



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 170 OF 2017

COSMUS NGUGI DAVID.....PLAINTIFF/RESPONDENT

VERSUS

FATUMA SHARIFF SALIM.....1ST DEFENDANT/RESPONDENT

NICHOLUS NZIOKA.....2ND DEFENDANT/RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 24th August 2017 and filed herein on 25th August 2017. By the said application, Nicholus Nzioka, the 2nd Defendant herein prays for orders that:-

1.....

2. Pending the hearing and determination of this suit, the Honourable Court be pleased to discharge and/or set aside orders issued on 1st August 2017 in this suit.

3. The Honourable Court be pleased to strike out the Plaintiff's suit with costs to the 2nd Defendant.

2. The application is supported by the 2nd Defendant's affidavit sworn on the same day and is premised on the grounds that:

i) The contract dated 22nd July 2011 executed between the Plaintiff and the 1st Defendant is unenforceable in law;

ii) The 1st Defendant has no legal right and/or interest over the suit property which is registered in the names of Maliam Ali Salim alias Mariam Binti Salim (deceased).

iii) The 1st defendant has no legal capacity to enter into the Sale Agreement dated 22nd July 2014;

iv) That there are no Letters of Administration and/or Power of Attorney issued to the 1st Defendant to enable her execute the said Agreement;

v) The Applicant specifically has a legal right and interest over a portion measuring 50m x 100m situated within the Parcel of land number 332 Malindi;

vii) That Sherif Salim Ali who executed the Sale Agreement with the Applicant has been issued with a declaration order at the Khadhi's Court as the sole beneficiary of the Estate of Mariam Ali Salim(deceased); and

viii) That it is in the interest of justice that the orders issued on 1st August 2017 be discharged and/or set aside.

3. In a Replying Affidavit filed on 4th October 2017 in response to the application, Cosmas Ngugi David, the Plaintiff herein avers that the said application is brought in bad faith, is ill motivated and an afterthought meant to delay this case.

4. The Plaintiff avers that he is the legal and absolute proprietor of the suit property and maintains that the Agreement between himself and Fatuma Shariff Salim, the 1st Defendant herein, is valid in every aspect of it. It is the Plaintiff's case that as at the time the 2nd

Defendant/Applicant executed an agreement with the said Sheriff Salim Ali on 7th December 2015, there was no Court Order giving any rights to the said Sheriff Salim Ali over the suit property.

5. The Plaintiff further avers that he purchased the property for value without notice of any defect in title and he should not be made to suffer for any defects herein. It is his case that the 1st Defendant is the daughter of the said Sheriff Salim Ali and he strongly suspects that the two are colluding with the 2nd Defendant herein to take away what was already sold to him.

6. The 1st Defendant initially appeared in these proceedings in person and sought time to file a Replying Affidavit to the application. She did not however do so upto the time the parties concluded their submissions herein.

7. I have considered the 2nd Defendant's application and the Plaintiff's response thereto. I have equally considered the submissions made by the two parties.

8. The suit before me was filed on 31st July 2017. By an application filed contemporaneously with the Plaintiff, the Plaintiff sought temporary orders of injunction to restrain the Defendants from trespassing, cultivating, alienating, selling off, transferring, carrying on constructions and/or further dealing with the parcel of land known as Portion No. 332 Malindi.

9. The said application was placed before the Honourable Yano J in Mombasa who upon consideration thereof on 1st August 2017 granted orders in terms of prayer Nos 1 and 2 of the application. The said orders required the Plaintiff/Applicant to serve the Respondents for inter - partes hearing on a date to be given on a priority basis at the Registry in Malindi.

10. As it were, the Plaintiff extracted orders which were signed and issued by the Honourable Deputy Registrar of this Court on 2nd August 2017 reading in the relevant portion as follows:-

IT IS HEREBY ORDERED:-

1. That the application dated 31st July 2017 is hereby certified as urgent.

2. That a temporary injunction is hereby issued preventing the Defendants, their agents, servants and/or any other person acting under them or their authority from trespassing, cultivating, alienating, selling off, transferring, carrying on constructions and or further dealings with the Applicant's parcel of land more specifically described and/or known as Portion No. 332 pending the hearing and determination of this suit.

11. Those are the Orders which gave rise to the application before me seeking their discharge and the striking out of the Plaintiff. The main reason advanced as to why I should discharge the orders is the contention that the 1st Defendant had no legal right to sell the land to the Plaintiff as he had neither a Power of Attorney nor Letters of Administration to empower her to do so.

12. While those may be matters for consideration by the Court at some point in time in the life of this case, I think the present application is based on the wrong facts. I say so because a perusal of the orders granted by the Honourable Yano J are not the orders that were extracted and served upon the parties. If the 2nd Defendant/Applicant were diligent enough, he would have noticed that the orders extracted and served upon him are at a complete variance with the orders that were granted by the Honourable Judge.

13. As it were, the Plaintiff for some reason extracted orders in terms of Prayer No. 3 of the application that was placed before my brother Judge on 1st August 2017 and chose not to fix a date for inter partes hearing as had been ordered by the Court. As a result the orders extracted herein were clearly an abuse of the Court process and this Court has a duty ex *debitio Justitiae* to correct the same.

14. In the circumstances, I set aside the Orders extracted by the Plaintiff herein as issued on 2nd August 2017. As the Plaintiff has been unduly and irregularly enjoying the Orders without their being subjected to inter-partes consideration, I will also discharge and set aside the temporary orders of injunction granted by the Honourable Yano J on 1st August 2017 as sought at Prayer No. 2 of the 2nd Defendant's application.

15. For the avoidance of doubt the Plaintiff is free to fix and serve the application dated 31st July 2017 for inter-partes hearing in the usual manner through the Court Registry.

16. As the 2nd Defendant was not diligent enough to notice the discrepancy in the orders granted and those extracted by the Plaintiff, each party shall bear their own costs.

Dated, signed and delivered at Malindi this 21st day of September, 2018.

J.O. OLOLA

JUDGE