



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 89 OF 2020

RAJESH MULJI BHUNDIA.....PLAINTIFF/APPLICANT

VERSUS

KAMAL HEMRAJ BHUNDIA

(sued as the Administrator of the estate of Hemraj Mulji Bhundia)

ABDUL REHMAN AL-AMOODI

RICHMOND HOLDINGS LIMITED

LAND REGISTRAR-MOMBASA LAND REGISTRY

HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

RULING

The application is dated 20th July 2020 and is brought under Article 159 of the Constitution of 2010, Section 1A, IB, 3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rules 1& 2, Order 51 Rules 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That this Application be certified urgent and be heard ex-parte in the first instance.
2. That pending hearing and determination of this Application, this Honourable Court be pleased to issue an injunction restraining the Defendants/Respondents either by themselves, their agents, servants and/or any person acting on their instructions from selling, charging or in any way howsoever interfering with the Applicant' peaceful possession, occupation and enjoyment of the suit property known as Plot No. MN/1/2434 situated in Mombasa Municipality within Mombasa County, together with the improvements therein.
3. That pending hearing and determination of this Application, an Order do issue do compelling the 1st, 2nd and 3rd Defendants to deposit with the Court for safe custody, the Certificate of Title for Plot No. MN/1/2434 situated in Mombasa Municipality within Mombasa County.
4. That pending hearing and determination of this Application, an Order do issue compelling the 4th Defendant to deposit with the Court for safe custody, all the Folders, copies of Titles, parcel files and all other documents and records in respect of Plot No. MN/1/2434 situated in Mombasa Municipality within Mombasa County.
5. That pending hearing and determination of the main Suit, this Honourable Court be pleased to issue an injunction restraining the Defendants/Respondents either by themselves, their agents, servants and/or any person acting on their instructions from selling, charging or in any way howsoever interfering with the Applicant' peaceful possession, occupation and enjoyment of the suit property known as Plot No. MN/1/2434 situated in Mombasa Municipality within Mombasa County, together with the improvements therein.
6. That pending hearing and determination of this Suit, an Order do issue do compelling the 1st Defendant to deposit with the Court for safe custody, the Certificate of Title for Plot No. MN/1/2434 situated in Mombasa Municipality within Mombasa County.

7. That pending hearing and determination of this Suit, an Order do issue do compelling the 4th Defendant to deposit with the Court for safe custody, all the folders, copies of Titles, parcel files and all other documents and records in respect of Plot No. MN/1/2434 situated in Mombasa Municipality within Mombasa County.

