



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 388 OF 2010

PAULINE MUTEI MAKUMU.....1ST PLAINTIFF/APP

KILUNGU JUSTUS MULI.....2ND PLAINTIFF/APP

-VERSUS-

URSULA KRESZENNTIA

MONIKA HERKENRATH.....1ST DEFENDANT

PETER JURGEN HERKENRATH.....2ND DEFENDANT

JAFFARALI KASSAM ABDULLA.....3RD DEFENDANT

OSCAR JUMA.....4TH DEFENDANT

RULING

1. The notice of motion dated 4th October 2016 filed by the plaintiff and brought under the provisions of section 1A, 1B & 3A of the Civil Procedure Act and Article 40(6) & 159 of the Constitution sought for orders that:

1. Spent

2. Spent

3. That this Honourable Court be pleased to find that the Transfer dated 26th April 2012 is null and void.

4. That the Court to direct the Registrar to cancel entry No. 9 (transfer to JAFARALI KASSAM ABDULLA) of Plot No. 2444/1/MN.

5. That the costs of this application and the entire suit be borne by the Defendants/Respondents.

2. The application is premised on the grounds listed on its face inter alia that the plaintiff closed its case on 12th May 2016. That the 3rd & 4th defendants filed and served further list of documents dated

24.5.2016 which were however expunged from the record. That the plaintiff carried a background check on the said documents which check revealed that PIN No A0024966352Z does not belong to the 2nd defendant but to David Kivisu Sifuna. Further that the 2nd defendant is a foreigner who did not own a KRA PIN as at 26th April 2012 therefore no legal transfer took place. Consequently the purported transfer dated 26th April 2016 is illegal, null & void.

3. The application is further supported by the 1st plaintiff's affidavit sworn on 4th October 2016. She deposed that the transfer dated 26.4.2012 forms the subject of the present application. She annexed as **PMM3** copies of emails exchanged between the 1st & 2nd defendants to show they were in Switzerland as at 26th April 2012. That on receipt of the bundle, the plaintiff wrote to KRA – Mombasa who responded stating that the PIN number belongs to one David Kinisu Sifuna. She deposed further that the factual and legal implications of this outcome as explained to her by her advocates is that the 2nd defendant did not own a KRA-PIN as at 26th April 2012, the date of the purported transfer. Secondly that the KRA-PIN reflected on form SDI is a forgery calculated the State and citizens inland revenue. Lastly that no legal transfer took place. And that it is an illegal document which bears criminal sanctions under the Income Tax Act. Consequently, she urged the Court to allow her application.

4. The 3rd & 4th defendants opposed the application vide their preliminary objection dated 22nd November 2016 and filed in Court on 23rd November 2016 listing the following as their grounds of opposition:

1. One of the substantive prayers in the plaint is that the registration of the suit property, namely Plot No 2444/1/MN in the name of the 3rd Defendant Jaffarali Kassam Abdulla be cancelled on account of alleged irregularities that were made when the said transfer was effected.

The plaintiff's case has already been closed and the matter is at the stage of the defendant's evidence being taken. The Notice of Motion dated 4th October 2016 is therefore an attempt to determine a substantive portion of the suit through an interlocutory application.

2. Considering the stage at which the matter is, the only alternative open to the plaintiff is to pray for leave to call additional evidence but not to mischievously introduce additional evidence through the back door as the Notice of Motion dated 4th October 2016 is attempting to do so.

3. The Court has no jurisdiction to decide a matter relating to a possible cancellation of a document of title on an interlocutory application as the same would defeat the doctrine of the sanctity of titles. Hence such a consequence can only be authorized by the Court upon the full hearing of the case as to do otherwise would compromise on the said document.

4. The said application is an abuse of the process of the Court. It is frivolous, vexatious and amounts to a deliberate wastage of resources in clear violation of Section 1A, 1B, and 1C of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2010.

5. The parties' respective advocates filed written submissions supported with list of authorities attached. I have read and considered the pertinent issues pointed out by both sides. To begin with, the plaintiff already closed her case. The same is stated by the plaintiff both on the face of the application and the affidavit sworn in support thereof. The plaintiff deposed that the 2nd defendant is a foreigner and was out the country as at 26th April 2012 when the impugned transfer took place. To support this fact she annexed copies of emails they exchanged whose import amounts to adducing evidence by way of affidavits. As correctly pointed out by the defendants, this is an indirect method used by the plaintiffs to re-open their case and offer additional evidence. These proceedings were in the middle of defence hearing as DW 2 already began his testimony before he was stood down. No prayer for leave of the Court has been included in the current application seeking the re-opening of the plaintiff's case and or adduction

of further evidence.

