



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 1030 OF 2013**

**HAJI OMARI(suing for and on behalf of the**

**Estate of Tabu Binti Yusuf also known as**

**Taabu Yusuf Marigi-deceased.....PLAINTIFF/APPLICANT**

**VERSUS**

**EDWARD NJUGUNA KANGETHE.....DEFENDANT/RESPONDENT**

**RULING**

The court vide a ruling delivered on 27<sup>th</sup> March 2014 ordered that HC **ELC 256 of 2012** where the present Defendant is the plaintiff and the plaintiff herein the Defendant be consolidated with the present suit. The court further directed that the consolidated suits henceforth continue with the present suit as the lead file. On 29<sup>th</sup> May 2014 when the consolidated suits came up for directions before me I directed that the plaintiff's application dated 27<sup>th</sup> August 2013 do proceed for hearing and granted the parties liberty to file further pleadings/responses to the application.

The plaintiff's application seeks the following substantive orders:-

1. That this Honourable court be pleased to grant a temporary injunction against the Defendant/Respondent, his servants agents, and or such persons claiming under the Respondent from selling, transferring, sub-dividing's, dealing and or in any other way alienating all the parcel of land known as plot **NO.36/1/133 Eastleigh section 1** pending the hearing and determination of this suit.
2. That this Honourable court be pleased to order that all the monthly income accruing to the Defendant/Respondent from all the land known as plot **NO. 36/1/133 Eastleigh** section 1 be deposited in court or in an account that the court will have a supervisory ability over pending the determination of this suit.
3. That the costs of this application be provided for

The application is founded on the grounds that appear on the face of the application and on the supporting affidavit of **Haji Omar** the plaintiff herein sworn on 27<sup>th</sup> August 2013. The plaintiff who is suing as the personal legal representative and administrator of the estate of **Taabu Binti Yusuf** (deceased) avers that the suit property has been and is still the property of the said **Taabu Binti Yusuf** also known as **Taabu Yusuf Marigi** (deceased). The plaintiff avers that the Defendant illegally and unlawfully caused the plaintiff and his tenants to be forcefully evicted from the suit property after procuring an illegal eviction order using forged and fraudulently obtained documents. The plaintiff has in the supporting affidavit annexed various documents to illustrate his late mother's ownership of the suit property as follows:-

- i. Indenture dated 5<sup>th</sup> October 1951 between **Ahmed Mulla Heptulla and Balwant Singh** registered at the Lands office on 5/10/1951 in Volume N.29 Folio 408/8 file NO. 9416.
- ii. Indenture dated 1<sup>st</sup> October 1969 between **Balwant Singh and Tabu Binti Yusuf** (as purchaser for value of Kshs.58,000/-) registered at the Lands Office on 1/10/1969 in volume N29 Folio 408/9 File NO. 9416.
- iii. Indenture dated 1<sup>st</sup> October 1969 between **Tabu Binti Yusuf** (as borrower of Kshs.21,000/-) and **Satpal Singh Sandhu and Mavinder Kaur Sandhu** (as the lenders) registered at the Lands Office on 1<sup>st</sup> October 1969 in Volume N29 Folio 408/10 file NO. 9416.
- iv. Indenture dated 28<sup>th</sup> April 1971 between **Satpal Singh Sandhu and Manvinder Kaur Sandhu** (as the lenders) and **Tabu Binti Yusuf** (as the borrower) registered at the Lands Office on 28/4/1971 in volume **N.29 Folio 409/11 file NO. 9416**. This was a reconveyance discharging the loan of Kshs.21,000/- advanced to **Tabu Binti Yusuf**.

The above four indentures/conveyances are annexed to the supporting affidavit of **Haji Omar** and collectively marked "HO2" A certificate of search annexed to the supporting affidavit dated 18<sup>th</sup> July 2012 and marked "HO2" indicates the current registered proprietor as **Tabu Binti Yusuf**. The utility bills in respect of electricity and water and property rates demands and the payments annexed and marked "HO13" are in the name of **Tabu Binti Yusuf**. Indeed the annexed rates demands from the City Council of Nairobi are for the year 2009 before the Defendant was registered as owner. The copy of the valuation report dated 30<sup>th</sup> August, 1988 annexed as "HO3" affirms that the said **Tabu Binti Yusuf** was the registered owner of suit property and that the property had been developed. The plaintiff avers that he had contracted **Maflora Agencies** to manage and collect rent from the tenants in the suit premises and has annexed the service contract, payment vouchers and schedule of tenants and the same are collectively marked as "HO4" to illustrate that he was in actual and physical possession before the unlawful eviction by the Defendant.

