

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO 347 OF 2017

SWALEH OMAR SAID.....PLAINTIFF

VERSUS

1. KHALID SALIM ABDULSHEIKH

2. FIRST COMMUNITY BANK LTD

3. REGISTRAR OF LANDS.....RESPONDENTS

RULING

1. There are two applications coming for determination. The 1st application was brought by the Plaintiff and is dated 26th September 2017. The Plaintiff is seeking for temporary orders of injunction restraining the named Respondents from interfering with the suit properties **MSA/BLOCK XVII/136 AND MSA/BLOCK XXIX/76** pending determination of the suit.

2. The court issued temporary orders at the ex-parte stage. The 1st Respondent challenged this application by filing an application dated 4/10/17 and amended on 16/10/17 under Order 40 seeking to have the plaintiff restrained from collecting rents from the suit properties and/or harassing the tenants occupying the suit premises pending determination of the suit.

3. The 1st Respondent's basis for asking on variation of the orders is on account that he purchased the suit properties from the Plaintiff. He annexed documents inter alia sale agreement, executed transfers and copies of title deeds bearing his name.

4. The Plaintiff in countering the 1st Respondent's claim filed an affidavit dated 23rd October 2017 in which he has denied selling the suit properties to the 1st Respondent. The Plaintiff is questioning the veracity of the documents presented by the 1st Respondent. He deposed that the 1st Respondent was his agent and friend collecting rents on his behalf and never sold the land to him.

5. The dispute thus is who between the Plaintiff and the 1st Respondent is entitled to deal with the property pending the hearing and determination of this suit. In para 5 of the 1st Respondent's affidavit in support of his motion, he deposed that he purchased the property while the Plaintiff was resident on **TITLE NO XVII/136**. According to the sale agreement this was on 20th January 2011 and the transfer registered on 14th July 2010 "annex B". The copy of sale agreement in respect of **PLOT NO.XXIX/76** is not indicated (pg 11 of the application) but the transfer is indicated to have been registered on 14th July 2010.

6. The 1st Respondent deposed in para 6 that the Plaintiff being a long term friend of his, he indulged the Plaintiff to continue staying on the suit property until this case surfaced. In respect of **TITLE NO.76**, the 1st Respondent annexed notification of approval for alteration and extension to a residential building issued on 10th December 2010. These documents do not expressly state that the 1st Respondent has been in control of the premises except for a demand letter dated 28th September 2017 done by the Plaintiffs advocate warning the tenants not to pay rent to the 1st Respondent as ownership is disputed.

7. From the facts of this case I am persuaded to believe that the Plaintiff has been in possession of the two properties. Whether or not there was a sale and transfer are issues that can only be determined after the full trial. The value of the properties are also ascertainable. Therefore I am satisfied that each of the parties have laid bare a prima facie case with a probability of succeeding. The loss is not irreparable given that the value of the properties and/or the receivable incomes in terms of accruing rent from **PLOT NO.XXIX/76** can be ascertained. This court is therefore guided to determine what orders to issue under the principle of balance of convenience.

8. Given that the plaintiff was the first in time to obtain the orders of injunction and on account of admission by the 1st Respondent that he indulged the Plaintiff to stay on the title no 136 because of their friendship; the equitable doctrine of the first in time prevails and/or equity aids the vigilant then allows the Plaintiff to continue enjoying the orders issued by this court on 27th September 2017. The Plaintiff shall however file an undertaking to reimburse all rents collected to the 1st Respondent from the date of filing of this suit to the time it shall be concluded in the event that his suit does not succeed.

9. In conclusion I do allow the Plaintiff's application dated 26th September 2017 in terms of prayer 3. The orders sought in the amended motion dated 16th October 2017 are declined for the reasons stated above.

The costs of each of the two application do abide the outcome of the main suit.

Ruling dated, signed and delivered at Mombasa this 28th day of September 2018

A. OMOLLO

JUDGE