



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 101 OF 2011

1. MICHELLE CALIENDO

2. MAURIZIO CARLO BESANE.....PLAINTIFFS/RESPONDENTS

=VERSUS=

1. SUN REEF LIMITED

2. D VITA GIUSEPE

3. REGISTRAR OF TITLES MOMBASA.....DEFENDANTS

1. MARIANGELA ALTERINI

2. FRANCESCO VELTRONI.....INTENDED DEFENDANTS/APPLICANTS

R U L I N G

Introduction

1. This matter proceeded for formal proof on 30th July 2013. On 18th October 2013, this court delivered a judgment in favour of the Plaintiff.
2. Mariangela Alterini and Francesco Veltroni, the Intended Defendants, have filed an Application dated 21st November 2013 seeking for the following substantive reliefs.
 - a. **That Mariangela Alterini and Francesco Veltroni, the registered proprietors of portion number 2914 (original number 514/35 – amended to read 514/53) Malindi, be granted unconditional leave to file their Defence and Counter Claim.**
 - b. **That Judgment and all consequential orders in the suit herein be set aside and the wrongful attachment of the applicants property be set aside or reversed.**
 - c. **That pending the hearing of the suit herein the Honourable Court be pleased to issue an order of injunction restraining the Plaintiffs, their servants, agents or any one of them from trespassing into or evicting the Applicants from or in any other manner interfering with the applicants quiet possession of Portion Number 2914 (original number 514/35 – amended to read 514/53).**
 - d. **Costs of and incidental to this application be provided.**

The Applicants' case:

3. The Application is supported by the Affidavit of Italo Cipriani, the Applicants' Attorney who has deponed that the intended Defendants/Applicants are the registered proprietors of portion number 2914 (original number 514/35) Malindi (the suit property).
4. According to the deponent, the Plaintiffs, together with their advocate, proceeded with the execution of the Judgment which had been entered into by this court while knowing that the suit premises belonged to his principals; that the Plaintiffs concealed material facts during the trial and more specifically that the suit property had been sold to the Intended Defendants before the suit was filed and that the Plaintiffs failed to disclose the existence of Civil Suit No. 18 of 2011 where the 2nd Defendant was the Plaintiff against the 2nd Plaintiff.
5. The Intended Defendants' attorney finally deponed that his principals should be allowed to defend this suit.

Plaintiffs'/Respondents' case:

6. Maurizio Carlo Besana, the 2nd Plaintiff, filed a Replying Affidavit and deponed that his property is portion number 2914 (original number 514/53) Malindi and not portion number 2914 (original number 514/35) as pleaded by the Applicants.
7. The 2nd Plaintiff further deponed that at the time of filing the suit, the Intended Defendants were made aware of the suit by being served with Summons to Enter Appearance, Plaintiff, List of Witnesses, List of Documents and all the other relevant documents.
8. The 2nd Plaintiff has deponed that the Intended Defendants were served with the documents in relation to the suit just for information because at that particular point, the suit property was still registered in the name of the 1st Defendant. However, on 2nd August, 2011, it was deponed, the Intended Defendants' advocate wrote to the Plaintiffs' advocate informing him that his clients had nothing to do with the Defendants; that the Intended Defendants' advocate proceeded to present an indenture for registration and that the Applicants were aware of the suit.
9. The Respondents finally deponed that the registration of the indenture on the 2nd August 2011 with the knowledge of the existence of the suit violates the provisions of Section 52 of the Indian Transfer of Property Act of 1882 and such a transfer is null and void.

Submissions

10. The parties appeared before me on 9th December, 2013 and made oral submissions. Mr. Ole Kina, counsel for the Applicants made an oral application under section 100 of the Civil Procedure Act to amend the original number of the suit property from "513/35" as indicated in the pleadings to "513/53". I allowed the said amendment.
11. The Applicants' counsel submitted that the Indenture annexed on his Application pre-dates the filing of the suit. Counsel submitted that the registered proprietors are not indicated as parties in the Plaintiff.
12. According to counsel, the ownership of the property by the Plaintiffs was extinguished by an Indenture dated 13th December 2009. At the time of filing the suit, it was deponed, the Plaintiffs were not the registered proprietors of the suit property. Counsel submitted that the Intended Defendants should have been made parties to the suit before summons could be served upon them.
13. The Intended Defendants' counsel finally submitted that the ex-parte Judgment entered in favour of the Plaintiffs by this court should be set aside and his clients, being the registered owners of the suit property, should be allowed to defend the suit. Counsel relied on the case of **Dutto Maria Lucia Vs Maurizio Ricotti (2006) e KLR; Arab Monetary Fund Vs Hashim & Others (No.4) ALL ER1936 and the code of Civil Procedure by Mulla, 16th Edition Vol 2 and 3.**
14. Mr. Otara, the Respondents' counsel, submitted that this suit was filed on 27th July 2011 and the Applicants were served with Summons to Enter Appearance. Counsel submitted that the 1st Defendant was served by way of substituted service and that the Intended Defendants were aware all along about the existence of the suit.

