



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 363 OF 2016**

**MOHAMED OMAR SALIM.....PLAINTIFF/APPLICANT**

**VERSUS**

**AMINA SHEYUMBE MUHAJI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MOHAMED MAHFUDH SAAD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE COUNTY LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 30<sup>th</sup> November, 2016. It is brought under Section 3, 3A and 63(e) of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 40 Rule 1 and 2 of the Civil Procedure Rules.
2. It seeks orders;
  - a) Spent
  - b) Spent
  - c) That this Honourable Court be pleased to issue an interim order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their agents, servants, employees, or any other person whatsoever acting for or under the instructions or directions of the Defendants from surveying, demarcating, fencing, constructing upon, alienating, transferring, selling, charging or any other way interfering with the title, ownership or status of the piece of parcel of land measuring one (1) Acre which is part of the parcel land known as Plot No 2923 (Original No 1365/2) Section/Mainland North situated at Kisauni pending the hearing and determination of this suit.
  - d) That costs of this Application be provided for.
3. The grounds are on the face of the application and are listed as paragraph a-g I do not need to reproduce them here.
4. The application is supported by the affidavit of Mohamed Omar Salim, the Plaintiff/Applicant herein sworn on the 30<sup>th</sup> November 2016.
5. The application is opposed. There is a replying affidavit sworn by Amina Sheyumbe Muhaji, the 1<sup>st</sup> Defendant/Respondent sworn on the 5<sup>th</sup> April 2017. The 1<sup>st</sup> Defendant/Respondent has also put in grounds of opposition dated 13<sup>th</sup> February 2017.
6. The 2<sup>nd</sup> Defendant/Respondent has also sworn an affidavit dated 13<sup>th</sup> December 2016. The 2<sup>nd</sup> Defendant/Respondent also filed a notice of preliminary objection dated 13<sup>th</sup> December 2016.
7. On the 16<sup>th</sup> December 2016 it was directed that the preliminary objection and the Notice of Motion be heard together. The court also directed that the parties do file written submissions to dispose of the same.
8. THE PLAINTIFF'S/APPLICANTS SUBMISSIONS

It is the Plaintiff/Applicant's case that he entered into an agreement for sale dated 13<sup>th</sup> November 2009 in respect of a portion of land known as Plot Number 2923 (Original No. 1365/2) Section 1, Mainland North and subsequently executed a deed of variation dated 8<sup>th</sup> April 2010.

9. The terms of agreement and the Deed of variation were supposed to be effected over a period of time subject to demarcation and sub-division of the Mother Title to create two separate titles that would result in the Plaintiff being given his share of the land.

10. The obligation was on the 1<sup>st</sup> Defendant as the vender and the registered owner of the property. The 1<sup>st</sup> Defendant failed in her obligations.

That the Plaintiff's proprietary right over the land cannot be defeated by a later agreement dated 3<sup>rd</sup> December 2012 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

11. Further that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants colluded and filed land case No 246 of 2016 in an attempt to unlawfully alienate and/or defeat the Plaintiff's claim or title over the suit property. That the consent executed on 3<sup>rd</sup> November 2016 between the Defendants is an attempt to effect the unlawful sale or transfer of the suit property using this court's process.

12. It is further the Plaintiffs contention that he has established a prima facie case with a probability of success.

He relies on the case of;

**i. Panari Enterprises Limited –versus- Lijoodi And 2 Others (2014) eKLR**

**ii. Mrao Limited –versus- First American Bank of Kenya Limited (2003) KLR 125.**

13. That the Plaintiff has demonstrated ownership of the suit property by relying on the sale agreement between him and the 1<sup>st</sup> Defendant. The purported sale agreement entered into between the Defendants is fraudulent as the 1<sup>st</sup> Defendant swore an affidavit denying having executed the same. The affidavit is annexed and marked "MOS 5."

14. That the 2<sup>nd</sup> Defendant acting in the behest of the 1<sup>st</sup> Defendant placed a caveat on the suit property to defeat the Plaintiff's claim and right over the suit property.

The Plaintiff's request to the 3<sup>rd</sup> Defendant to remove the caveat has borne no fruit.

15. The Plaintiff has continued to pay land rates. He has also paid demarcation and sub-division costs to the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant had obtained a grant of letters of administration by the time of executing the sale agreement between herself and the Plaintiff.

16. That the Plaintiff has established a clear legal right in breach hence damages is not a suitable remedy. He has also relied on the case of;

**Joseph Mbugua Gichanga –versus- Cooperative Bank of Kenya limited, Mombasa HCCC No. 74 of 2000**

17. The Plaintiff will suffer irreparably if these orders are not granted. The balance of convenience tilts in favour of the Plaintiff whose agreement was first in time. That the orders of injunction is an equitable remedy and the maxim of equity provides that where there are two competing interests then the just in time shall take procedure.

He also relied on the case of;

**Wreck Motors Enterprises –versus- The Commissioner of Lands CA No. 71 of 1997.**

18. In regard to the 2<sup>nd</sup> Defendant's preliminary objection the Plaintiff submits that Section 6 of the Civil Procedure Act does not apply since the Plaintiff was not a party to Land Case No 246 of 2016. Further that this matter is not resjudicata as the Plaintiff's application to be enjoined in Land Case No. 246 of 2016 was denied.

19. The Plaintiff's suit is not time barred since the Plaintiff was not aware of the purported sale agreement dated 3<sup>rd</sup> December 2012. Further that the Plaintiff's suit is within the time limits provided for in the Section 4 of the Limitation of Actions Act.

He prays that the 2<sup>nd</sup> Defendant's preliminary objection be dismissed and the application be allowed.

20. THE 1<sup>ST</sup> DEFENDANT/RESPONDENT'S SUBMISSIONS

The Plaintiff breached the agreement and the same was rescinded for failure to comply with the terms of the agreement. The Plaintiff's application does not meet the threshold for grant of temporary injunctions.

21. THE 2<sup>ND</sup> DEFENDANT/RESPONDENT'S SUBMISSIONS.

It is the 2<sup>nd</sup> Defendant's contention that the Plaintiff's suit is time barred under the Limitation of Actions Act.

The Plaintiff relies on the sale agreement dated 13<sup>th</sup> November 2009 and a deed of variation dated 8<sup>th</sup> April 2010. The suit was filed on 30<sup>th</sup> November 2016 which is clearly out of time hence null and void.

22. The Plaintiff's cause of action did not arise after he gained knowledge of the 1<sup>st</sup> Defendant's agreement with the 2<sup>nd</sup> Defendant. That under the Law Society Conditions of sale, Section 2 (c) completion date means 42 days after the date of the contract. That therefore the Plaintiff's enforcement of his own contract does not depend on his knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' contract.

23. The 1<sup>st</sup> Defendant had no authority to sell the land in 2009 as she was a beneficial owner and not a registered owner. The Plaintiff has not demonstrated that the 1<sup>st</sup> Defendant had authority to sell the suit land.

He relied on the case of

**Mary Wambui Marungo –versus- Anderson Mukinya Mwaira And Another (2006) eKLR.**

24. That the Plaintiff has not demonstrated that he will suffer irreparable injury which cannot be adequately compensated an award of damages. That he has put forward the case of;

**Gem Securities East Africa Limited –versus- Uzima Press Limited (2006) eKLR.**

25. The Plaintiff has not shown what is special to him about the suit land save that he has expended some monies on it.

The 2<sup>nd</sup> Defendant is in possession and occupation from 2012. That the balance of convenience tilts in favour of the 2<sup>nd</sup> Defendant who is in occupation. Further that the consent entered into Land Case No. 246 of 2016 is not fraudulent since there was no collision between the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

26. The Plaintiff's claim that he has been paying Land Rates is not true since the rates remain unpaid for the year 2009-2015 and the receipts confirming payment to the firm of M/s Mogaka, Omwenga Advocates are irrelevant and they do not describe what the monies was for. He prays that the Plaintiff's application be dismissed with costs.

27. I have considered the pleadings and the Notice of Motion dated 30<sup>th</sup> November 2016 together with the supporting affidavit and the annexures.

I have also considered the replying affidavits, the grounds of opposition and the preliminary objection. I have also considered the written submissions and the authorities cited.

28. The issues for determination are;

- i) Whether or not the Plaintiff's suit is *judice* and/or *resjudicata*.
- ii) Whether or not the Plaintiff's suit is time barred for being filed outside the period provided for under section 4 of the Limitation of Actions Act.
- iii) Whether the Plaintiff's application meets the threshold for grant of temporary injunctions.
- iv) Who should bear costs?

29. The Plaintiff was not a party to the land case No. 246 of 2016. His contention is that he applied to be enjoined in that suit but the application was denied. This suit is therefore not *subjudice*. It is also not *resjudicata* because the Plaintiff/Applicant was not a party to that suit. The 2<sup>nd</sup> Defendant/Respondent's preliminary objection in this ground fails.

30. It is the 2<sup>nd</sup> Defendant/Respondents contention that the Plaintiff's suit is time barred that the Plaintiff/Applicant is relying on the sale agreement dated 13<sup>th</sup> November 2016 which is more than six years.

The Plaintiff/Applicant's contention is that the terms of the agreement and the deed of vacation were supposed to be effected over a period of time subject to demarcation and sub-division of the mother title to create two separate titles that would result in the Plaintiff being given title to his share of the land.

31. I have gone through the sale agreement dated 13<sup>th</sup> November 2009. The same does not set the completion time.

Clause 2 states;

**“The vendor shall at her own cost demarcate survey and obtain title in favour of the purchaser and thereafter evict all the trespassers or occupants of the Plot and hand over vacant possession of the same to the purchaser at the time of completion.”**

32. It appears the agreement was to be concluded after all this was done. It is clear that to date, the 1<sup>st</sup> Defendant has not complied with clause 2 of the agreement.

33. Under the deed of vacation the purchaser (Plaintiff) was given the mother title to keep as security for the deposit paid and to assist in subdivision.

In my humble view this does not give the purchaser (Plaintiff) the responsibility of effecting transfer in his favour.

34. The Plaintiff/Applicant has annexed acknowledgment of receipt of part payments of the purchase price by the 1<sup>st</sup> Defendant from the Plaintiff some are dated April, May 2016. The 1<sup>st</sup> Defendant has thumb printed and signed and they bear the identity card number 10390171.

35. It is the 2<sup>nd</sup> Defendant/Respondent's contention that it does not say what the monies was for. An example is the one dated 17<sup>th</sup> May 2016 for Kshs100,000/=. It clearly states that it is from Mohamed Omar Salim and it is in respect of part of purchase price for Plot No 2923/Section I/Mainland North. The 1<sup>st</sup> Defendant/Respondent has not denied that she received these amounts.

36. I find that the agreement was not concluded by May 2016 hence time starts running from when the 1<sup>st</sup> Defendant/Respondent stopped receiving the payments. The 1<sup>st</sup> Defendant/Respondent did not give the Plaintiff a notice of rescission of the agreement. The Plaintiff was not aware of the existence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant agreement. I find that the 2<sup>nd</sup> Defendant/Respondent's objection on this ground fails as well.

37. As regards the Notice of Motion dated 30<sup>th</sup> November 2016, I have considered the facts that have emerged and the legal principles applicable.

38. The principles were laid down in the precedent setting case of

**Giella –versus- Cassman Brown And Company Limited (1973) EA 358**

They are as follows;

- i) An applicant must show a prima facie case with a probability of success at the trial.
- ii) An interlocutory injunction will normally not be granted unless an applicant shows that he will suffer irreparable loss that cannot be compensated by an award of damages.
- iii) If the court is in doubt. It will decide on a balance of convenience.

39. In the case of **Mrao Limited –versus- First American Bank Limited And 2 Others (2003) KLR 125**

The Court of Appeal gave a definition of what amounts to a prima facie case. It stated;

**“A prima facie case in a civil application includes but 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 as to call for an explanation or rebuttal from the latter.”**

40. Has the Plaintiff made out a prima facie case with a probability of success at the trial? The 1<sup>st</sup> Defendant/Applicant has not denied she entered into a sale agreement dated 13<sup>th</sup> November 2009 with the Plaintiff. She has not denied that she had capacity to do so.

41. However along the way it appears the 1<sup>st</sup> Defendant/Respondent changed her mind and entered into another agreement with the 2<sup>nd</sup> Defendant/Respondent. As things stand now, the 2<sup>nd</sup> Defendant/Respondent is in occupation of the suit land. He has paid about Kshs.1,401,000/= towards the purchase price.

42. In the case of

**Mary Wangui Maringo –versus- Adamson Mukinya Mwaura And Another (2006) eKLR**, it was held that,

**“In view of the admission by the Plaintiff that she has not been in occupation of the suit parcels of land, and further in view of the uncontroverted evidence that the Defendants are in occupation of the suit land, it is clearly evident that the Plaintiff has not established a prima facie case .....**

43. I am guided by the above authority in finding that, since the Plaintiff is not in occupation, he has not established a prima facie case with a probability of success at the trial.

44. The Plaintiff/Applicant's contention is that he has expended money towards the transaction hence he will suffer irreparable injury if these orders are not granted.

45. In the case of

*Gem Securities East Africa Limited –versus- Uzima Press Limited (2006) eKLR* where Alnasher Visram held,

**“I agree with my brother Ringera J that indeed it is not an inexorable rule of law that an injunction should “never” issue where damages are appropriate. However I believe that for that to happen the applicant must show the intrinsic value of land, some social characteristics of features of the suit land distinguish it of such value on importance, that damages would be inadequate remedy. However there is no such thing. The only reason why the suit property is “important” to the applicant is that it has invested considerable resources .... Including Architects fees. “In my view those are damages that can be easily calculated.”**

46. I am guided by the above authority in finding that the Plaintiff/Applicant herein can be adequately compensated by damages. The amount he has spent is quantifiable. I find that he has failed to demonstrate that he will suffer irreparable injury if they injunctive orders are not granted.

47. I have considered the circumstances herein. I am of the view that the balance of convenience tilts in favour of the 2<sup>nd</sup> Defendant who is in occupation.

48. There is a consent order between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in Land Case No. 246 of 2016. The same is dated 3<sup>rd</sup> November 2016. Subsequently a decree was extracted and signed by Honourable Justice A. Omolo. The Plaintiff/Applicant cannot ignore this consent judgment as it exists. The same has not been set aside.

49. All in all I find that the Plaintiff/Applicant application has failed to meet the threshold for grant of temporary injunction. I decline to grant the orders sought.

50. The upshot of the matter is that the 2<sup>nd</sup> Defendant/Respondents preliminary objection is not merited and the same is dismissed. The Plaintiff/Applicant's notice of motion also lacks merit and the same is dismissed.

The costs do abide the outcome of the main suit.

**It is so ordered.**

**Dated, Signed and Delivered at Mombasa on the 7<sup>th</sup> day of December, 2017.**

**L. KOMINGOI**

**JUDGE**

**7/12/2017**

Mrs. Moolraj : I pray that I be supplied with typed copy of the ruling.

Court: To issue.