8. That the Officer Commanding Station at Nyali Police Station to enforce the orders of this Honourable Court.

9. That costs for and incidental to the Application be provided for.

It is based on the grounds that the Plaintiff/Applicant is a co-owner of Plot No. MN/1/2434 (the "suit property") situated in Mombasa Municipality within Mombasa County, having acquired it jointly with his two brothers, the late Hemraj Mulji Bhundia (hereinafter "the Late Hemraj") and the Late Ramesh Mulji Bhundia (hereinafter "the Late Ramesh"), as owners in common each holding one-third (1/3) share. Upon acquisition of the Suit Property by the Applicant and his brothers, the Applicant and the Late Ramesh voluntarily agreed that the Late Hemraj, who was their eldest brother, to have physical custody of the ownership documents of the Suit Property including the title deed. After acquiring the Suit Property and considering the relationship existing then, the co-owners including the Applicant, built two mansionettes owned separately by the Applicant and the Late Hemraj and one flat on top of the two mansionettes owned by the Late Ramesh. Each of the co-owners including the Applicant occupied their respective mansionette separately from the others where they were living with their families peacefully. They, however, jointly used the common areas including the parking area, staircase, water tanks among others. The Applicant is aware that the Late Hemraj deposited the title deed of the Suit Property in a family locker opened at the Bank of Baroda where the title deed was until it was collected by the 1st Defendant after the death of the Late Hemraj. On 8th March, 2003 the Late Hemraj passed on and his estate devolved to his two sons; Kamal Hemraj Bhundia and Ajay Hemraj Bhundia who were confirmed legal administrators of the said estate via a Certificate of Confirmation of Grant issued on 30th November, 2012. The Applicant is reasonably informed that soon after obtaining letters of administration of the Estate of the Late Hemraj, the 1st Defendant (who is the Late Hemraj's eldest son) accessed the safe locker at Bank of Baroda and took away the title deed of the Suit Property without knowledge of the Applicant and that of the Late Ramesh. Ever since the death of the Late Hemraj, the 1st Defendant has been very cagey on the whereabouts of the title deed of the Suit Property prompting the Applicant to report at Central Police Station the title as lost vide OB/70/19/05/2008 and immediately initiated the process of obtaining provisional title. Sometime in 2012, the Applicant was reliably informed that the 1st Defendant had obtained a loan from money-lenders and that he was being pushed to use the title deed of the Suit Property as security of the loan. On 31st July, 2012, soon after being informed of the intended fraudulent sale of the Suit Property to the 3rd Defendant, the Applicant through his wife Mrs. Kiran Rajesh Bhundia applied for a registration of a caveat claiming proprietary interests. The caveat was properly registered by the 4th Defendant. On 19th March, 2018, the Applicant conducted an official search which confirmed that the Applicant's caveat registered on 31st July, 2012 had been unilaterally removed by the 4th Defendant on 26th September, 2012 and replaced with a caveat by the 3rd Defendant who was, and still is; claiming purchaser's interests on the Suit Property. The Applicant protested the actions of the 4th Defendant aforesaid, and on 17th October, 2018, the 4th Defendant reinstated the Applicant's caveat and proceeded to issue him (the Applicant) with a search of the same date which search indicated that both the Applicant's and 3rd Defendant's caveats were registered and in force. Immediately after conducting the search on 17th October, 2018, the parcel file including the duplicate title in the land registry and all records of the Suit Property at the Mombasa Land Registry suspiciously disappeared and have never been traced to date. In October, 2018, the 2nd Defendant, on the instructions of the 1st Defendant, came to the Suit Property and informed the Applicant that he had been instructed to be a caretaker of the entire property. The 2nd Defendant immediately changed locks of the main entrance gate, chased the Applicant's guards, installed CCTV cameras and recruited new guards without consent of the Applicant. On 25th September, 2019, in another attempt to dispossess the Applicant the Suit Property, the 1st and 2nd Defendant colluded with officers from Nyali Police Station to arrest the Applicant's son and charged him at Shanzu Law Courts in Criminal Case No. 1545 of 2019, Republic -vs- Dhruv Bhundia. That ever since the arrest of the Applicant's son, the 1st Respondent using his money, power and political influence and with the assistance of the area jurisdictional police, have intimidated the Applicant and his family forcing them to vacate the Suit Property and rent his maisonette. The Applicant's desire is to live in his maisonette which was specifically built for his family but the actions of the Defendants have made it practically impossible to occupy the Suit Property. The Applicant reasonably believes that the purported sale of the Suit Property to the 3rd Defendant, the disappearance of the ownership records at the Mombasa Land Registry and the subsequent arrest and prosecution of the Applicant's son is a well-choreographed and deliberate scheme to illegally coerce the Applicant out of the suit property and/or to fraudulently extinguish the Applicant's proprietary and legal interests on the suit property. From the foregoing, the Applicant has no efficacious remedy against the Respondents' illegal actions than to approach this Honourable Court for intervention by issuing injunctive orders sought in the Motion. That the Applicant has established a prima facie case with probability of success, to warrant grant of the interim reliefs sought herein. The Applicant and his family are already suffering from hardship and mental anguish, and are likely to be deprived of their interests on the suit property unless the Honourable Court intervenes in the manner sought herein. It is in the interest of justice that this matter be heard expeditiously and without delay and the orders sought granted.

