



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.47 OF 2014

ALI MWADUNA.....PLAINTIFF

VERSUS

MASHA MKADHA.....DEFENDANT

DR. CHARLES MWANGOME MBANGO.....PROPOSED INTERESTED PARTY

R U L I N G

Introduction:

1. This Ruling is in respect to the Intended Interested Party's Application dated 29th April 2015 in which the following reliefs are being sought.

(a) THAT Dr. Charles Mwangome Mbango be granted leave to be enjoined into this suit as an Interested and/or a Third Party herein and be allowed to participate as such in the matter by filing any relevant pleadings and/or response to the Plaintiff's suit.

(b) THAT upon the grant of prayer 2 and 3 above, there be a stay of execution of the judgment delivered herein on 17th October, 2014 and/or any consequential orders made thereafter.

(c) THAT the Honourable Court be pleased to set aside the Judgment made herein on 17th October, 2014 and/or any consequential orders made thereafter.

(d) THAT the Honourable Court do give any further directions in the matter as the Court may deem necessary.

(e) THAT costs of this application be provided for.

The Applicant's case:

2. In his Affidavit, the Intended Interested Party (the Applicant) has deponed that he is the registered proprietor of parcel of land number Kilifi/Ngerenyi/1268 which was curved out of Kilifi/Ngerenyi/331; that he acquired the suit property on 19th December 2013 from the Defendant for Kshs.1,500,000 and that a Title Deed was issued in his favour on 22nd December 2014.

3. It is the Interested Party's case that upon perusal of the proceedings herein, it is apparent that the proceedings will affect him; that this matter should not have been entertained considering the provisions of Limitation of Actions Act and that once an illegality has been brought to the attention of the court, the proper recourse is to undo everything.

The Respondent's case:

4. In his Affidavit, the Plaintiff/Respondent deponed that the Interested Party has no valid title having obtained the title document from someone who could not pass a valid title; that the Applicant should have applied to be enjoined in the suit as a Defendant and not an Interested Party and that the Application has been filed in bad faith because the Applicant has filed Kilifi PMCCC No. 93 of 2015.

Submissions:

5. The Applicant's advocate submitted that the suit property is a subdivision of Plot Number 331; that at the time of the commencement of this suit, the Interested Party was not aware of these proceedings and that the Applicant only became aware of this suit when he filed Kilifi PMCC No. 93 of 2015.

6. Counsel submitted that Order 1 Rule 10(2) of the Civil Procedure Rules allows any person whose presence before the court may be necessary to be enjoined in the suit.

7. The Plaintiff's/Respondent's counsel submitted that the court should be slow in imposing other Defendants on the Plaintiff; that there already exists Kilifi PMCC No. 93 of 2015 and that in any event, the decree has already been executed.

Analysis and findings:

8. The Applicant's case is that parcel of land known as Kilifi/Ngerenya/1268 is a subdivision of Kilifi/Ngerenya/331 which he purchased from the Defendant herein.

9. According to the Sale Agreement that was entered into between the Defendant and the Applicant dated 19th December, 2013, the Defendant sold to the Applicant a portion of plot 331 measuring 6 acres for Kshs.1,500,000.

10. As at the time of the Agreement of 19th December, 2013, parcel of land known as Kilifi/Ngerenya/1268 was not in existence.

11. Indeed, the sale Agreement shows that the Defendant was the registered proprietor of plot number 331 measuring 12 acres and agreed to sell 6 acres of his land to the Applicant.

12. It would appear that plot no. 331 was subsequently subdivided creating plot number 1268 and another plot.

13. The Land Control Board gave its consent to have plot number 1268 transferred to the Applicant on 4th December, 2014 and the Title Deed was issued to the Interested Party on 22nd December 2014.

14. This suit was filed on 13th March, 2014.

15. In the Plaintiff's case, the Plaintiff sought for eviction orders as against the Defendant pursuant to the Orders of Mbogholi J that were issued on 12th October, 1994 in Civil Misc Application No. 174 of 1994.

16. In the Judgment of this court dated 17th October 2014, I allowed the Plaintiff's suit in the following terms:-

“The receipt dated 19th June, 1990 shows that the Plaintiff purchased the suit property in a

public auction and paid to Shariff Alwi Ahmed Auctioneers Kshs.68,500. The sale of the suit property by way of a public auction was pursuant to an order of the Court in Malindi CMCC No. 8 of 1989.....The said vesting order was confirmed by the High Court in Mombasa Misc Civil Application No. 174 of 1994.....In view of the fact that the Defendant has never set aside the orders of the lower court and the High Court, I find that the Plaintiff has proved his case on a balance of probabilities.....”

17. The penultimate order of this court directed that the Defendant, his agents and servants be evicted from land known as Kilifi/Ngerenya 331.

18. It is therefore obvious that by the time the Defendant was selling to the Applicant a portion of land known as Kilifi/Ngerenya/331, there was ongoing litigation between the Plaintiff and the Defendant that had commenced way back in 1989.

19. In the circumstances, in arriving at its decision, this court adopted the vesting order that had been issued by the Magistrate on 29th June, 1990 and confirmed by the High Court in Mombasa Misc. Civil Application Number 174 of 1994.

20. Indeed, the Applicant cannot succeed as against the Plaintiff notwithstanding that a Title Deed for Plot 1268 was issued to him. The Applicant's cause of action is pegged on the success of the Defendant in setting aside the order of this court.

21. In the event that the Defendant does not succeed, and in view of the fact that the Defendant sold the suit property during the pendency of the suit, then the Applicant's cause of action can only be as against the Defendant for damages.

22. In the circumstances of this case, the Interested Party, whether he was aware of this suit or not, cannot be said to be a necessary party to these proceedings because by the time the Title Deed was issued to him, this court had already delivered its Judgment.

23. For those reasons, I dismiss the Application dated 29th April, 2015 with costs.

Dated, signed and delivered in Malindi this **14th** day of **September**, 2016.

O. A. Angote

Judge