



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI LAW COURTS**

**ELC CASE NO. 318 OF 2018**

**ABDILRASHID ABDULKADIR WARSAME.....PLAINTIFF**

**=VERSUS=**

**ABDULLAHI MOHAMED SHEIKH & 2 OTHERS.....DEFENDANTS**

**RULING**

**Background**

1. This is a Ruling in respect of two separate applications. The first application is dated 13<sup>th</sup> July 2018. It is brought by the Plaintiff and it seeks the following orders:-

**1. Spent**

**2. Spent**

**3. Pending the hearing and determination of this suit, the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants/respondents by themselves, assigns, servants and/or agents be and hereby restrained and prohibited from unlawfully advertising the sale, disposal and or transfer by way of Public Auction or in any way dealing with Flat No.D1 erected on Land Reference Number 209/7260/72 and IR Number 11423, situate in Section III, Eastleigh Area Nairobi County.**

**4. Pending the hearing and determination of the suit, the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents by themselves, assigns, servants and/or agents be and hereby compelled to issue the applicant with the with the title document to Flat No.D1 erected on Land Reference Number 209/7260/72 and IR Number 11423, situate in Section III, Eastleigh Area Nairobi County, to enable the applicant to effect the transfer.**

**5. Costs of this application be in the cause.**

2. The second application is dated 20<sup>th</sup> July 2018. It is brought by the second and third defendants and it seeks the following orders:-

**i. Spent**

**ii. The interim orders of injunction given by this honourable court on 16<sup>th</sup> July 2018 be set aside forthwith.**

**iii. Mr Abdilrashid Abdulkadir Warsame, the deponent of the supporting affidavit to the notice of motion dated 13<sup>th</sup> July 2018 and the verifying affidavit to the plaint be summoned and cross examined under Oath for perjury.**

**iv. Upon cross-examination the court should rule on whether an order should be issued directing the police to charge the said deponent with the offence of perjury contrary to section 108 of the penal code.**

**v. The costs of the application be awarded to the 2<sup>nd</sup> defendants in any event.**

3. The first defendant put up a block of about 20 apartments on LR No.209/7260/72 at Eastleigh Section III in Nairobi. On 31<sup>st</sup> July 2009, the first defendant and the plaintiff entered into a sale agreement in respect of one of the apartments known as flat D1 (suit property) at a consideration of 3,800,000/=/. Upon completion of payment of purchase price, the plaintiff took possession of the suit property where he is residing to date.

4. On 14<sup>th</sup> October 2010, the first defendant without any knowledge of the plaintiff took a facility from the second defendant and charged the suit property together with other apartments. The first defendant defaulted in paying the loan which prompted the second defendant to instruct the third defendant to sell the charged property including the suit property. This is what prompted the plaintiff to move to court seeking among other prayers an injunction restraining the second and third defendants from proceeding with sale of the suit property.

5. The plaintiff came to court under certificate of urgency on 16<sup>th</sup> July 2018. He obtained interim injunction stopping a sale of the suit property which had been scheduled to take place on 17<sup>th</sup> July 2018. The second and third defendants raised a preliminary objection on the ground that this court does not have jurisdiction to deal with the matter in issue. I will first deal with the issue of jurisdiction before I deal with the two applications.

#### **Preliminary Objection**

6. The second and third defendants filed a notice of preliminary objection dated 20<sup>th</sup> July 2018 and filed in court on 24<sup>th</sup> July 2018. The second and third defendants argue that since this case involves issues of realization of security, the Environment & Land Court (ELC) does not have jurisdiction to entertain the suit. They argue that the court with jurisdiction to entertain this suit is the commercial and Tax Division of the High Court.

7. The plaintiff opposed the preliminary objection on the ground that there was no charge between the plaintiff and the second defendant and therefore the issue of jurisdiction cannot arise. The plaintiff argues that he had purchased the suit property from the first defendant, fully paid for it and took possession but the first defendant fraudulently charged it to the second defendant without his knowledge. He therefore contends that his case is founded on fraud and the issue in the suit is on occupation, use and ownership of the suit property which is within the jurisdiction of the ELC Court.

8. I have considered the submissions by the parties herein in respect of the issue of jurisdiction. I have also considered the authorities cited by the second and third defendants. Whereas I agree that recently there has been a decision from the court of appeal that matters relating to realization of securities should be handled by the Commercial and Tax Division of the High Court, the circumstances in this case are quite different. There is no chargor and chargee relationship between the plaintiff and the second defendant. The chargor and chargee relationship is between the first defendant and the second defendant. The plaintiff's claim is that a property which he had purchased is being sold by the second defendant. The plaintiff had fully paid for the suit property and took possession. The first defendant went ahead to charge the same property to the second defendant.