6. Further while the 3rd & 4th defendant was referring DW 2 to their documents contained in their supplementary list dated 24th May 2016 and filed in Court on 9th June 2016, the plaintiffs' counsel raised objection to reference to these documents. Mr Munyithya advocate submitted that the supplementary list was filed without leave of the Court and after the plaintiffs had closed their case. That their client would suffer prejudice if the documents in the impugned list are admitted in evidence. His objection was opposed by the defendants' advocates. For the reasons given by this Court on 14th September 2016 Mr Munyithya's objection was sustained. I found the documents were improperly on record and were accordingly expunged.

7. Now the same party who applied to have the impugned documents expunged seeks to introduce them into these proceedings by asking the Court to make a finding declaring the transfer dated 26.04.12 as illegal, null & void because it was founded on a PIN that did not belong to a transferor. It is equivalent of a case eating your cake and keep it at the same time i.e the plaintiffs are guilty of approbating and reprobating. Until the said documents are re – introduced in evidence by either of the parties, the plaintiffs cannot rely on the same as they are extraneous.

8. Further in a case where the plaintiffs have not sought leave to re-open their case to introduce the additional evidence, can the orders sought in the application succeed? The Court is asked to find that the transfer dated 26.4.12 is null & void and therefore direct the registrar to cancel entry No 9 of plot No 2444/1/MN. The defendant submitted that summary judgment can only be invoked under Order 36 of the Civil Procedure Rules 2010. In the instant case, parties have filed substantive pleadings and tendered evidence. Therefore the Court is obligated to determine the issues raised on merits. The plaintiffs on their part submit that the documents came into their possession after they had closed their case. That the Court has no other chance of considering the admissibility or otherwise of the impugned transfer other than through this application.

9. The grounds upon which summary judgement can be granted is set out under order 36 of the Civil Procedure Rules in cases of liquidated claim or recovery of land by a landlord where the defendant/tenant has filed appearance but before filing a defence. The second provision of summary procedure is provided under order 2 rule 15(a) to (d) where the defence raises no reasonable defence, is frivolous et al. The present application is not brought under either of the provisions. Secondly, the reasons given in support of the application are not one of the grounds upon which summary orders can be granted. The plaintiff is asking the Court to rule that the document obtained through fraud should not be subjected through a full trial. As pointed earlier, the documents being relied on have not been produced in evidence either by the plaintiffs or the defence. Notwithstanding this, proof of fraud is required on a higher scale than in civil cases and room should be given for such allegations to be tested. In the instant case, there are many questions to be answered for example; is the fact that the questioned KRA-PIN sufficient proof that the 2nd defendant did not have a personal PIN or; what offence was committed under the Income Tax Act or; was the 2nd defendant party to the alleged fraud? I am unable to get answers based only on the presentation of the document.

10. The plaintiffs referred this Court to the following decisions:

a) Bulloch -vs- USA 763 f. 2d 1115 (1998) 1 leagle. Com

b) Jeanette P. Rocha -vs- Jose M. B. Rocha High Court of America Samoa Trial Division OR No 74 – 89 June 7,1993.

c) Alberta Mae Gacie VSA. G & 4 others (2006) eKLR.

d) S. K Macharia -vs- Ali Khan Muses & 2 others (2014) eKLR.

11. The first two decisions refers to some procedure of called independent action. I have read the two and

they mention hearings before a judgement is given. Although they relate to fraud, the judgement was not issued during after a hearing brought by an independent action from the original suit because the information as relates to fraud was not in possession of the plaintiff when they originated their first suits. In the Kenyan decisions quoted particularly the Alberta case the learned Judge founded that the plaintiff's title was the valid one because the 4th defendant's title was acquired in unclear circumstances. However his findings were based on analysis of the documentary evidence adduced by both the plaintiff and the defendants and their witnesses. None of the decisions cited had judgement entered summarily as is being prayed herein thus the cases are disistinguishable. The plaintiffs/applicants still have their options open on how to deal with the so called questioned documents but the procedure they have adopted herein is certainly not one of them.

12. Given the circumstances of this case where the plaintiff has testified and closed his case and the defendants' being partially heard it serves the interest of justice if the same is concluded on its merits. The result of my observations above is that I find no merit in the plaintiffs' application and hereby dismiss it with costs to the 3rd & 4th defendants.

Dated, signed & delivered at Mombasa this 31st day of July 2017

A. OMOLLO

JUDGE