



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 515 of 2011

**HAMADI BAKARI KALAMU (the Personal representative of the
Estate of BAKARI KALAMU SULEIMAN)..... PLAINTIFF**

V E R S U S

JOSEPH MUTUA MAKAU DEFENDANT

RULING

- 1) This Court is asked to determine the applications of 16th September 2011 and 13th October 2011 together.
- 2) The application of 16th September 2011 is a request by the Plaintiff for the following orders-
 - (a) Spent
 - (b) Spent
 - (c) **The Defendant be ordered to return to the Plaintiff his Title Deed for the parcel of land known as Ukunda/Kwale/4083.**
 - (d) **That an order of injunction do issue against the Defendants or their agent or servants from trespassing or remaining or entering or developing the whole or part of the parcel of land known as Ukunda/Kwale/4083 until this suit is heard and determined.**
- 3) That of 13th October 2011 is by the Defendant seeking the following prayers-
 - (i) Spent
 - (ii) Spent
 - (iii) **That pending the hearing and determination of this application of this suit the Respondent himself, his agent and/or any other persons authorized by the Respondent be restrained by way of a temporary injunction from entering and/or remaining in occupation, alienating, disposing, leasing, mortgaging, and or further restrained from erecting any structures, fencing construction and or interfering with/disrupting the Applicant's quiet possession and enjoyment of and or in any manner dealing with Plot No. Kwale/Ukunda/4083.**
 - (iv) **That the hearing and determination of this application of this suit, the original title deed**

with respect to Plot No. Kwale/Ukunda/4083 deposited with one Mr. Said, Court Prosecutor at the Senior Resident Magistrate's Court in Kwale in Criminal Case No. 393/2010, R –Vs- Bakari Kalamu Suleiman on 15th September 2011, be released and this Court do give appropriate directives on its safe custody.

4) These proceedings were initially commenced by Bakari Kalamu Suleiman (Deceased) who died on 23rd November 2011 during the pendency hereof. On 2nd October 2012 and with the consent of the parties, the Deceased personal representative Hamadi Bakari Kalamu, was made a Plaintiff in his place.

5) I am able to determine these two applications without going into details of the facts surrounding the dispute. The trial Court will have occasion to do so. Some facts seem agreed and undisputed-

i. There were sale agreements entered

between the Deceased and the Defendant for the sale of a portion of Kwale/Ukunda/204 (which was on subdivision designated Kwale/Ukunda/4083) by the Deceased to the Defendant. The last agreement was made in 2007.

ii. Although some consideration for the sale was, paid, there is a dispute as to whether it was paid in full.

iii. The transaction between the Deceased and the Defendant was a controlled transaction requiring the consent of The Land Control Board under the provisions of The Land Control Act (Chapter 301 Laws of Kenya).

iv. The Defendant is in occupation of suitland and has carried out developments thereon.

v. On the basis of a complaint by the Defendant the Deceased was charged with the offence of receiving money by false pretences. The Criminal Case being Kwale Criminal Case No. 393 of 2010 is yet to be concluded and may never be concluded on account of the death of the Deceased.

6) The prayers sought by the Plaintiff in the Plaint dated 16th September 2011 are-

(i) A declaratory order declaring the sale Agreement between the Plaintiff and the Defendant dated 6th July 2007 null and void.

(ii) The Defendant or his agents or servants be evicted from the suit premises known as Kwale/Ukunda/4083 at the Defendant's costs.

(iii) An order be made by the Court forcing the Defendant to return the Title Deed of Kwale/Ukunda/4083 to the Plaintiff.

(iv) An order of injunction be made against the Defendant restraining him from trespassing, entering or developing or being on the said parcel of land until this suit is heard and determined.

7) The Defendant filed Defence and mounted a Counterclaim for the following prayers-

(a) A permanent injunction restraining the Plaintiff, his employee, servants, and/or agents from allowing the transfer, disposal, alienation of and/or further restraining the Plaintiff from selling the suit property to 3rd parties and/or interfering with/disrupting the Defendant's quiet enjoyment of and/or in any manner dealing with Plot No. Ukunda/Kwale/4083.

