



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.11 OF 2016**

**AHMED OMAR SWADAN.....PLAINTIFF**

**=VERSUS=**

**FREDRICK NDAMBUKI MUTISYA.....DEFENDANTS**

**R U L I N G**

1. The Application before me is the one dated 21<sup>st</sup> January, 2016 in which the Plaintiff is seeking for the following orders;-

**(a) THAT this Honorable Court be pleased to Order the Defendant to furnish security in the sum of Kshs.2,162,200/- within a specific period of time, and in the event the Defendant fails to honour the same, the Defendant's parcel of land, being plot No.Kilifi/Kadzozzo/Madzimbani/26 be attached before Judgment to satisfy the decree which may be passed against him.**

**(b) THAT the costs of this application be provided for.**

2. The Application is supported by the Plaintiff's Affidavit in which he has deponed that the Defendant has attempted to dispose of the suit property; that he purchased the suit property from the Defendant vide an agreement dated 12<sup>th</sup> January, 2015 and that the said agreement was subject to verification of acreage of the suit property before the final payment could be made.

3. It is the Plaintiff's deposition that the verification of the acreage was done; that the Defendant thereafter went underground and that he realised that the Defendant intends to sell the suit property to third parties.

4. The Plaintiff deponed that he paid to the Defendant Kshs.1,000,000 at the time of the execution of the agreement.

5. In response, the Defendant deponed that he agreed to sell to the Plaintiff the suit property for Kshs.4,000,000; that he was not allowed to read the sale agreement before signing it; that the suit property measures 18 acres and not 3.37Ha as shown on the title deed and that the entire purchase price for the land should be Kshs.72,000,000.

6. It is the Defendant's case that he has been paid only Kshs.1,000,000 by the Plaintiff for the land and that the prayer for security is not necessary because the Plaintiff is in possession of the original Title Deed.

7. In his submissions, the Plaintiff's advocate submitted that the Defendant received the sum of Kshs.1,000,000; that he has had more than one year to refund the said sum and that the Defendant is about to sell the suit property.

8. The Defendant's advocate submitted that the very fact that the Plaintiff is still holding the original Title Deed is sufficient security; that the order for attachment before Judgment is in its very nature draconian and should be granted sparingly and that the Respondent has demonstrated that he has other properties.

9. This matter emanates from a land sale transaction which seems to have fallen through. The Plaintiff is seeking for a refund of the money that he purportedly paid to the Defendant together with general damages for breach of contract.

10. The Defendant has disputed that he received Kshs.2,162,200 that the Plaintiff is claiming in the Plaintiff. The Plaintiff now wants the Defendant to give security in the sum of Kshs2,162,200 and if he fails, the suit property to be attached before Judgment.

11. Order 39, Rule 5, of the Civil Procedure Rules provides that where at any stage of a suit the court is satisfied that the Defendant, with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of any part of his property or is about to remove his property from the local limits of the jurisdiction of the court, may order for security or attachments before Judgment.

12. The Plaintiff's apprehension emanates from the fact that the Defendant has subdivided the suit property.

13. The Plaintiff has annexed on the Affidavit an undated and unsigned "proposed subdivisions of Kilifi/Kadzonzo/Madzimbani/26."

14. Other than the proposed subdivision scheme, there is no evidence that the Defendant is selling or is about to sell the suit property before the hearing of the suit.

15. In any event, any purported sell of the subdivisions is unlikely to go through considering that it is the Plaintiff who is in possession of the Title Deed for the entire suit property. It is trite that the Title Deeds for the proposed sub-plots can only be issued after the Title Deed for the entire land has been surrendered and cancelled.

16. In the circumstances, I find that there is no clear proof of mischief on the part of the Defendant viz-a-viz the sale of the suit property.

17. It is for those reasons that I dismiss the Application dated 21<sup>st</sup> January, 2016 with costs.

Dated, signed and delivered in Malindi this **14<sup>th</sup>** day of **October**, 2016.

**O. A. Angote**

**Judge**