9. The plaintiff is seeking to assert his ownership rights. These rights can only be protected by the ELC Court. The issue of charge between the first defendant and second defendant has been brought in this case to demonstrate how the plaintiff's ownership rights are about to be infringed by the sale of the suit property. This case has not been brought by the first defendant against the second defendant. I therefore find that the court with jurisdiction is the ELC Court. I therefore dismiss the preliminary objection with costs to the plaintiff.

#### **Application dated 13<sup>th</sup> July 2018.**

10. The plaintiff contends that he purchased the suit property from the first defendant on 31<sup>st</sup> July 2009. He fully paid for it and took possession. The plaintiff cleared paying for the suit property on 5<sup>th</sup> October 2010. The first defendant charged the suit property on 4<sup>th</sup> October 2010 a day before the plaintiff completed paying for the suit property. The charge between the first defendant and the second defendant was not registered until 1<sup>st</sup> November 2010.

11. The second and third defendants have opposed the plaintiffs application on the ground that the Plaintiff is guilty of material non-disclosure ; that there was Milimani CMCC No.533 of 2016 which had been filed by the plaintiff against the first and second defendant; that the plaintiff did not seek consent from the second defendant before purchasing the suit property; that the plaintiff was only entitled to possession after full payment of the purchase price and that the plaintiff's former Advocates had assured the second defendant that the suit property was not among those which the first defendant had sold and that the plaintiff's claim should be directed at his previous advocates and the first defendant.

12. I have considered the plaintiff's application and the opposition to the same by the second and third defendants. Although there was Milimani Chief Magistrates Court civil case No. 533 of 2016 between the plaintiff and the first and second defendant, that suit was stayed following stay orders which had been granted in Malindi High Court Petition No. 1 of 2016. That Petition has since been determined and Magistrates have jurisdiction to handle land cases subject to pecuniary jurisdiction. It is therefore wrong for the second and third defendants Advocate to claim that applications which were filed in the lower court were dismissed.

13. It is clear that the plaintiff purchased the suit property in 2009 well before the first defendant purported to charge the same to the second defendant. The issue of when the last payment was made is immaterial. The fact remains that the plaintiff completed paying for the suit property and was given possession. The Plaintiff was under no obligation to seek consent from the second defendant as he had already purchased the suit property. The plaintiff in prayer (4) is seeking a mandatory order at interlocutory stage. I do not think that the prayer can be granted at the moment. I therefore decline to grant prayer (4) but as the plaintiff has demonstrated that he has a prima facie case with probability of success, I allow prayer (3) of the Notice of Motion dated 13<sup>th</sup> July 2018 with costs.

#### **Application dated 20<sup>th</sup> July 2018**

14. In this application, the second and third defendants are contending that the injunctive orders which were issued on 16<sup>th</sup> July 2018 were issued without the plaintiff disclosing that there was another suit which had been filed in the lower court. The second and third defendants contend that there were two applications which had been filed, in the lower court which applications were dismissed.

15. The second and third defendants also contend that as the plaintiff failed to disclose that there was another suit in the lower court, he committed perjury for which the court should order that police do charge him with perjury contrary to section 108 of the penal code.

16. The application by the second and third defendants was opposed through grounds of opposition dated 4<sup>th</sup> September 2018 and filed on 5<sup>th</sup> September 2018. The first defendant contends that this court has discretion to grant and maintain interim orders and that the application by the second and third defendant is an abuse of the process of the court.

17. I have considered the application by the second and third defendants and the opposition to the same by the first defendant. I have looked at proceedings from the lower court. There was no dismissal of the applications which were filed in the lower court. The trial magistrate held that she had no jurisdiction in view of the stay orders which had been granted in Malindi High Court Petition No.1 of 2016. The trial Magistrate consequently stayed the proceedings in that case pending the outcome of the petition. There is no evidence that the proceedings in the lower court file were re-activated after the court ruled that the magistrates had jurisdiction to handle land matters.

18. The plaintiff in this case was not cross –examined on the contents of his verifying affidavit where he did not disclose the fact that there was another case which had been filed in the lower court. I therefore do not find any basis upon which the court can recommend that the plaintiff be charged for perjury. The interim injunction which had been obtained by the plaintiff were properly obtained. The same cannot be discharged as they have been confirmed in the application dated 13<sup>th</sup> July 2018. I therefore do not find any merit in the application dated 20<sup>th</sup> July 2018 which is hereby dismissed with costs to the plaintiff and the first defendant.

It is so ordered.

**Dated, Signed and Delivered at Nairobi on this 26<sup>th</sup> day of November 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Mueke for Mr Wawire for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

M/s Njagi for Mr Olaha for Plaintiff

Court Clerk : Hilda

**E.O.OBAGA**

**JUDGE**