(b) An order of declaration recognizing the Defendant herein as the rightful owner of Plot No.

Ukunda/Kwale/4083 curbed (sic) from Plot No. Ukunda/Kwale/204 after sub-division and as per the sale agreements between the Plaintiff and the Defendant.

(c) A mandatory order compelling the Plaintiff to co-operate in the necessary process of execution of the transfer documents in respect of Plot No. Ukunda/Kwale/4083 in favour of the Defendant and a consequent order to have the register of lands reflect the same once the Certificates are issued.

8) The main prayers in both applications are in the nature of temporary orders of injunction. The principles to be applied in determining these applications are those in **Giella –Vs- Cassman Brown & Co. Ltd [1973]EA 358** and so this Court must first assess the respective strengths of the Plaintiffs claim and the Defendants Counterclaim.

9) In my assessment and without making any firm conclusion this is yet another matter in which the harsh side of the provisions of The Land Control Board may after full trial hold sway. The Defendant, I would think, appreciates this and pleads as follows in paragraph 25 of the Defence -

“The Defendant contends that that equity would not allow the expectation so created to be defeated. He hastens to add that this Court, which is driven to do substantive justice, has jurisdiction to apply the doctrines of equity to soften the harshness of the provisions of the Land Control Board Act in circumstances that warrant that equity be invoked to come to the aid of a vulnerable party.”

It is a plea that Equity interposes to mitigate the harshness of the statutory provisions.

10) On countless occasions the difficulty sometimes

presented by the provisions of The Land Control Act have been discussed by the Courts. Sadly this case may find itself in that category. This passage from the decision of the Court of Appeal in **Civil Appeal No. 26 of 1979 Kariuki –Vs- Kariuki [1983]KLR 225** at page 227 captures what may be the limited option open to the Defendant. In it the Court of Appeal says-

“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void ... No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under Section 7 of the Act.”

11) I make these observations well aware that the Defendant

has sought solace in the Doctrine in **Inward & Others –Vs- Baker (1965) 1 ALLER 448**. In that decision Denning MR had this to say-

“It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money in the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.”

Equity follows the law. The Defendant will have to persuade the trial Court that, notwithstanding the holding in **Kariuki –Vs- Kariuki**, the Doctrine in **Inward** is consistent with the provisions of the Land Control Act. That may not be plainsailing.

12) For now I am willing to find that the Plaintiff has established a prima facie case with a probability of success. I am not certain about that of the Defendants Counterclaim. That notwithstanding I am reluctant

to allow the Plaintiff's application. The Defendant is and has been in possession of the suit land from 2003 or thereabouts and, admittedly, has carried out developments thereon. Although couched as a plea for prohibitory orders the effect of allowing the Plaintiffs application would be to dispossess or evict the Defendant. If this Court were to do so then the Plaintiff will have summarily succeeded in prayer (b) of the plaint which is that-

“The Defendant or his agents or servants be evicted from the suit premises known as Kwale/Ukunda/4083 at the Defendant's costs.”

The purpose of an interlocutory injunction is not to summarily determine a suit. That can be achieved by other avenues provided for in the Civil Procedure Rules.

13) This Court is inclined to make an order that maintains

the status quo until the parties rival positions are resolved on merit. The quiet possession enjoyed by the Defendant should remain undisturbed. Both the Plaintiff and the Defendant are barred from alienating, disposing, leasing or mortgaging the suitland.

14) These are the orders I make in answer to both applications.

Dated and delivered at Mombasa this 27th day of February, 2013.

**F. TUIYOTT
JUDGE**

**Dated and delivered in open court in the presence of:-
Miss Kariuki for Plaintiff
Buti for Masisa for Defendant
Court clerk - Moriasi**

**F. TUIYOTT
JUDGE**