



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 85 OF 2016

LANFRANCUS WASI BIRYA.....PLAINTIFF

VERSUS

1. JOEL NGALA JILANI

2. CHARO KENNEDY KAZUNGU

3. THE ATTORNEY GENERAL

4. CHIEF LAND REGISTRAR.....DEFENDANTS

RULING

1. This is a Ruling on an application dated 15th April 2016. The Ruling was initially set to be delivered by the Honourable Justice Angote (who has since moved to Machakos) after he heard the application on 14th September 2016. However, when the Learned Judge retired to prepare the Ruling, the 1st Defendant's Replying Affidavit could not be traced in the file and the file was subsequently returned from Machakos on 8th May 2017. All the pleadings that were misplaced have since been traced and placed in the file.

2. In the Application, the Plaintiff Lanfrancus Wasi Birya T/A/ Bii Enterprises prays for Orders as follows:-

1. Spent

2. Spent

3. THAT pending the hearing and determination of this suit a temporary injunction order do issue restraining the Defendants/Respondents by themselves, servants, agents and any other person deriving interest from them from trespassing into the Plot No Subdivision No Group V/605 (Original No. 507/98) with Land Survey No. 248358 being CR 39322/1 and from selling, transferring, alienating and/or conveying this Plot No to the 2nd Defendant.

4. THAT the cost of this application be in the cause.

3. The application is supported by the annexed Affidavit of the Plaintiff sworn on 15th April 2016 and a further Affidavit sworn on 20th May 2016. The gist of the Affidavits may be summarized as follows:

(i) That by an agreement executed between Kevin Mwamuye Jilani (herein Kevin) and the Plaintiff, the Directors of Kilifi Plantations who were the custodians of the suit property were instructed and ordered by the said Kevin to transfer the suit property directly to the Plaintiff because the Plaintiff had loaned the said Kevin some money totaling to Kshs 700,000/=

(ii) That the said Kevin subsequently died but after the Directors of Kilifi Plantations had obliged to transfer the suit property as directed.

(iii) The Plaintiff subsequently handed over all original documents to a firm of Advocates to have the land transferred to his name but the said firm appears to have lost the documents which included the Original title deed in Kevin's name.

(iv) Thereafter, the Plaintiff went to the Vendors-Kilifi Plantations, who applied for a provisional certificate, obtained the same and handed it over to the Plaintiff. However, before the Plaintiff could transfer the land into his business name, he got a letter from the Chief Land Registrar (the 4th Defendant) informing them that the Original Title deed had always been with the 1st Defendant who had since lodged it at the Lands Registry Mombasa intending to transfer the same to the 2nd Defendant.

(v) The Plaintiff therefore states that the 1st Defendant must have colluded with staff at his said Advocates Office to obtain the title deed and were now destined to deprive him of the suit property unless otherwise stopped by this court.

4. In a Replying Affidavit sworn on 9th May 2016, the 1st Defendant who is a brother to and the Administration of the estate of Kevin Mwamuye Jilani is opposed to the Orders sought in the application. He states that Kevin passed on after being shot on 23/9/2010 and the Plaintiff who was present at the burial has never raised a finger on the issue of the suit premises. The 1st Defendant denies that there were any instructions between the deceased and the Plaintiff and/or Kilifi Plantations asking for the transfer of the suit property to the Plaintiff.

5. The 1st Defendant further avers that he did not collude with the staff at the Plaintiff's Advocates Office to obtain the title deed as alleged or at all and avers that the same was handed over to him by the Chair of Kevin's burial committee soon after Kevin's burial in 2010 at Chumani Village in Kilifi County.

6. The 1st Defendant further scoffs at the Plaintiff's claim that his brother Kevin owed the Plaintiff money stating that the Plaintiff has not attached any document to show that Kevin owed him the sum of Kshs 700,000/= as alleged.

7. I have considered the application and the Replying Affidavit. I have also considered the submissions placed before the Court by the Learned Counsels representing the parties herein. The principles for the grant of an injunction are now fairly settled. At the very outset, an Applicant must show that he has a prima facie case with a probability of success.

8. It was not clear from the material placed before me whether the Plaintiff and/or the 1st Defendant has been in possession of and/or occupation of the land. Indeed it is apparent that the title deed remains in the name of Kilifi Plantation Ltd even though they appear to have executed a transfer in the name of the Plaintiff.

9. While it is the Plaintiff's claim that he loaned a sum of Kshs 700,000/= to the late Kevin and hence Kevin's instructions to the Vendor to transfer the land directly to him, nothing was placed before me in support of the allegations. The Plaintiff's Confirmation Note attached to the Plaintiff's Further Affidavit signed by one Christopher Dennis Wilson who identifies himself as a Director of Kilifi Plantation Ltd states that Christopher did not know why Kevin instructed him to transfer the land to a 3rd Party.

10. On his part, the 1st Respondent has annexed a document showing that Kevin bought the land for Kshs 230,000/= from Kilifi Plantations Ltd which amount appears to have been paid in full. The subsequent agreement to transfer the land to the Plaintiff at a consideration of Kshs 500,000/= therefore required a little bit more of substantiation.

11. Arising from the foregoing and given that neither party could clearly explain the reasons why the title has not been transferred many years after Kevin's death, I am convinced that it would be in the interest of justice to preserve the suit property as it is currently pending the hearing and determination of the suit.

12. Accordingly, I hereby order that the status quo obtaining as of today in regard to all that parcel of land known as subdivision No Group V/605(Original No. 507/98) with Land Survey No. 248358 being CR 39322/1 be maintained until such a time that the suit herein shall be heard and determined.

13. The costs of the Application shall be in the cause.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE