



PUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC 97 OF 2016

KADZO KATANA KONDE & OTHERS.....PLAINTIFFS

=VERSUS=

ISLAM AHMED SAID & ANOTHER.....DEFENDANTS

RULING

1. The application before me is a Notice of Motion dated 31st March 2016, brought under Article 159 of the Constitution, Order 40 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedures Act. The Applicant prays for Orders framed as follows: -

(i).....

ii. THAT pending (the) hearing and determination of this application and this suit a temporary injunction be issued compelling the 1st Defendant, his servants, workmen, agents or otherwise whatsoever(sic) from occupying, interfering, wasting, damaging, letting, transferring, charging, disposing and in any way modifying the interests in land property title Number Kilifi/Vipingo/406 pending both inter partes hearing of this application as well as the hearing and determination of this suit without a lawful court order.

iii. THAT pending the hearing and determination of this application and this suit an order be issued compelling the 2nd Defendant/ Respondent to rectify the entries concerning the title of land property Kilifi/Vipingo/406, revoke the title issued to the 1st defendant and reinstate the Plaintiffs in land property title Number Kilifi/Vipingo/406 forthwith.

2. The application is premised on a number of grounds and supported by the annexed affidavit of Kadzo Katana Konde sworn on 31st March 2016. It is the Applicant's case that the 1st Defendant has, with the assistance and/or connivance of the 2nd Defendant, fraudulently acquired title for the suit property being title Number Kilifi/Vipingo/406. Before the title was transferred to the 1st Defendant, the land was registered in the name of the father of the 5 plaintiffs herein, one Katana Konde Ngundo who is now deceased. It is the Plaintiffs/ Applicants case that the signature executed on the transfer dated 19th January 2011 which led to the title being transferred to the 1st Defendant was fraudulently obtained as the documents of transfer were neither signed by the Late Katana Konde Ngundo nor his authorized representative, As a result of the transfer, the Plaintiffs aver that they have been stripped of their legal rights of ownership and they stand to suffer injustice, loss and irreparable harm unless this court revokes the registration in the 1st Defendants name and restrains the Defendants from dealing in any manner with

the suit property Kilifi/Vipingo/406.

3. In response to the application, the 1st Defendant Islam Ahmed Said has vide a Replying Affidavit sworn on 25th November 2016 opposed the granting of any orders on the basis that the application is anchored on an incompetent suit, is defective an abuse of the court process. The 1st defendant avers that he was lawfully registered as the owner of land title No. Kilifi/Vipingo/406 after he purchased 3 acres of land from the late Katana Konde Gunda in the year 2010. The late Katana Konde Gunda who was the father of all the 5 plaintiffs herein was the registered owner of title No. Kilifi/Vipingo/162 from which the suit property was hived upon sub-division. It is the 1st Defendant's case that since the late Katana Konde Gunda was old and unwell at the time of the transaction, he appointed his son Said Katana Konde who is the 5th Plaintiff/Applicant herein as his attorney and the transfer documents were lawfully executed by the 5th Applicant in exercise of the donated power of attorney.

4. The Land Registrar, Kilifi sued as the 2nd Defendant herein has through the Office of the Honourable the Attorney General filed Grounds of Opposition to the Application. The grounds filed on 18th November 2016 object to the granting of the orders sought herein on the basis that the actions taken by the 2nd Defendant in effecting the transfer of the suitland to the 1st Defendant, were proper and within his powers and mandate and therefore the prayers sought by the Plaintiffs are neither available nor merited in the circumstances.

5. I have perused the application and the supporting documents. I have also perused the Replying Affidavit and the Grounds of Opposition filed in opposition thereto as well as the rival submissions filed by Counsels in support of and in opposition to the application.

6. As SPRY V-P indicated in the old case of *Giella-vs- Cassman Brown Company Ltd. (1973)EA 358* the conditions for the grant of an interlocutory injunction are now well settled.

