



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.242 OF 2014

ZAMIN LIMITED.....PLAINTIFF

=VERSUS=

- 1. CHARLES BAMBO**
- 2. EPHRAIM MWANGI**
- 3. LAWRENCE NYABENGA**
- 4. THOMAS MASSEKI MAERA**
- 5. MIRITINI WAREHOUSING LTD**
- 6. THE CHIEF LAND REGISTRAR MOMBASA.....DEFENDANTS**

RULING

1. What is before me is the Application by the 5th Defendant dated 24th June, 2015 seeking for the following orders:-

- (a) The Plaintiff's suit against the 9th (sic) Defendant be struck out with costs to the 5th defendant and/or in the alternative;**
- (b) The Plaint dated 26th August 2011 to the extend that it relates to an alleged cause of actions against the 5th Defendant be struck out with costs to the 5th Defendant.**
- (c) That the costs of this application be borne by the Plaintiff.**

The 5th Defendant's /Applicant's case:

2. The 5th Defendant's director has deponed that the 5th Defendant legally and properly acquired portion of land known as plot number 757/III/MN (the suit property) from the 1st Defendant; that the Plaintiff has not challenged the process in which the 5th Defendant became the lawful proprietor of the suit property and that the Plaintiff was privy to, connected to or knew about any alleged irregularity in the title that

passed to the 5th Defendant.

3. It is the 5th Defendant's case that it was not a party or privy to the proceedings in HCCC no. 577 of 2011 or the consent therein and that the reading of the consent reveals that the Plaintiff was never in possession of the suit property.

4. According to the 5th Defendant, the only remedy that is available to the Plaintiff is the claim of damages as against the 1st, 2nd and 3rd Defendants.

The Plaintiff's/Respondent's case:

5. In his Replying Affidavit, the Plaintiff's director deponed that the Plaintiff purchased the suit property from the previous owners in the year 2009; that the Plaintiff never transferred the property to the 5th Defendant and that in the year 2010, the 1st, 2nd, 3rd and 4th Defendants attempted to sell the property using a fake title deed and that the Plaintiff entered into a consent to enable it get back at least the purchase price and some profit from its land.

6. According to the Plaintiff, the allegation of fraud in the current suit is against all the defendants and that where there is a semblance of a cause of action against any party, the pleadings ought not to be struck out.

Submissions:

7. The 5th Defendant's advocate submitted that his client is a bona fide purchaser of the suit property having purchased it from the 1st, 2nd and 3rd Defendants; that before purchasing the suit property, the 5th Defendant followed the due process and that he took possession of the suit property after the said purchase.

8. Counsel submitted that it is now settled that the title of a bona fide purchaser for value without notice of fraud cannot be impeached.

9. The Plaintiff/Respondent's advocate submitted that the present suit is not scandalous, frivolous or vexatious; that the present suit has alleged fraud on the part of the Applicant and that the 5th Defendant is a necessary party in the proceedings.

10. Counsel submitted that the consent filed in HCCC No. 557 of 2011 has been rendered unenforceable due to the fraudulent transaction by the Defendants and that despite warnings of the fraud, the 5th Defendant went ahead to purchase the suit property.

Analysis and findings:

11. According to the Plaintiff, the Plaintiff was the registered proprietor of L.R. No. 757 Section III, Mainland North.

12. The Plaintiff has averred that on 18th November 2014, he was shocked to discover that the suit property had been transferred to the 5th Defendant. The Plaintiff has accused the 1st, 2nd, 3rd and 4th Defendants for failure to disclose to the 5th Defendant/Applicant the existence of a consent in HCCC No. 557 of 2011.

13. The Plaintiff is praying for the revocation and cancellation of the title deed that was issued to the 5th Defendant after the suit property was transferred to him.

14. The Agreement dated 22nd July, 2014 and annexed on the 5th Defendant's Supporting Affidavit shows

that the 5th Defendant purchased the suit property from the 1st, 2nd and 3rd Defendants for Kshs.15,000,000 which the 5th defendant paid.

15. Prior to the sale of the suit property by the 1st, 2nd and 3rd Defendants to the 5th Defendant, the Plaintiff herein had sued the 1st to the 4th Defendants in Mombasa HCCC 577 of 2011 in respect to the same property.

16. In the said suit, the Plaintiff agreed with the 1st to the 4th Defendants to have the suit property sold at a price of not less than Kshs.40, 000,000 within 90 days and the proceeds therefrom be shared between the parties in the ratio of 40% to the Plaintiff and 60% to the 1st to 4th Defendants.

17. It would appear that the 1st to the 4th Defendants went ahead and sold the suit property without involving the Plaintiff and at a value much lower than that was agreed upon, thus the current suit.

18. The 5th Defendant was not a party to Mombasa HCCC No. 557 of 2011. In deed, the 5th Defendant purchased the suit property after conducting an official search which showed the 1st, 2nd and 3rd Defendants as the registered proprietors of the same.

19. Having agreed to share the proceeds of the sale with the 1st, 2nd and 3rd Defendants, the Plaintiff's claim for recovery of land in Mombasa HCCC No. 577 of 2011 collapsed. Indeed, pursuant to the said consent, the Plaintiff's claim against the 1st- 4th Defendants was limited to damages, that is the proceeds of the sale of the suit property. The Plaintiff cannot in the circumstances claim for the suit property and more so from the 5th Defendant who was not a party to Mombasa HCCC No. 577 of 2011.

20. I am therefore in agreement with the Applicant's submissions that the Plaintiff does not have a cause of action as against the 5th defendant in so far as the recovery of the suit property is concerned. Having signed the consent in HCCC No. 577 of 2011, the Plaintiff can only reinforce the said consent and recover money from the 1st to the 4th Defendants. The Plaintiff's suit cannot succeed as against the 5th Defendant.

21. For those reasons, I allow the Application dated 24th June, 2015 as prayed.

Dated and delivered in Malindi this **19th** day of **February**, 2016.

O. A. Angote

Judge