



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.68 OF 2015

ALI MOHAMED HILAL.....PLAINTIFF

=VERSUS=

1. MOHAMED SHALO DUREY MWENYE
2. YAHYA MOHAMED SHEE
3. BASRA AHMED
4. NAJIM SALIM MOHAMED
5. THE NATIONAL LAND COMMISSION.....DEFENDANTS

R U L I N G

1. In his Amended Notice of Motion dated 15th September, 2015, Plaintiff is seeking for the following reliefs:

- (a) THAT a temporary order of injunction be issued restraining the 1st, 2nd, 3rd and 4th Defendants from encroaching, entering or accessing the parcel of land known as Plot No. 64 Mashudwani, Lamu pending the hearing and determination of this suit.
- (b) THAT a mandatory order of injunction be issued directed to the National Land Commission to cancel the compensation to the 4th Defendant and/or compel the said defendant to reimburse the monies paid thereof pending determination as to the issue of ownership.
- (c) A mandatory order of injunction compelling the National Land Commission to pay to the Plaintiff the sum of Kshs.13,043,173.00 being compensation for property known as Plot Number 64 Mashundwani; Lamu
- (d) THAT the cost be provided for.

2. The Application is supported by the Plaintiff's Affidavit in which he has deponed that the 1st Defendant was the owner of land at Mashundwani "B" measuring ten (10) acres and known as plot number 64 (the suit property).

3. It is the deposition of the Applicant that on 6th March, 2012, he entered into an agreement with the 1st Defendant for the sale of the suit property and that the 1st Defendant acknowledged receipt of the entire purchase price of Kshs.50,000.
4. According to the Applicant, he came to learn that the 1st Defendant subsequently sold the suit property to the 4th Defendant; that he informed the area Assistant Chief and the National Land Commission about the second sale of the suit property by the Defendant and that the 2nd, 3rd and 4th Defendants are fraudulently representing themselves to the National Land Commission as the bona fide owners of the suit property.
5. In his Replying Affidavit, the 4th Defendant deponed that it is not true that the Applicant bought the suit property from the 1st Defendant; that the sale agreement that the Applicant is relying on is a forgery and that he bought land known as C23/147 and not plot number 64 from the 1st Defendant on 10th July, 2012 at an agreed price of Kshs.250,000.
6. When he sought for legal advise, the 4th Defendant has deponed that he was advised to have another agreement executed and witnessed and that is when the agreement of 15th July, 2012 was drawn, executed and attested.
7. According to the 4th Defendant, it was during the ground verification exercise by Ministry of Lands Officials in the year 2014 that the 2nd and 3rd Respondents claimed to be the owners of the land; that all parties including the Plaintiff, presented their cases to the National Land Commission which ruled in his favour.
8. The 4th Respondent deponed that on 5th May, 2015, the National Land Commission paid him Kshs.13,043,173 and he vacated the suit premises for the construction of the Lamu Port Project; that the Applicant has never been in occupation of the suit property and that the orders being sought have already been overtaken by events.
9. The Chairperson of the National Land Commission deponed that the 5th Respondent is undertaking compulsory acquisition of the land within Lamu County for the construction of the Lamu Port as part of the ongoing LAPSSET corridor project; that the suit property was surveyed for the purpose of compensation and that after survey, the suit property was identified as C23/147.
10. According to the Chairperson of NLC, when a dispute arose over the suit property, a meeting was held whereafter it was established that the 4th Defendant was the bona fide owner of C23/147; that the 4th Defendant was paid for the land on 3rd May, 2015 and that neither of the parties can claim the land.
11. The 5th Defendant's Chairperson deponed that the sale agreement that the Plaintiff is relying on does not describe the property that he bought; that the Plaintiff can only appeal against the decision of the Commission and that the suit is an abuse of the court process.
12. In his Further Affidavit, the Plaintiff deponed that by the time he purchased the suit property, the same had not been subdivided hence the lack of specificity about the property; that he is not aware about the existence of plot number C23/147 and that the agreement exhibited by the 4th Defendant was done after he had purchased the suit property.
13. The Applicant deponed that he was not been given any chance by the NLC to present his side of the story; that the compensation of Kshs.13,042,173 was done in error and that the NLC relied on forged documents.
14. The advocate for the Plaintiff, the 4th and 5th Defendants' filed written submissions which I have considered.

15. The Plaintiff's amended Notice of Motion is premised on the amended Plaintiff.

16. In the amended Plaintiff, the Plaintiff is seeking for a declaration that the unregistered property known as plot number 64 Mashundwani, Lamu County belongs to him; an order of mandatory injunction directing the 4th Defendant to refund the sum of Kshs.13,043,173 and an order of mandatory injunction direction the NLC to pay him Kshs.13,043,173 as compensation and for a permanent injunction.

17. The Plaintiff's Application for a prohibitory and mandatory injunction is premised on the ground that he purchased the suit property from the 1st Defendant on 6th March, 2012.

18. The Plaintiff has annexed on the Supporting Affidavit the agreement that he entered into with the 1st Defendant. The 1st Defendant did not deny the allegation that he indeed sold to the Plaintiff the suit property.

19. On the other hand, the 4th Defendant's claim is that he purchased the same property from the 1st Defendant vide two agreements dated 10th July, 2012 and 15th July 2012. It is on the basis of these two agreements that the NLC compensated him for the land by paying him Kshs.13,043,173.

20. The 5th Defendant, the NLC deponed that it paid the 4th Defendant for the land after making inquiries as to the owner of the suit property pursuant to the provisions of Section 112 of the Land Act.

21. Although the Plaintiff has denied that the NLC informed him of the inquiries it was making, the evidence before this court shows that indeed an inquiry was made.

22. If it turns out at the hearing of the suit that the NLC arrived at its decision without involving the Plaintiff as alleged, or the decision that it arrived at was wrong, then the court will be at liberty to open up the issue of ownership of the land.

23. However, considering that the Plaintiff's claim is for compensation for the land, the Plaintiff has in effect admitted that even if the orders of injunction are granted, he shall not suffer irreparable injury that cannot be compensated in damages.

24. The order for a prohibitory injunction has also been overtaken by events considering that the 4th Defendant has since been compensated for the land.

25. If the Plaintiff succeeds at the hearing, then the 4th Defendant will have to pay to the Plaintiff the money that was paid to him considering that there can be no wrong without a remedy.

26. It is not true, as submitted by the 5th Defendant, that this suit is res judicata just because the NLC made an inquiry and determined the issues of ownership in favour of the 4th Defendant.

27. What was before the NLC was an inquiry and not a suit for the purpose of Section 7 of the Civil Procedure Rules. This court will have the final say as to the person entitled to the suit property because the Commission could not have made such a determination with finality.

28. In a matter where the issue of ownership of the suit property is highly disputed like in this particular case, an order of mandatory injunction cannot issue at an interlocutory stage.

29. It is for these reasons that I dismiss the amended Notice of Motion dated 15th September, 2015 with costs.

Dated, signed and delivered in Malindi this 22nd day of **September**, 2016.

O. A. Angote

Judge