



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 443 OF 2015

DAVID M'MASI LUTOMIA.....PLAINTIFF/RESPONDENT

VERSUS

ISAAC LISA LISA.....DEFENDANT/APPLICANT

RULING

The applicant, Isaac Lisa Lisa applies for orders that this Honourable court be pleased to set aside review and or discharge the ex-parte order of injunction in this matter and the consequential order(s) thereof and that this Honourable court be pleased to grant stay of any proceedings in this matter pending the hearing and determination of this application inter-parties and that the costs of this application be provided for. The application is based on grounds that the orders were granted ex-parte and the applicant continues to suffer irreparably as he was condemned unheard. Moreover, that the respondent came to court and sought for equitable orders with unclean hands. The transactions and evidence as used by the respondent in granting the orders are fraud. That it is in the best interests of justice that the orders sought be granted.

In the supporting affidavit, Isaac Lisa Lisa states that he is the lawful and registered proprietor of Land Parcel Eldoret Municipality 20/Kapyemit/2942 having purchased the same on 26th of January, 2002. That upon purchase, he took immediate possession and exercised control by fencing the said parcel which land he used for agriculture purposes. That at the time of purchase, the land was referenced as Eldoret Municipality Block 20/Kapyemit/556 measuring 9.11 Ha to which he purchased 0.109 Ha an acre that was to be hived off from the said parcel. That the process of subdivision was done and he was issued with the title of Eldoret Municipality Block 20. Kapyemit/2942 measuring 0.109 Ha (the land in dispute). That he has and still is exercising possession over the said parcel since 2002 to date.

Sometimes in April 2015, he had the intention of disposing off the land and he approached one Albert Kaiya a property Manager to help him find a buyer for his land. That on the same month, he erected a placard on the said parcel notifying interested persons of the intention to sale, indicating the details of the person to be contacted to enable effect the sale. That on or about June 2015, he started receiving a lot of phone calls from people who were showing interest in the purchase of the land but none materialized to sale. On or about month of November 2015, he received two peculiar phone calls from two different individuals, one indicated to him that he ought to meet him collect his balance while the other phone call rudely indicated that he had refused to give them land and thus they will teach him a lesson. That he was appalled by the said averments and not knowing who these people were and their motive, immediately he received Kshs.50 from one of the persons who called him.

That being done, he found out that via transaction JK68EK2E3A, one was known as David Mmasi while the other through transaction No. JK62ELAOB2 was known as Shihuma Mmassi. That since then, there were no further communication from the two individuals as from the date of the Mpesa transaction and he assumed, it was mistaken identity on their part and that is why they did not continue with any further

communication. That sometime in June 2016, he was called by the village elder Henry Kiptum to attend to a Chief's office to solve a boundary dispute between himself and Mr. Tamaini Kassim. That the dispute related to the boundary of his parcel Block 20/2942 and Block 20/2940 which belonged to Mr. Kassim, the dispute was heard and finalized. That at the date of the aforementioned boundary dispute, he had neither found a buyer nor ever sold his piece of land to any third party.

That sometime in September, he got a buyer known as Dr. Nyikuli who intended to buy the land from him, they negotiated the price and he sought for time so that he could do more requisitions on the land to authenticate the validity of the title. That after a month, he received a phone call from the intended purchaser, that he had done a search and found out that there was a restriction on the parcel to his utter shock and dismay. That he immediately proceeded to Eldoret to establish the existence of the present case before court. That upon perusal of the documents filed in court, he was shocked to find the names of the plaintiff who he recalled as having called him way back in 2015. That he was also shocked to peruse the court file and saw a sale of land agreement purportedly between himself and the plaintiff which he never did execute.

That as at the time of perusing the court file, the averments contained in the suit papers were all falsehood and creations of fraud as neither have he met Advocate Omusundi who witnessed the agreement, nor ever has he met the plaintiff, nor ever has he signed any agreement in disposing of his land to any third parties and the documents used in the suit are all but forgeries.

