



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 76 OF 2013**

**ZUBEDA SAID ABDALLA ..... PLAINTIFF**

**=VERSUS=**

**MASOUD MOHAMED SHEE (Alias)**

**MOHAMED SUDI SHEIKH ..... DEFENDANTS**

**JUDGEMENT**

[1] The Plaintiff filed this suit against the Defendants and prayed for injunctive orders against the Defendants, his employees, servants agents and or assigns from interfering with the Plaintiff's property Plot No. 341/Section 1/MN situated at Utange. He also prayed for a mandatory injunction compelling the Defendant to demolish, pull down the structures, houses and fixtures erected on the suit property and to give vacant possession on the suit property. He asked for General Damages for trespass to land and costs of the suit. The Defendant filed his defence but alleged fraud on the part of the Plaintiff in securing registration alleging that no consideration was paid and that the registration documents were falsified. He filed a counterclaim claiming that the transfer of 5/8 share of plot No. 341/Section I Mainland North was illegally and fraudulently obtained and null and void. He sought for a declaration that he is the rightful registered owner of 5/8 share of the said land and costs of the counterclaim. The Plaintiff herein had filed a Notice of Motion dated 26<sup>th</sup> April 2013 praying for injunctive orders similar to those in the plaint. He served the Respondent who filed his replying affidavit in court on 11<sup>th</sup> June 2013. The replying affidavit is undated and contained several annexures. I dismissed that application on 18<sup>th</sup> June 2013 when counsels were unable to prosecute the same.

[2] The history of this case is that the advocates in the firm of M/s Abuodha for the Plaintiff and the firm of Aboubarkar Mwanakitina never appeared in court. Each and every time a different advocate held their brief for this or that reason. On 30<sup>th</sup> April 2013 Mr. Kabebe advocate appeared for Miss Abhuodha on 13<sup>th</sup> May 2013 Miss Mbatia Advocate appeared for Miss Abuodha on 29<sup>th</sup> May 2013 Miss Njuguna advocate appeared for Miss Abuodha while Mr. Hamza advocate appeared for Mr. Abubakar. On 18<sup>th</sup> June 2013 Mr. Munyao appeared for M/s Mwanakitina while Miss Ochola advocate appeared for Ms Abuodha on 18<sup>th</sup> July 2013 Mr. Wachira advocate appeared for Ms Abuodha while Abubakar Mwanakitina & Company advocates did not appear at all.

[3] On 17<sup>th</sup> September 2013 Miss Anyumba advocate conducted the case for Miss Abuodha while M/s Abubarkar Mwanakitina & Company never appeared though served. The Plaintiff gave evidence and case was closed and judgement was set for delivery on 18<sup>th</sup> November 2013. While the file was pending in my chambers for judgement, Mr. Abubarkar then appeared in my chambers with Mr. Odiaga advocate holding brief for Ms Abuodha. He said that he had filed an application that was urgent. The file could not be traced (obviously because it was pending for judgement). He said that parties were discussing and there was a probability of filing a consent and that in the meantime M/s Abuodha could have leave to file her reply to that application. This application by Abubarkar Mwanakitina & Company for the Defendant was filed on 20<sup>th</sup> September 2013. Court receipt of the same is No. 2763022. It was issued on 20<sup>th</sup>

September 2013 for Ksh.595. The existence of this application which was filed after the case was closed and pending for judgement was not brought to the courts attention until 30<sup>th</sup> October 2013.

[4] It would appear the registry having received the application aforesaid, were unable to file the same as the suit file was in my chambers for the pending judgement. That is why Mr. Abubarkar came to address the court with Mr. Odiaga for Miss Abuodha on 30<sup>th</sup> September 2013. This application has not been served on Miss Abuodha to the best of my knowledge. She has not filed any papers in regard to its contents. It was filed without leave of the court. The application is an abuse of the process of the court. The same is struck out. The Plaintiff gave her evidence in court and closed her case. She produced her ownership documents of the suit property. She was able to explain how she bought the first five acres and two acres from one Abdul-Aziz and two acres from one Shaban all totalling to 9 acres. She produced the title documents the Search Certificate. She also produced receipts showing the payment of rates. She showed the court through photographs the house constructed by the Defendant and that the house was built in 2011. She told the court that she needed the house to be removed from her land. Her evidence was neither challenged nor controverted.

[5] The Defendant was served. Neither he nor his advocate attended the court on the day fixed for hearing. She was candid and convinced the court of her ownership of the property. I allow her prayers as prayed in the plaint in terms of prayers (a) (b) and (d) therein. The Plaintiff was however unable to prove any damages for trespass to land by the Defendants and I will not award any in that regard. The Defendant's counterclaim is dismissed with costs to the Plaintiff.

It is so ordered.

**Dated and Delivered in Mombasa this 21st day of February, 2014.**

**S.N. MUKUNYA**

**JUDGE**

**21.2.2014**

In the presence of:

Mr. Wafula Advocate, Ms. Abuodha Advocate for Plaintiff

Abubakar Mwanakitian for the defendant.