



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO 120 OF 2017**

**CHARO CHOME**

**KENGA KOMBE.....PLAINTIFFS**

**VERSUS**

**BENDERA CHARO THOYA**

**THE DISTRICT LAND REGISTRAR KILIFI.....DEFENDANTS**

**RULING**

1. Before me for determination is the Plaintiffs/Applicants' Notice of Motion dated 2<sup>nd</sup> June 2018. The Plaintiffs pray for a temporary injunction to issue restraining the 1<sup>st</sup> Defendant from trespassing and entering into all that parcel of land known as Roka/Uyombo/154 and from selling, alienating and/or dealing with the said parcel of land in any manner whatsoever pending the hearing and determination of this suit.

2. The application is supported by the annexed affidavits of Charo Chome, the 1<sup>st</sup> Plaintiff/Applicant and is premised on the grounds that:-

***i. The 1<sup>st</sup> Plaintiff is the owner of all that portion of land known as Plot No. Roka/Uyombo/154 having bought the same from the 2<sup>nd</sup> Plaintiff;***

***ii. The 2<sup>nd</sup> Plaintiff had bought the said parcel of land from the 1<sup>st</sup> Defendant but the 1<sup>st</sup> Defendant concealed the fact that she had already been issued with a title deed;***

***iii. The 1<sup>st</sup> Defendant has now decided to sell the land to a 3<sup>rd</sup> party and the title may soon be transferred to the 3<sup>rd</sup> Party and thereby lead to irreparable loss and damage to the 1<sup>st</sup> Plaintiff;***

3. In a Replying Affidavit filed herein in response to the Application, Bendera Charo Thoya (the 1<sup>st</sup> Defendant) avers that she is not aware of the alleged Sale Agreement made between the Plaintiffs herein and that if there is one, the same is null and void for all purposes as the same did not confer any interests in the suit property to the 1<sup>st</sup> Plaintiff.

4. The 1<sup>st</sup> Defendant further avers that the suit property is registered in her name and the 2<sup>nd</sup> Plaintiff had no interest capable of being passed to the 1<sup>st</sup> Plaintiff. She concedes that she entered into a Sale Agreement with the 2<sup>nd</sup> Plaintiff on 23<sup>rd</sup> November 2001 but states that the same was rescinded and/or voided when her family declined to consent to the same. In addition, the 1<sup>st</sup> Defendant states that the subject property was agricultural land and the 2<sup>nd</sup> Plaintiff failed to obtain the requisite Land Control Board Consent within six months as by law required and the sale therefore became null and void.

5. The 1<sup>st</sup> Defendant further states that after her family objected to the transfer, the 2<sup>nd</sup> Plaintiff was requested to get a refund of the purchase price but he has failed to collect the same.

6. I have considered the application and the response thereto. I have equally considered the submissions of the Learned Advocates for the parties. The principles for the grant of an interlocutory injunction were stated by Spry VP in the celebrated case of ***Giella –vs- Cassman Brown & Company Ltd(1973)***, EA 358 as follows:-

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”***

7. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003)eKLR* stated that:-

***“In civil cases, a prima facie case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”***

8. In the matter before me, the 1<sup>st</sup> Defendant does not deny having sold the subject parcel of land to the 2<sup>nd</sup> Plaintiff. It is however her case that her family subsequently objected to the sale and issuance of the Land Control Board Consent as a result whereof she retained interest in the property.

9. I have considered the circumstances of this case more so the fact that the Plaintiff claims to be in possession of the land and that the purchase price paid to the 1<sup>st</sup> Defendant has never been refunded some 8 years down the line. I have also considered the fact that the 1<sup>st</sup> Defendant does not deny that she now intends to dispose of the property to a third party said to be Mombasa Cement Company Ltd.

10. Given the circumstances, I think it is fair and just that the subject parcel of land be preserved pending the clarification of a number of issues at the full trial. Accordingly I find merit in the Plaintiff’s application. The same is allowed with costs.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of June, 2018.**

**J.O. OLOLA**

**JUDGE**