The 2nd and 3rd defendants raised a preliminary objection that the Application dated 20th July, 2020 and suit herein offends the Provisions of Order 2 Rule 15 (1) (a) of the Civil Procedure Rules 2010 as it discloses no reasonable cause of action in Law. That the Application 20th July, 2020 and suit offends the Provisions of Order rule 15 (1) b of the Civil Procedure Rules 2010 as it is scandalous, frivolous and vexatious. The Application dated 20th July, 2020 and the suit herein are an abuse of the Court process. The Court lacks jurisdiction to hear and determine the Application and Suit herein on the issues that are criminal in nature and are already before a Court of competent jurisdiction that is in Criminal Proceedings in Shanzu Law Court Criminal Case No. 1545 of 2019. The Application and Suit herein offend the Provision of Section 82 of the Law of Succession Act Cap 160 Laws of Kenya as the Plaintiff has sued one Administrator of the Estate of Hemraj Mulji Bhundia. The Application and Suit herein offend the Provisions of Section 82 of the Law of Succession Act Cap 26, 30, 33, 61, 62 and 71 (1a) of the Land Registration Act 2012.

The 4th defendant submitted that according to the records in their Custody at the Lands Registry; the Plaintiff herein is the registered owner of 1/3 share of the suit property herein known as subdivision No.2434 Section I Mainland North- CR. 15662. Annexed and marked as Exhibit "JGW-1" is a copy of the Title Deed. That the on 9th August 2012, a Caveat dated 31st July, 2012 by Kiran Rajesh Bhundia claiming licensee interest regarding r/B share-of-Rajshi-Mulji Bhundia was registered. The Caveat is still in place and has not been removed as alleged by the Applicants herein. That the Applicants have not demonstrated anywhere in this matter herein or even produced a letter to the Registrar

confirming that they went to land office and pursued the deed file of the suit property herein and as informed that the same cannot be traced. The Deed file for sub-division No. 2434/I/MN-CR. 15662 is available in the Land Registry and has Deed file for sub-division No. 2434/I/MN-CR. 15662 is available in the Land Registry and has never been lost. The Plaintiff has not contacted the Land Registrar over non-availability of the deed file and therefore has no capacity to claim that the same is not available or lost. That this Application is misconceived, frivolous and an abuse of the court process. The Applicant basically has no claim against the 4th and 5th Respondents therefore they pray that the Claims against them should be dismissed with Cost.

The 2nd defendant submits that the current ownership is that the Plaintiff owns One Third (1/3) Share and the 3rd Defendant owns Two Third (2/3) Share hence it is the majority owner. Annexed is a copy of the Search dated 21st February, 2020 marked as Exhibit No. "ARA-1". That the Shares of each of the owners are known save for the common area including the parking, staircase and water tanks and indeed each of the Shareholders are in use and occupation of their respective maisonettes. That by the Plaintiffs own admission he applied for the Provisional Certificate of Title way back in 2008 yet he makes no mention of the outcome of the said process or whether he is now in possession of the same. That the two Administrators have finished their Administration work when they transferred the Share of Late Hemraj to the rightful beneficiary as per the deceased's Will and Grant of Probate, who has since transferred her Share to the 3rd Defendant. That the 2nd and 3rd Defendants are total strangers to the averments and indeed there is no evidence from the Bank of Baroda to verify the allegations nor has the Deponent disclosed his source of information. That having lived in continuous distress and fear of further attempted harm because the Plaintiff had installed at the Property as a Tenant one of the accomplices and co accused in the Criminal matter, he proceeded to obtain injunctive relief from this Court vide Civil Suit (CMCC ELC NO. 32 of 2020), A copy of the Order dated 2nd April, 2020 is attached herewith marked as Exhibit No. "ARA-4". That the Plaintiff voluntarily moved out of his maisonette and indeed rented it out for rental income/benefit without the 3rd Defendant's consent who is a major Shareholder and indeed the Plaintiff is earning rental income from his Share and indeed his Tenant is not complaining of any specific harassment from the 2nd and 3rd Defendants.

This court has considered the preliminary objection, application and submissions therein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

"..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit"

In the same case, Sir Charles Newbold said:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion".