That immediately he proceeded to Eldoret Police Station and reported a case of fraud and forgery and was issued with OB No. 65/24/10/16 as against the purchaser and the lawyer as never, have he met the two individuals as claimed.

The assertions that the respondent has the original title is not only false but misleading and if at all the same is a fake title because he is in possession of the original title, which he has never surrendered to any other person. That he is advised by his counsel on record which information he verily believe to be true that the respondent has perjured himself because all the averments contained in the respondent's affidavits are total falsehood and ought to be expunged from the records. That it is not true, that the respondent was not able to trace him to serve him with court process but rather, it was a deliberate attempt on the part of respondent to mislead the court in allowing its application for substituted service in the hope that he would have never known and the orders sought by the respondent would have been granted in absentia.

That on 28.10.2016, he was called by his counsel on record who indicated to him that he accompanies him to Morgan Omusundi law firm as he had arranged for a meeting between the respondent, his advocate in attempting an out of court settlement. That on the same day, they arrived at the chambers of Morgan Omusundi and that is the first time he met the counsel who had purported to witness the agreement.

That at the office, he was introduced to David Mmasi the respondent herein and the purported purchaser and he was accompanied by his brother while he was accompanied by Mr. Nicholas Kibii and his advocate. That when introductions were done, it was agreed by all parties that, it was the first time all parties were seeing each other. That he was shown completion documents to wit a copy of the he'd of the alleged vendor, the purported original title which on the face of the documents held by the respondent were all fake. That the identification card held by the respondent was fake as the picture attached to the ID was not his and details on the ID were tampered with. That it was unanimous agreed that it was unfortunate the respondent had been conned of his hard-earned cash by a fraud and the title in possession of the respondent was also fake. That it was agreed by both parties would agree to dispense with the matter since it was without a shadow of doubt that the respondent had been deceived in to the transaction. That even after the meeting and the respondent knowing he had been conned, he has refused and or remained adamant to withdraw this case and follow up the case with the police to find the criminal who is at large. That it is at the meeting that he came to know that the respondent who admitted that he had become suspicious of the transaction when he had called the imposter to come and pick the balance of the purchase price and he had refused and switched off his phone. That he has never sold his land to anyone

including the respondent nor have he appeared before any advocate to execute the sale agreement and all the documents relied by the respondent are forgeries.

That on the alleged date of the agreement, he was at his home in Kabras, Malava Constituency with his wife and children where he has been staying after his retirement in 2008.

That the prayers as was sought by the respondent are not only made in bad faith but also are based on falsehood and criminal conduct which the court ought not to entertain. That the orders granted were based on falsehood and ought to be discharged.

The plaintiff/respondent filed Grounds of Opposition whose import is that the application is bad in law and inculcated.

After hearing parties, I called for a supplementary affidavit and one was filed by Isaac Lisa Lisa who states that he is the lawful registered owner of land reference Eldoret Municipality Block 10/Kapyemit/2942 measuring 0.109 Hectares. That he has never disposed off his interest to the land to any third party as alleged by the plaintiff/respondent. That he is in possession of the original valid title and the documents used by the respondents in invoking the court for orders of injunction are all but fake. That he is still in possession of the land and the land register still reflects him as the lawful registered owner. That the respondent's allegations are based on forged documents and fraud and the matter is being handled by the police via OB No. 65/24/10/16.

I have considered the evidence on record and the submissions of counsels and do find that the application is merited as it was not brought to the court's attention that the land is not registered in the plaintiff's name but in the defendant's name as per the records availed to this court by the applicants. Moreover, it is the defendant in possession and therefore, an order of injunction cannot be issued as it was done. Application is allowed. Costs to the applicant.

DATED AND DELIVERED AT ELDORET ON 2ND DAY OF MARCH, 2017.

ANTONY OMBWAYO

JUDGE