



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELC LAND CASE NO. 45 OF 2015**

OMAR SHARIFF HASHIM.....PLAINTIFF/APPLICANT

-VERSUS-

ABDULATTIF AHMED

LUCY MWAURA NDICHU

DAULA MOHAMED OMAR

RASHID FAMAU NAGI

REGISTRAR OF TITLES, MSA.....DEFENDANTS/RESPONDENT

**RULING**

1. There are two applications for determination. The first application brought by the plaintiff is dated 13<sup>th</sup> March 2015 and the 2<sup>nd</sup> one filed by the 4<sup>th</sup> defendant is dated 9<sup>th</sup> April 2015. The Court directed that both applications be heard at the same time as they sought partially similar orders and they are both premised on the provisions of Order 40.
2. The plaintiff sought for an order of temporary injunction to issue against all five Respondents restraining them, their servants, agents or assigns from interfering, selling transferring and or dealing in any manner with plot No 203/24/11/MN CR No 53614 subdivision No 11328 (original No 10528/11) and CR No. 52764 subdivision No 11327 pending hearing and determination of the suit. He also prayed for costs of the application.
3. The 4<sup>th</sup> defendant on his part prayed for restraining orders to issue against the plaintiff restraining him and his agents from any further trespass, encroachment, collecting rent and howsoever from dealing with the plaintiff's property known as plot No 11328 Section 11 MN, together with the developments on it pending determination of the suit. He also prayed for the rents collected from the suit premises to be deposited in a joint account, to be opened in their advocates names.
4. The applications are supported by the grounds on their faces, affidavits sworn in support and written submissions filed. As regards the plaintiff's motion, the plaintiff's advocate submitted that the plaintiff purchased the suit property from the 2<sup>nd</sup> defendant's husband in may 2002, before the subdivision were

registered on the mother title No 203/24/11/MN. Later the suit property was transferred to the 2<sup>nd</sup> defendant and his two sons by way of Assent.

5. The plaintiff allege that he was registered as owner at one time but was never made aware. He is questioning how the Respondents acquired ownership of the suit property as they have not annexed any sale agreement.

6. The 4<sup>th</sup> Respondent deposed that he is the registered proprietor of property plot No 11328/11/MN having purchased it from Abdulatiff Ahmed (the 1<sup>st</sup> defendant). The 4<sup>th</sup> Respondent deposed that the applicant is misleading the Court while he continues to collect rent from the suit premises to the detriment of the 4<sup>th</sup> Respondent's interests. The other defendants did not file any documents to oppose the plaintiff's motion.

7. In submission, the 4<sup>th</sup> Respondent restated that he is the registered proprietor of plot No 11328/11/MN. And since he is the registered owner is prima facie evidence of his ownership as was held in the case of **Mary Chelagat Chesirsir vs Charles Ruto & 2 Others (2005) eKLR** and the provisions of section 26 of the Land Registration Act. He however denied ownership of plot No subdivision 11327.

8. The 4<sup>th</sup> defendant submitted that plot No 203/24/11/MN is no longer in existence therefore the orders sought cannot be granted. Further that the order of injunction cannot be granted in one suit over different parcels of land owned by different people who have no conflict between themselves. He urged the Court to dismiss the motion.

9. In the plaint, the Applicant has sought for declaratory orders to cancel the sub-divisions and subsequent registrations of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. This means that the change already took place confirming the 4<sup>th</sup> Respondent's submission that he currently holds title for one of the suit plots Nos 11328/11/MN. In paragraph 10 of the supporting affidavit it is deposed that plot No 11327/11/MN was on 1.8.2011 registered into the name of 3<sup>rd</sup> Respondent. There are documents annexed to confirm this deposition.

10. The two plots were a subdivision of 10528 which was also created from plot No 203/24/11/MN. The Applicant pleads that the 1<sup>st</sup> defendant attempted to collect rents from the suit premises upon which the tenants filed Mombasa HCC No 53 of 2012. No more was said on the status of this suit except on learning of the case, the Applicant said he went to the lands office but did not trace the mother title. It is the letter of 15<sup>th</sup> January 2015 written by the 4<sup>th</sup> defendant to the tenants to pay rent that jolted the Applicant to file this suit.

11. Together with the suit, the plaintiff filed this motion in which he is seeking temporary orders of injunction. The principles of granting injunction are laid down in the classical case of **Giella vs Cassman Brown** which are ;

**i) Prima facie case**

**ii) Irreparable loss**

**iii) Balance of convenience**

The questions for me to determine is whether the Applicant has established either of the above principles.

12. The Applicant annexed a sale agreement as OSH – 1 showing he jointly with his wife purchased a portion of plot No 203/19/11/MN measuring 9399 sq on 20<sup>th</sup> May 2002. He has also annexed certificate of title No CR 46329 in their joint names. The title is indicated as a subdivision No 10528 from the original No 203/24/11/MN. This title was closed on sub-division of the same to plot Nos 11327 and 11328 on 1<sup>st</sup> August 2011. Subsequent to the sub-division, the two titles are currently registered into the

names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively. Therefore the property already changed hands to parties who are also sued in this case but who did not originally own the land.

13. Under the provisions of section 24 and 25 of the Land Registration Act gives the registered proprietor rights and privileges to enjoy the use and occupation of the land. Since in this case the titles have not been challenged as provided for under section 26 of the Act, raising a dispute to be determined on merits thus making a prima facie case. The orders although directed against all the Respondents will only affect the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who the current registered owners of the plot in dispute. But the 3<sup>rd</sup> Respondent did not oppose the motion.

14. On the aspect of irreparable loss, it is apparent from the pleadings and submissions that the Applicant is not living on the plot. However he is collecting rent and had been collecting rents before the 4<sup>th</sup> Respondent acquired ownership. If the orders sought are not granted, he will suffer irreparable loss as he will be denied income. Although the development therein is quantifiable and therefore compensation can be made to whichever party loses the case, will be compensated.

15. The Applicant is receiving rents from the suit premises. The 4<sup>th</sup> Respondent has not had access to the premises although he has made efforts to do so by demanding for rents. The balance of convenience would tilt in favour of the one in possession. Further the rents are generated by the developments undertaken by the Applicant. The applicants' collection of rent from the suit premises cannot by any chance dispossess the 4<sup>th</sup> Respondent of his property if the Applicant loses the case.

16. I do therefore find merit in the Applicant's motion grant the orders sought in the motion dated 13.3.2015 for the reasons given in the preceding paragraphs. The orders are directed to the 3<sup>rd</sup> and 4<sup>th</sup> defendants because the 2<sup>nd</sup>, 5<sup>th</sup> and 1<sup>st</sup> defendant were not shown to have exhibited any manner of interference on the plots.

17. In regard to the notice of motion dated 9.4.2015, the same cannot be granted on the basis that the plaintiffs' motion has succeeded. Further, other than collection of rent which the 4<sup>th</sup> Respondent applied to be deposited in a joint account, no other interference explained to the Court which the plaintiff was undertaking to the detriment of the 4<sup>th</sup> Respondent.

18. On costs, I direct that each party to bear their respective costs of both applications.

**Ruling dated and delivered at Mombasa this 22<sup>nd</sup> April, 2016**

**A. OMOLLO**

**JUDGE**