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

On perusal of the pleadings in this case the plaintiff seeks among other reliefs the ownership of the suit property. On the other hand, the jurisdiction of the ELC Court is limited by **Article 162(2) and (3)** of the Constitution of Kenya and **Section 13(2)** of the ELC Act No. 19 of 2011. **Article 162(2)(b)** states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. The provisions of **Section 13(2)** of the **ELC Act** clearly gives power to ELC to hear and determine disputes relating to *inter alia*, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues. The major issue in the dispute at hand is ownership of the suit land and this court has jurisdiction and I overrule the objection and proceed to determine the application.

The application being one that seeks injunctions, has to be considered within the principles set out in the case of Giella vs Cassman Brown & Co Ltd 1973 E.A 358 and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*
2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. It is based on the grounds that the Plaintiff/Applicant is a co-owner of Plot No. MN/1/2434 (the "suit property") situated in Mombasa Municipality within Mombasa County, having acquired it jointly with his two brothers, the late Hemraj Mulji Bhundia (hereinafter "the Late Hemraj") and the Late Ramesh Mulji Bhundia (hereinafter "the Late Ramesh"), as owners in common each holding one-third (1/3) share. Sometime in 2012, the Applicant was reliably informed that the 1st Defendant had obtained a loan from money-lenders and that he was being pushed to use the title deed of the Suit Property as security of the loan. On 31st July, 2012, soon after being informed of the intended fraudulent sale of the Suit Property to

the 3rd Defendant, the Applicant through his wife Mrs. Kiran Rajesh Bhundia applied for a registration of a caveat claiming proprietary interests. The caveat was properly registered by the 4th Defendant. On 19th March, 2018, the Applicant conducted an official search which confirmed that the Applicant's caveat registered on 31st July, 2012 had been unilaterally removed by the 4th Defendant on 26th September, 2012 and replaced with a caveat by the 3rd Defendant who was, and still is; claiming purchaser's interests on the Suit Property. The Applicant protested the actions of the 4th Defendant aforesaid, and on 17th October, 2018, the 4th Defendant reinstated the Applicant's caveat and proceeded to issue him (the Applicant) with a search of the same date which search indicated that both the Applicant's and 3rd Defendant's caveats were registered and in force. Immediately after conducting the search on 17th October, 2018, the parcel file including the duplicate title in the land registry and all records of the Suit Property at the Mombasa Land Registry suspiciously disappeared and have never been traced to date. In October, 2018, the 2nd Defendant, on the instructions of the 1st Defendant, came to the Suit Property and informed the Applicant that he had been instructed to be a caretaker of the entire property. On 25th September, 2019, in another attempt to dispossess the Applicant the Suit Property, the 1st and 2nd Defendant colluded with officers from Nyali Police Station to arrest the Applicant's son and charged him at Shanzu Law Courts in Criminal Case No. 1545 of 2019, Republic -vs- Dhruv Bhundia. That ever since the arrest of the Applicant's son, the 1st Respondent using his money, power and political influence and with the assistance of the area jurisdictional police, have intimidated the Applicant and his family forcing them to vacate the Suit Property and rent his maisonette.

It is not disputed that the suit property is jointly owned and the applicant shares a 1/3 interest in the same. The 4th defendant submitted that according to the records in their Custody at the Lands registry; the Plaintiff herein is the registered owner of 1/3 share of the suit property herein known as subdivision No.2434 Section I Mainland North- CR. 15662. Annexed and marked as Exhibit "JGW-1" is a copy of the Title Deed. There is a caveat in place and the file is intact and in their custody. The 2nd defendant stated that having lived in continuous distress and fear of further attempted harm because the Plaintiff had installed at the Property as a Tenant one of the accomplices and co accused in the Criminal matter, he proceeded to obtain injunctive relief from this Court vide Civil Suit (CMCC ELC NO. 32 of 2020), A copy of the Order dated 2nd April, 2020 is attached herewith marked as Exhibit No. "ARA-4". I find that the Applicant has not come to this court with clean hands. I find that he is still in possession of his share of the suit premises. Secondly the caveats are still in place and there is no evidence that the file is missing in the lands registry. I find that the applicant has failed to establish a prima facie case and I order that the status quo be maintained pending the hearing and determination of this matter. Costs of this application to be in the cause

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH JANUARY 2022.

N.A. MATHEKA

JUDGE