached the Court is provided within the law. Consequently, to preserve the suit property so that this suit is rendered an academic exercise, it is only reasonable that the orders of injunction prayed for are allowed.

10. In the conclusion, I am persuaded that the present application is merited. Accordingly I do allow it in terms of prayers 2, 3 & 4. The Costs to abide the outcome of the main suit.

Dated, signed & delivered at Mombasa this 29th June 2018

A. OMOLLO

JUDGE