15. The Plaintiffs'/Respondents' counsel further submitted that the Indenture transferring the suit property was drawn by the advocate who had been served with the Summons to Enter Appearance on behalf of the Intended Defendants and that the transfer took effect on 3rd August 2013 upon registration.
16. Counsel finally submitted that the suit property was transferred to the Intended Defendants during the pendency of the suit; that the doctrine of *les pendens* applies and that the said transfer is therefore null and void. Counsel relied on the case of **Carol Silcork Vs Kassim Shariff, Malindi Land Case No. 55 of 2011; Hans French Detlif Vs Mohamed Awadh, Mombasa HCCC NO. 482 of 1995 and Fredrick Moses Kinya Vs J. N. Baird, Nairobi HCCC No. 4819 of 1989.**

Analysis and findings

17. The Applicants have annexed a copy of the Indenture showing that they purchased the suit property from the 1st Defendant on 14th July 2011 for Kshs.7,000,000. The said Indenture was registered in the Government Lands Registry Mombasa on 3rd August 2011. The Applicants have also annexed a Certificate of Postal search as on 16th August 2011 showing the Applicants as the registered proprietors of the suit property.
18. According to the Plaintiffs, the suit property was sold to the Applicants during the pendency of the suit and consequently the said agreement is null and void.
19. Section 52 of the repealed Indian Transfer of Property Act, 1882 prohibits a party to a suit from transferring a property to a third party during the pendency of a suit. In the case of **Carol Silcock Vs Kassim Sharif Mohamed, Malindi ELC Case No.55 of 2011**, I held that where a party to a suit transfers the suit property to a third party *pendente lite*, such a transfer shall be null and void for being contra statute.
20. The Applicants' argument however is that the suit property herein was transferred to the Applicants before the filing of the suit and that the Plaintiffs were aware of the said transfer. On the other hand, the Respondents are of the view that the property was transferred to the Applicants on 3rd August 2011 by the 1st Defendant, a few days after the suit was filed.
21. The Plaintiffs' application was filed on 27th July 2011 against the three Defendants. On 28th July, 2011, the Plaintiffs moved the court under a certificate of urgency for temporary orders of injunction. However the court declined to issue the said orders ex parte and directed the Plaintiffs to serve the Application on the Defendants.
22. When the Application for injunction came up for hearing on 8th August 2011, the Plaintiffs' advocate informed the court that they had been unable to trace the 1st Defendant's director with a view of serving them with the Summons to Enter Appearance. The Plaintiff sought for leave of the court to serve the 1st Defendant with the Summons to Enter Appearance by way of substituted service. The order to serve the 1st Defendant by way of advertisement in the local daily was granted by the Court on the same day.
23. The 1st Defendant was not served with the Summons to Enter Appearance until 15th December 2011 when the Plaintiff effected service on the 1st Defendant by way of advertisement in the Daily Nation.
24. It is therefore correct to state that the 1st Defendant was not aware of the existence of this suit until 15th December 2011 when it was served with the Summons to Enter Appearance by way of advertisement in the Daily Nation of the same date.
25. The doctrine of *lis pendens*, in my view, only comes into play where it is shown to the satisfaction of the court that a party who is accused of having sold the property during the pendency of the suit was aware of the existence of the suit. A party can only be aware of the suit if he is, firstly, a party to the suit and secondly, if he has been served with the Summons to Enter Appearance.
26. In view of the fact that the suit property was transferred to the Applicants on 3rd August 2011, the 1st Defendant cannot be accused of having sold the suit property during the pendency of the suit because it was served with the Summons to Enter Appearance on 15th December 2011, way after it had sold the suit property to the Applicants.
27. In any event, it would appear that the Plaintiffs were aware that the Applicants had an interest in the suit property. That explains why the Summons to Enter Appearance was sent to the Applicants'

advocate notwithstanding the fact that the Applicants were not Defendants. Having known that the Applicants had an interest in the suit property, it was incumbent on the part of the Plaintiff to enjoin them in the suit before serving them with the Summons. A party can only be served with the Summons if he is a Defendant to the suit.

28. In view of the fact that the 1st Defendant transferred the suit property to the Applicants before it was served with the Summons to Enter Appearance, the Applicants were necessary parties to these pleadings. The Applicants had a right to be heard before a judgment could be delivered. This matter should not have proceeded for hearing in the absence of the Applicants who were the registered proprietors of the suit property and were in actual occupation and possession.
29. Consequently the judgment and the orders of this court of 18th October 2013 should be set aside *ex debito justitiae*. I shall however not make any pronouncement on the prayer for injunctive orders considering that the Applicants have not filed a Defence and Counterclaim. The draft defence and counterclaim cannot pass as a defence and counterclaim. It remains just that, a draft. However, the parties are at liberty to file Applications for injunctive orders, if need be.
30. For the reasons I have given above, I allow the Applicants' Notice of Motion dated 21st November 2013 and filed on the same day in the following terms:
- a. **That the Judgment and all consequential orders in the suit herein be and is hereby set aside and the subsequent attachment of the Applicants' property be and is hereby set aside.**
 - b. **That Mariangela Alterini and Francesco Veltroni, the registered proprietors of portion number 2914 (original number 514/53) Malindi, be and are hereby granted unconditional leave to file their Defence and Counter Claim within 14 days from the date hereof.**
 - c. **Costs of and incidental to this application to be paid by the Plaintiffs.**

Dated and Delivered in Malindi this 25th Day of February, 2014.

O. A. Angote

Judge