



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.217 OF 2014

AZZURI LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

1. LAWRENCE KADENGE ZIRO

2. KAMBI KADENGE ZIRO

3. VALERIO BUCCIARELLI.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. What is before me is the Plaintiff's Application dated 19th November 2014 seeking for the following orders:

Pending hearing and determination of the main suit, the Hon. Court be pleased to issue temporary injunctive orders restraining the Respondents, their servants, agents, employees, beneficiaries and/or any person acting on their behalf from obstructing the Applicant taking vacant possession, disposing off, transferring, alienating, charging, and/or interfering in any manner with parcel of land reference No.Chembe/Kibabamshe/356.

The Plaintiff's/Applicant's case:

2. The Applicant's case is that on 4th June 2014, it entered into a sale agreement with the 1st and 2nd Respondents, who had the authority of all the beneficiaries of parcel of land number Chembe/Kibabamshe/356 at a consideration of Kshs.18,900,000.
3. It is the deposition of the Applicant's director that the Applicant was to take vacant possession of the suit property upon payment of a deposit of Kshs.5,000,000; that the Applicant has so far paid Kshs.13,500,000 and that the Applicant has been denied entry into the said land.
4. According to the Applicant, the 1st and 2nd Respondents have entered into another sale agreement with the 3rd Respondent and that the 3rd Respondent sued the 1st and 2nd Respondents in Malindi ELC No. 198 of 2014, which suit has since been withdrawn.

The Defendants'/Respondents' case:

5. The 1st Defendant stated in his Replying Affidavit that the Plaintiff forged documents of transfer and purported that he signed them; that he has reported the issue of forgery to the police and that the title deed in possession of the Plaintiff is a forgery and has since been recalled by the Government for cancellation.
6. In his affidavit, the 3rd Defendant has deponed that he has no claim in respect of the suit property and the entire suit against him is unjustified and without legal grounds.
7. The 2nd Defendant disassociated himself with the 1st Defendant's depositions.
8. According to the 2nd Defendant, he was appointed together with the 1st Defendant by the Ziro family to jointly represent the family in the sale of the suit property to the Plaintiff; that they collectively agreed to sell to the Plaintiff the suit property for Kshs.18,500,000 and that the agreement they entered into allowed the Plaintiff's company upon payment of the deposit to take possession.
9. It is the case of the 2nd Defendant that the two of them opened a joint account where the monies paid by the Plaintiff for the suit property was deposited and that he later discovered that the 1st Defendant had previously defrauded third parties by holding out as the sole owner of the subject property.
10. Due to the fraudulent transactions by the 1st Defendant, the 2nd Defendant deponed that the family had to repay to the third parties Kshs.2,800,000 being the money that was received by the 1st Defendant from the said third parties.
11. The parties did not file their respective submissions.

Analysis and findings:

12. The Plaintiff entered into an agreement dated 14th June 2014 with the 1st and 2nd Defendants for the purchase of the suit property for Kshs.18,900,000.
13. According to the affidavit of the 2nd Defendant, him and the 1st Defendant represented the family of Ziro in the sale of the said property.
14. In his Affidavit, the 1st Defendant has admitted that it is true that he had the intention of selling the suit property to the Plaintiff and that he believed the agreement he signed was "a preliminary agreement" to be completed later.
15. The 1st Defendant has therefore not denied that he signed the agreement of 14th June, 2014.
16. Indeed, the Plaintiff's representative and the 1st and 2nd Defendants signed the said agreement before Mwadilo advocate.
17. The 2nd Defendant has stated in his affidavit that him, together with the 1st Defendant, opened a joint account number 7500008805 with Imperial Bank in which the Plaintiff deposited Kshs.13,500,000 being part of the purchase price. Indeed, that evidence has been annexed on the Plaintiff's Application. The 1st Defendant has not denied the fact that Kshs.13,500,000 was deposited in a joint account that was being held by him and his step brother, the 2nd Defendant.
18. The agreement that was entered into between the Plaintiff, the 1st and the 2nd Defendants shows that the vendor and the beneficiaries were to yield to vacant possession of the suit property to the Plaintiff upon payment of the deposit.
19. Having entered into a binding agreement with the Plaintiff, it would appear that the 1st Defendant was in possession of another set of title deeds in respect to the suit property in his name.
20. The 1st Defendant's step brother has annexed on his Replying Affidavit the Sale Agreement that the 1st Defendant purported to enter into on 12th June 2012 with a third party in which he purported to sell the same property for Kshs.20,000,000.
21. Evidence has been annexed on the 2nd Defendant's Affidavit showing that the 1st Defendant received monies from third parties in respect of the same piece of land.
22. If the 2nd Defendant's allegations are true, then the 1st Defendant should be investigated by the police for prosecution for receiving money from several people by false pretences.
23. Having paid to the 1st and 2nd Defendants a substantial sum of money towards the purchase price as admitted by the 2nd Defendant, the Plaintiff is entitled to the suit property pursuant to the terms

- of the agreement.
24. Whether the suit property was lawfully transferred to the Plaintiff or not can only be ventilated at full trial.
25. The evidence before me shows that the Plaintiff has a prima facie case with chances of success.
26. For those reasons, I allow the Application dated 19th November 2014 as prayed.

Dated and delivered in Malindi this **19th** day of **June**, 2015.

O. A. Angote

Judge