The plaintiff has contended that the Defendant's ownership documents were fraudulently obtained and that the consequent eviction of the plaintiff and his tenants was unlawful and illegal. The plaintiff avers that the Lands Office has disowned the conveyance dated 6<sup>th</sup> September 2010 made between one **Mohammed Twahir Shaban and Edward Njuguna Kangethe** stating that the same is a forgery and further state the official searches furnished by the Defendant were not issued from the Land Office. The Chief Land Registrar vide a letter dated 27<sup>th</sup> July 2012 annexed to the plaintiff's affidavit and marked "HO10" confirms that the suit property is registered in the name of **Tabu Binti Yusuf** vide the indenture of conveyance dated 1<sup>st</sup> October 1969 from **Balwant Singh s/o Havi Singh** registered in Volume N.29 Folio 408/9. The letter states in part thus:-

**"The conveyance dated 6<sup>th</sup> September 2010 between Mohammed Twahir Shaban and Edward Kangethe is clearly a forgery and does not form part of our records. The searches attached thereto were not issued from this office and the same should be treated with contempt they deserve".**

The plaintiff further deposes that the person described as **Mohammed Twahir Shaban** in the various

documents including the agreement for sale and the conveyance in favour of the Defendant does not exist and/or is a fraudster as inquiries from the National Registration Bureau confirmed the holder of identity card NO.12965436 shown in the conveyance as belonging to **Mohammed Twahir Shaban** is one **JOYCE KADENYI TITO** from Vihiga District. The plaintiff further deposes that upon making inquiry from the KRA to confirm the holder of the KRA PIN shown in the conveyance as belonging to **Mohammed Twahir Shaban** he was advised such a PIN number did not exist in the KRA records.

The plaintiff in the premises avers that the Defendant has no right to be in possession of the suit property and asserts that the suit by the Defendant against the said **Mohammed Twahir Shaban** being **ELC NO. 159 of 2011** was stage managed with the objective of obtaining the illegal and unlawful eviction order which the Defendant eventually used to evict the plaintiff and his tenants from the suit property. The plaintiff upon learning of the existence of the suit applied to be enjoined in the suit and he was so enjoined but before he could take further action in the matter he states the court file went missing and upon applying for the file to be reconstructed he states that when the application for reconstruction came up for hearing on 4<sup>th</sup> June 2013 it was reported that **Mohammed Twahir Shaban** had died by his Advocate though no proof of death was furnished.

The plaintiff further deposes that the Defendant filed **ELC NO. 256 of 2012** against the plaintiff claiming that the plaintiff was a trespasser and sought a permanent injunction and general damages for trespass against the plaintiff but as in the case of **ELC 159 of 2011** the plaintiff deposes that the court file of **ELC NO. 256 of 2012** went missing at the court registry rendering it impractical for the plaintiff to file a defence and counterclaim in the suit and that accounts for the filing of the present suit by the plaintiff which has now been ordered to be consolidated with ELC case NO. 256 of 2012.

The Defendant filed a replying affidavit sworn on 4<sup>th</sup> July 2014 in opposition to the plaintiff's application. The defendant deposes that he is the present registered owner of the suit property and annexes a copy of the certificate of search dated 27<sup>th</sup> April 2012 marked "ENK1" to evidence this fact. The Defendant claims that he purchased the suit property from one **Mohammed Twahir Shaban** for the sum of Kshs.12,000,000/- as per the Agreement of sale dated 20<sup>th</sup> July 2010 which together with the indenture dated 6<sup>th</sup> September 2010 is annexed and marked "ENK2". The Defendant states that he purchased the property after carrying out the relevant search at lands office and confirming the property indeed belonged to the said **Mohammed Twahir Shaban**. A certificate of search dated 15<sup>th</sup> July 2010 affirming the ownership is annexed and marked "ENK3".

