



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 30 OF 2017

TIRUS KARUGA GITHAKA.....1ST PLAINTIFF/APPLICANT

WINNIE MBUCU NDARU.....2ND PLAINTIFF/APPLICANT

VERSUS

DAVID SHIMEKHA MWASHI.....1ST DEFENDANT/RESPONDENT

CHARLES THUKU MUTUURA.....2ND DEFENDANT/RESPONDENT

STEPHEN MWANGI KANGARA.....3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR, LAMU now known as

COUNTY LAND REGISTRAR/LAND REGISTRAR

LAMU COUNTY.....4TH DEFENDANT/RESPONDENT

RULING

1. I have before me for determination a Notice of Motion application dated 7th February 2017. In the said application, the Plaintiffs herein pray:-

4. That the Honourable Court do issue a mandatory injunction restraining the Defendant/Respondents by themselves, their agents and/or servants from accessing, trespassing, alienating, fencing, taking over possession, evicting and/or in any way dealing with the six acres Portion of land known as LR No. Lamu/Hindi/Magogoni/518 measuring 12 acres situate in Lamu.

5. That the costs of this application be awarded to the Plaintiffs/Applicants.

2. The application is grounded on the Supporting Affidavit of the 1st Plaintiff Tirus Karuga Githaka and is founded on the grounds:-

i. That by a Sale Agreement dated 15th March 2016, the Plaintiffs bought from the Defendant six acres of the said Parcel of land. They paid Kshs 450,000/- in cash and a sum of Kshs 16,000/- to the 1st Defendant to cater for sub-division;

ii. That unknown to the Plaintiffs, the 1st Defendant proceeded to fraudulently sub-divide the suit property into three plots of land namely Lamu/Hindi Magogoni/995, 996 and 997;

iii. The 1st Defendant thereafter proceeded to sub-divide the portions and grant them to other persons as follows:-

a) Lamu/Hindi Magogoni/995-Charles Thuku Mutura

b) Lamu/Hindi/Magogoni/996- Stephen Mwangi Kangara

c) Lamu/Hindi/Magogoni/997 to David Shimekha Mwash.

iv) That the Plaintiffs were bonafide purchasers for value without notice and there were no encumbrances against the property at the time of the purchase.

v) The Respondents have since trespassed upon the property and have refused to vacate and/or return the same to the Plaintiffs.

3. In a Replying Affidavit filed herein on 11th May 2017 on his own behalf and on behalf of the 2nd Defendant, Stephen Mwangi Kangara (the 3rd Defendant) denies the averments contained in the Plaintiff's Supporting Affidavit. It is their case that the Plaintiffs never applied for the land Control Board consent as purported and further that it is them the 2nd and 3rd Respondents who proceeded to process the Discharge of Charge for the disputed parcel of land from the Settlement Fund Trustees.

4. The 2nd and 3rd Respondents aver that they entered into a proper Sale Agreement with the 1st Defendant after carrying out due diligence on the property. While admitting that the land was sub-divided into three parcels, the two Respondents deny that the same was fraudulent in any way. Accordingly they deny trespassing into the Plaintiffs' land as it is their case that the same never belonged to the Plaintiffs at any point in time.

5. Responding to the said application, the 1st Defendant-David Shumekha swears in a Replying Affidavit filed herein on 22nd June 2017 that he entered into a Sale Agreement with the 1st Plaintiff for the purchase of one acre of the land comprised in Lamu/Hindi/Magogoni/518 on 10th October 2009 at a price of Kshs 400,000/-. He avers that the 1st Plaintiff paid a sum of Kshs 110,000/- and agreed to pay the balance within three months but he has never done so to-date.

6. The 1st Defendant further states that the said Agreement allowed him to re-sell the land to any other person if the balance was not paid within three months. That is what led him to get new buyers in November 2010 in the names of the 2nd and 3rd Defendants herein.

7. The 1st Defendant further avers that he refunded a sum of Kshs 319,000/- which the 1st Plaintiff had paid to him vide a cheque dated 1st February 2012 which the Plaintiff refused to bank. Instead the Plaintiff pressed criminal charges against him. Thereafter, a Court in Lamu ordered that the 1st Plaintiff be refunded Kshs 450,000/- and the 1st Defendant complied and deposited the sum into the Plaintiff's account.

8. On his part, the County Land Registrar Lamu(the 4th Defendant) has filed Grounds of Opposition herein on 13th June 2017 stating that:-

1. The application is a non-starter as it seeks orders of injunction against the Government grant of which is expressly prohibited under Section 16 of the Government Proceedings Act.

2. The application is an abuse of the Court process as it seeks Orders for a parcel of land that is non-existent.

3. The application has not met the threshold for granting of an injunction as sought by the applicants.

4. The applicants have not furnished sufficient proof to establish ownership or entitlement of the suit property hence the application lacks merit.

5. The suit property was lawfully and procedurally allocated to the Respondent herein and the application is therefore overtaken by events.

