



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC MISC APP. NO. 12 OF 2015

PETER GACHIRI MURIGI.....APPLICANT

=VERSUS=

1. SAID ATHAMN MZEE

2. DISTRICT LAND REGISTRAR -LAMU

3. HON. ATTORNEY GENERAL.....RESPONDENTS

4. STEPHEN THUKU KABEBE.....INTERESTED PARTY

R U L I N G

1. The Application before me is the one dated 5th November, 2015. In the Application, the Interested Party is seeking for the following relief:-

(a) **THAT the Honorable Court be pleased to issue an injunction order against the Registrar of Lands Lamu from effecting the orders of the court issued on 26th October, 2015 or doing any act pursuant to the said order or register in regard to any or any other transactions or altering the records or the register in regard to LAMU/LAKE KENYATTA/11/538 and the same to remain as they were as at 26th October, 2015.**

(b) **THAT this honorable court be pleased to vary, discharge, set aside and/or lift the orders issued on the 26th October, 2015 and the Interested Party be allowed to defend the Application dated 26th October, 2015.**

(c) **THAT any transactions taken by the Plaintiff pursuant to the orders of 26th October, 2015 be cancelled and or position be reverted back to the original state as at 26th October 2015.**

(d) **THAT the Honourable court do issue summons against the process server in the matter herein for cross examination of the matters deponed in his affidavit of service.**

(e) **THAT the cost of this application be provided for.**

2. The Application is premised on the grounds that the Application dated 26th October, 2015 was heard in

the absence of the Interested Party; that the Interested Party was in Mombasa where he resides with his family on the day the process server alleges to have served him and that the Interested Party was not served with the Application.

3. In his Replying Affidavit, the Plaintiff deponed that the 1st Respondent and the Interested Party were served with the pleadings and hearing notices; that the agreement executed by the 1st Respondent and the Interested Party is unenforceable and that in any event, the purported sale of the suit property is null and void for failure to adhere to the mandatory provisions of Section 6(1) of the Land Control Act.

4. According to the Plaintiff, the Interested Party can only claim for a refund of the purchase price from the 1st Respondent for want of the land control board consent.

5. The 1st Respondent deponed that he has never executed a contract for sale of the suit property with the Interested Party; that the agreement for sale that was executed between himself and the agent of the Interested Party is not enforceable and that the Interested Party has another remedy.

6. The parties filed written submissions. I have considered the said submissions and the authorities.

7. The suit was commenced by way of a Miscellaneous Application.

8. In the Application, the Applicant prayed for two substantive orders: the removal of the caution dated 12th March, 2015 which was lodged by the Interested Party and the return of the Title Deed that the Interested Party was holding.

9. This suit was filed after the Plaintiff herein recorded a consent with the 1st Defendant herein in another suit being ELC Civil Case No. 178 of 2011.

10. In the consent, the 1st Defendant agreed to transfer the suit property to the Plaintiff upon payment of the consideration of Kshs.2,250,000.

11. After the said consent was recorded in ELC No. 178 of 2011, the Plaintiff realised that the Interested Party had lodged a caution in respect to the suit property. That is when the Plaintiff filed the present suit.

12. According to the Affidavit of Service that was filed on 8th September, 2015, the Interested Party was served with the amended Miscellaneous Application on 29th August, 2015 at Kibaoni Village in Mpeketoni at 2.45 pm.

13. The process server filed another Affidavit of Service which shows that he again served the Interested Party with hearing notices on 10th September, 2015 at 2.45 pm and 19th October, 2015 at his residence in Kibaoni Village.

14. The court proceeded with the hearing of the Miscellaneous Application on 26th October, 2015 and allowed the Application.

15. Although the Interested Party claims that he was not served on the three occasions, it is highly improbable that the process server can depone that he served the Interested Party thrice with the pleadings and the hearing notice.

16. Indeed, there is no evidence before me to show that the Interested Party was not at Kibaoni Village in Mpeketoni on 29th August, 2015, 10th September, 2015 and 19th October, 2015 when he was served with the pleadings.

17. The Interested Party's advocate did not also call the process server for cross-examination before arguing her Application, an indication that the process-server would have given more details on how he

personally served the Interested Party at Kibaoni Village.

18. I am satisfied that on the basis of the Affidavits of Service that are before me, the Interested Party was served with the Miscellaneous Application and the hearing notices but declined to respond to the allegations that were raised by the Plaintiff.

19. In any event, the Interested Party has not even attempted to respond to the legal issues that the Plaintiff has raised in the suit, viz-a-viz the legality of the purported agreement that was entered into between his agent and the 1st Defendant and whether the land control board ever gave its consent within six months after the signing of the agreement.

20. The failure to satisfactorily respond to those legal issues shows that the Interested Party does not have a defence viz-a-viz the issues raised by the Applicant.

21. In the circumstances, and considering that I am satisfied that the Interested Party was served with the pleadings herein, I dismiss the Application dated 5th November, 2015 with costs.

Dated, signed and delivered in Malindi this 1st day of **July**, 2016.

O. A. Angote

Judge