The Defendant deposes that the sale of the property to him was on terms that it would be in vacant possession and as the said **Mohammed Twahir Shaban** failed to deliver the suit premises in vacant possession, he sought an order of eviction against the said **Mohammed Twahir Shaban** his servants and agents which the court granted him in terms of the court order issued in **ELC case NO. 159 of 2011** annexed and marked "ENK4". The Defendant states that he obtained a lawful order of eviction which was duly executed and avers that the plaintiff is but a mere trespasser onto the suit property who has no interest in the suit property and cannot therefore be entitled to the orders that he seeks. The Defendant states that following his registration as the lawful owner of the suit property he has developed a rental property thereon and collects rent from the tenants and it is the source of his livelihood. The Defendant denies all the allegations of fraud by the plaintiff and seeks the dismissal of the plaintiff's application.

As directed by the court the parties filed written submissions articulating their respective positions. The plaintiff filed his submissions dated 20<sup>th</sup> August 2014 on 27<sup>th</sup> August 2014 and the Defendant filed his submissions dated 16<sup>th</sup> October 2014 on 21<sup>st</sup> October 2014. The parties have each reiterated the facts as set out in their respective affidavits and have each submitted on the law in regard to grant of temporary injunction. The well trodden conditions for the grant of temporary injunction were enunciated in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** and are as follows:-

- i. An applicant must show a prima facie case with a probability of success.
- ii. An applicant must demonstrate he stands to suffer irreparable harm/damage that cannot be

adequately compensated by an award of damages.

iii. Where the court is in doubt, the application can be decided on consideration of the balance of convenience.

In the present case the plaintiff submits that he has demonstrated a prima facie case with a probability of success against the Defendant having regard to the documents he has tendered in support of ownership of the suit land by his late mother. On the face of it there is clearly ample evidence to show that the plaintiff's mother **Tabu Binti Yusuf** purchased the suit property in 1969 as per the indenture dated 1<sup>st</sup> October 1969 from **Balwant Singh** who had in turn purchased the same from one **Ahamedali Mulla Heptulla** vide the conveyance dated 5<sup>th</sup> October 1951. Ownership of the suit property by **Tabu Binti Yusuf** is further fortified by the fact that she in fact charged the same to **Satpal Singh Sandhu** and **Manvinder Kaur Sandhu** for a loan of Kshs.21,000/- vide the mortgage/conveyance dated 1<sup>st</sup> October 1969 which mortgage/charge was discharged vide the reconveyance dated 28<sup>th</sup> April 1971. The official search by the Registrar of Government Lands dated 18<sup>th</sup> July 2012 further confirms **Tabu Binti Yusuf** to be the registered proprietor of the suit property. The valuation report on the suit property carried out in 1988 shows the plaintiff's mother was the owner of the suit property and this fact coupled with the demonstrated evidence that the utilities such as water, electricity and land rates were all in the name of **Tabu Binti Yusuf** during the period before the purported purchase of the property by the Defendant are clear pointers that the plaintiff's mother had an interest in the suit property and was in possession of the same which fact is further amplified by the fact that the plaintiff had contracted with an agency firm **M/S Maflora Agencies Limited** to manage the premises and collect rent from the tenants on his behalf. There is no evidence that has been tendered to show that the plaintiff's mother at any time disposed of the interest that she acquired in the suit property pursuant to the conveyance of 1<sup>st</sup> October 1969.

On the material presented before the court I am satisfied that the plaintiff has demonstrated a prima facie case such as would require the opposing party to be called upon to offer an explanation or to offer a rebuttal of the same. To that end I am satisfied the plaintiff has met the test of what constitutes a prima facie case as defined in the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125** where the court observed thus:-

**“---a prima facie case in civil applications includes but is not confined to a genuine arguable case. It is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

The Defendant has stated that he is the lawful owner of the suit property having purchased the same and the same having been conveyed to him vide the conveyance dated 6<sup>th</sup> September 2010. The Ministry of Lands has disowned this conveyance and the certificates of official search tendered by the Defendant to support his claim of ownership terming them as forgeries. The National Registration Bureau has also denied that the person described as **Mohammed Twahir Shaban** from whom the Defendant claims to have purchased the property is the holder of National Identity card NO. 12965436. The court has further perused the conveyance dated 6<sup>th</sup> September 2010 and notes that although the conveyance cites the conveyance dated 11<sup>th</sup> August 2004 as the conveyance that conveyed the suit property to the said **Mohammed Twahir Shaban** it does not indicate from whom **Mohammed Twahir Shaban** bought property and no copy of this conveyance has been exhibited. The said conveyance is also contradictory in terms when the penultimate last paragraph is considered. The conveyance states:-