9. I have considered the application and the various responses thereto. I have equally studied the detailed written submissions filed herein by the Learned Advocates acting for the respective parties herein.

10. From the very outset, I must state that Prayer No. 4 of the Plaintiff's application which forms the substance of the issue before me for determination is worded in a rather curious manner. By the said Prayer, the Plaintiffs express themselves to be seeking an order of mandatory injunction to restrain the Defendants from accessing, trespassing, alienating, fencing, taking over possession, evicting and/or in any way dealing with the six acres Portion of the parcel of land known as Lamu/Hindi/Magogoni/518.

11. By the wording of the said Prayer the Plaintiffs appear to me to be seeking both a mandatory injunction and a prohibitory one within the same prayer. As the Court of Appeal explained in ***Kenya Railways Corporation –vs- Thomas Nguti & 6 Others(2009) eKLR:-***

“...there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the Court does no more than prevent for the future the continuance or repetition of the conduct of which the Plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may... require the dismantling or destruction of something already erected or constructed.....

12. In regard to the consequences and what the Court ought to weigh in granting either a prohibitory or a mandatory injunction, the Court in the ***Kenya Railways Corporation –vs- Thomas Nguti & 6 Others(Supra)*** quoted from the English case of ***Gale –vs- Abbot(1862) WLR 748*** and observed that:-

“The subject is not one in which it is possible to draw firm lines or impose any rigid classification. Nevertheless, it is plain that in

most circumstances, a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the Defendant has rushed on with his work in order to defeat the Plaintiff's attempt to stop him, then upon the Plaintiff promptly resorting to the Court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the Plaintiff's promptitude is a badge of the seriousness of his complaint."

13. It would accordingly appear to me that while the two prayers may be sought in the same application, the two are distinct and governed by different principles. In this regard, I was prepared to assume that the Plaintiffs were mistaken in the use of the word "mandatory" in Prayer No. 4 as it is apparent from the wording therefrom that what they seek is to restrain or prohibit the Defendants from doing certain future acts as stated therein such as accessing, trespassing into, alienating, taking over or evicting the Plaintiffs from the subject parcel of land.

14. But that was until I read the Plaintiff's Written Submissions filed herein on 2nd October 2017 in which the Plaintiffs make it clear that what they are seeking is a mandatory injunction requiring the Defendants to vacate the property and for the 4th Defendant to be compelled to remove the entries relating to the sub-divisions and to reinstate the status quo before the sub-division were done.

15. In ***Kenya Breweries Ltd –vs- Washington Okeyo(2002) EA 109***, the Court of Appeal once again endorsed the thinking in ***Kenya Railways Corporation –vs- Thomas Nguti & 6 Others(Supra)*** when it observed that:-

".....a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application...."

16. Similar sentiments were made in ***Nderu –vs- Kenya National Chamber of Commerce and Industry & Another(2003) eKL*** where the Court again held that:-

"a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied..."

17. In the matter before me, the Plaintiffs state that they entered into a Sale Agreement dated 15th March 2010 with the Respondent for the sale of six acres of land which were to be sub-divided from a parcel of land known as Lamu/Hindi/Magogoni/518 which land measures 12 acres. The Plaintiffs aver that they paid the 1st Defendant a sum of Kshs 450,000/- in cash as the purchase price and a further sum of Kshs 16,000/- for the sub-division to be carried out. It is their case that the 1st Defendant colluded with the other Respondents and proceeded to fraudulently sub-divide the land into three portions two of which have since been transferred to the 2nd and 3rd Defendants.

18. As it were, the Plaintiffs contention has been vehemently denied by the Defendants. The 1st Defendant in particular denies that he has ever executed the Agreement dated 15th March 2010. He terms it a forgery and only admits to entering into a handwritten agreement with the 1st Plaintiff on 10th October 2009, for the sale of one acre of land which was to be hived off from his parcel No. Lamu/Hindi/Magogoni/518 aforesaid. According to the 1st Defendant, the 1st Plaintiff never paid the full purchase price within three months as they had agreed and thereafter he found new buyers who were ready to purchase the land.

19. The 1st Defendant further avers that he opted to refund the 1st Plaintiff a sum of Kshs 319,000/- which he had been paid as at the time he rescinded the contract. It is however his case that even though he wrote a cheque to the 1st Plaintiff, he opted not to cash the same and instead pressed criminal proceedings against the 1st Defendant before filing this case.

20. In my considered view, there are no special circumstances in this case that would warrant the grant of mandatory injunction of the orders as sought. As it were, nothing has so far been placed before me to support the contention that the 2nd, 3rd and 4th Defendants in particular colluded in any way to have the disputed parcels of land transferred to the names of the 2nd and 3rd Defendants.

21. The upshot of this is that I find no merit in the Plaintiffs' application dated 7th February 2017. The same is dismissed with costs to the Defendants/Respondents.

Dated, signed and delivered at Malindi this 31st day of October, 2018.

J.O. OLOLA

JUDGE