“First, an Applicant must show a Prima Facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated.

7. Before dealing with the issue of injunction, I must deal first with an issue raised by the 1st Respondent. It is the 1st Respondent's case that this suit is incompetent as the same has been instituted by persons without locus. It is true that this is a suit for the recovery of the estate of the late Katana Konde Gunda who was the father of all the Plaintiffs herein. Such a suit can therefore only be properly instituted by an administrator of the estate of the deceased. While the Plaintiffs do not indicate that they are bringing the suit as administrators of the estate, I note from the documents filed that the 5th Plaintiff/Applicant was on 5th June 2012 appointed as an Administrator of the estate of the late Katana Konde Gunda. In my view the mere inclusion of parties who are not administrators of the estate does not make the suit incompetent given that one of the parties is a duly appointed administrator of the Estate. I therefore decline to strike out the suit and posit that the injunction application is properly grounded on the suit as filed.

8. In *Mrao-vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, it was held inter alia, that;

A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.

9. As I understand it, the 5 Plaintiffs herein contend that the suit property Kilifi/Vipingo/406 measuring approximately 1.21 Ha was previously lawfully registered in the name of their father the late Katana Konde Ngunda. Before his demise the deceased donated a power of attorney to Said Katana Konde, the

5th Plaintiff/Applicant herein (Incorrectly described as the 6th Plaintiff in the Plaint) specifically to deal with his parcel of land Kilifi/Vipingo/162. This power of attorney according to the Plaintiffs terminated upon the demise of the late Katana Konde Ngundo on 14th June 2011. However, through some fraudulent means, the Defendants obtained the signature of the 5th Plaintiff and proceeded to illegally effect transfer of a portion of the title Number Kilifi/Vipingo/162 into the 1st Defendant's name it being title No Kilifi/Vipingo/406 on 19th January 2011. The Plaintiffs aver that a letter of consent dated 3rd November 2011 was unprocedurally executed and used to effect the illegal transfer to the 1st Defendant's name months after the late Katana Konde Ngundo had died.

10. I have looked at the documents annexed to the affidavits of rival parties herein. It is evident that on or about 18th November 2010, the 5th Plaintiff/Applicant in exercise of a power of attorney donated to him by his father Katana Konde who was then still alive, agreed to sell 3 acres of land to the 1st Defendant. The 3 acres of land were to be hived from all that parcel of land known as Kilifi/Vipingo/162 which was said to be measuring approximately 9.5 acres. According to the sale agreement the land was sold at Kshs 450,000/ out of which a down payment of Kshs 150,000/ was made at the time of execution of the agreement.

11. While the Plaintiffs claim that the transfer of the land was fraudulently obtained, it is apparent that the 5th Plaintiff signed the Transfer of Land form on 19th January 2011 in exercise of the power of attorney donated to him by his father who in actual fact was alive at the time. This in my view is what must have started the process of sub-division of land Parcel Number Kilifi/Vipingo/162. It is indeed interesting that the 5th Plaintiff/Applicant who is part of the allegations of fraud against the Defendants does not deny that he signed the land transfer documents.

12. Although the Baharini Land Control Board sat and gave its consent to the sub-division some 5 months after the death of the Plaintiffs' father, the Board was only acting on the earlier request to transfer a portion of the land and the consent obtained cannot be said to have been fraudulent in the circumstances.

13. It is also evident from the documents attached that the 1st Defendant paid the full purchase price to the 5th Plaintiff and/or his lawyers. In my view therefore, the allegations of fraudulent transfer of the land do not hold much water. I think it would be unfair in the circumstances to injunct the 1st Defendant from enjoying the benefits that accrue with ownership of land which he has purchased at a consideration.

14. The upshot of all this is that I do not find merit in the application dated 31st March 2016. I dismiss the same with costs to the Respondents.

Dated, signed and delivered in Malindi on 7th day of April 2017.

J.O. OLOLA

JUDGE