**“Now THIS INDENTURE witnesseth that in consideration of sum of shillings Twelve Million (Kshs.12,000,000/-) paid to the Transferor by the Transferer, receipt of which sum is acknowledged, the Transferor conveys into the Transferee ALL THAT interest comprised in the premises which interest is a portion of land contained and conveyed by the recited indenture of conveyance of the first day of October one Thousand Nine Hundred and sixty Nine TOGETHER with all the buildings and other improvements standing or being thereon TO HOLD with the transferor, for an estate in fee simple SUBJECT HOWEVER to the provisions of the Government**

**Lands Act (Chapter 280) and of the rules for the time being in force there under” (emphasis mine).**

This conveyance raises issues as to what interest was actually transferred to the Defendant if it was a portion of the land conveyed by the conveyance of 1<sup>st</sup> October 1969. The conveyance recited in the preamble was one dated 11<sup>th</sup> August 2004 and not the one of 1<sup>st</sup> October 1969 which had conveyed the suit property to the plaintiff’s mother. Thus in my view the ownership of the Defendant of the suit property is put to question and needs to be explained at the trial.

Having come to the determination that the plaintiff has demonstrated a prima facie case with a probability of success I need to determine whether the plaintiff would suffer damages that would not be compensatable in damages. The plaintiff states that his mother has owned this property since 1969 when she purchased the same and had effected developments and had tenants in the premises who were paying him over Kshs.95,000/- per month. In the plaint the plaintiff has sought orders for the eviction of the Defendant and for compensation of lost income at the rate of Kshs.95,600/- per month from September 2011 up to the time the Defendant vacates. Quite evidently therefore the lost income and/or mesne profits can be ascertained as at the trial. However land is a unique commodity and as in the present case the plaintiff’s family have claimed to have occupied the suit land for over 40 years since purchasing the same before they were evicted by the Defendant. The plaintiff in my view cannot be adequately compensated in damages for the loss of the land if indeed the court finds in his favour after the trial. It would not be right or proper for any person to forcefully invade another’s property eject them and argue that the person who may indeed turn out to have been unlawfully ejected or evicted cannot be granted an injunction since he/she can be compensated by an award of damages. A person has a right to choose where to invest and own property and having made that choice such a person ought not to be pushed aside by other persons who may be well endowed and therefore in a position to pay damages. The court’s ought not to be used to promote and/or encourage impunity and every citizen should always feel that they can seek refuge in the courts of law and have their rights protected.

In the circumstances of this case I am persuaded that the parties should and ought to maintain the obtaining status quo where no party should sell and/or alienate the suit property and consequently the plaintiff’s prayer for injunction in terms of prayer (4) of the Notice of Motion is well deserved and I grant the same.

As regards the plaintiff’s prayer to have the monthly rental income deposited in court it is my view that the court lacks the machinery to exercise the supervisory authority as requested by the plaintiff. No schedule of tenants and/or the amounts that they pay has been furnished to the court. The plaintiff acknowledges that all his tenants were evicted and his houses demolished by the Defendant who has instead put up his own structures which he rents out. I have elsewhere observed that the plaintiff if he is successful at the trial can be adequately compensated by way of damages as the loss of income can be quantified. I thus decline to grant prayer (5) of the Notice of Motion.

The upshot is that I grant prayer (4) of the plaintiffs Notice of Motion dated 27<sup>th</sup> August 2013 to the plaintiff and award the costs of the application to the plaintiff. Having regard to the nature of this case I am of the view that the ends of justice would be better served if the hearing and determination of the suit is accelerated and expedited and in that regard I further order and direct that the parties complete compliance with the provisions of Order 11 of the Civil Procedure rules within the next 60 days from the date of this ruling and the matter be and is hereby fixed for a pre trial conference on 30<sup>th</sup> March 2015 for pre trial directions.

Orders accordingly.

Ruling dated signed and delivered this.....22<sup>nd</sup> ...day of...**January**.....2015.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

...Nzioka..... For the Plaintiff

.....N/A..... For the Defendant