



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 221 OF 2021

MWANAMAKA AMANI MABRUKI

MEULEDI KITONGO MABRUKI ISEME.....PLAINTIFFS/APPLICANTS

VERSUS

ISAIAH MASABA NICHOLAS

ABUBAKAR NOOR HABIB

LAND REGISTRAR, MOMBASA.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 1st November 2021 and is brought under Order 40 Rules 1, 2, 3 and 4 Order 51 Rule 1, Sections 1A, 1B, 3, 3A, 63 (c) and (e) of the Civil Procedure Rules and Act, Section 13 of the Land and Environment Act, 2012, Article 159 (2) of the Constitution of Kenya 2010 seeking the following orders;

1. That this application be certified as urgent, the same be heard ex-parte and service thereof be dispensed with in the first instance.
2. That pending the hearing and disposal of this the Defendants application, by themselves, their servants and or agents or otherwise howsoever be restrained by a temporary injunction from charging, or in any way leasing, selling, transferring whatsoever and howsoever dealing with the parcels of land known as MOMBASA/BLOCK XII/104, KWALE/DIANI/377, KILIFI/MTWAPA/92 and PLOT NO. 11/36.
3. That pending the hearing and disposal of this suit, the Defendants by themselves, their servants and or agents or otherwise howsoever be restrained by a temporary injunction from charging, leasing, selling, transferring or in any other way or manner whatsoever and howsoever interfering with the parcels of land known as MOMBASA/BLOCK XII/104, KWALE/DIANI/377, KILIFI/MTWAPA/92 and PLOT NO. 11/36.
4. That costs of this application be provided for.

It is based on the grounds that the Parcels of land known as Mombasa/BlockXII/104, Kwale/Diani/377, Kilifi/Mtwapa/92 and PLOTNO.11/36 are part and parcel of the Estate of Hannah John Werikhe (Deceased). That in Mombasa High Court Succession Cause No. 257 of the Plaintiffs were appointed 2007, the Administrators of the Estate of Hannah John Werikhe. That on or about 20th August 2009 the Plaintiffs were issued with the Certificate of Confirmation of a Grant. That the 1st Defendant has fraudulently obtained Letters of Administration to the Estate of Hannah John Werikhe (Deceased) in Mombasa Chief Magistrates P & A Cause No. 452 "b" of 2019. That the 1st Defendant has fraudulently sold and transferred to the Second Defendant the parcel of land known as Mombasa/Block XII/104. That there is real danger that the 2nd Defendant, if not restrained by this Honourable Court, may sale the land and or dispose the same thereby causing irreparable loss and damage. That the 1st Defendant is holding fraudulent letters of administration and may dispose assets and land owned by the Estate unless he is restrained by this Honourable Court. That the Defendants are in fact fraudsters and it is in the interest of justice that the orders sought herein be granted.

The 1st Defendant/Respondent stated that he is a grandson of Hannah John Werikhe (deceased) whose children include the Plaintiffs herein and his father Nicholas Andrew Werikhe (deceased). (Annexed hereto and marked IMN-1 is a copy of his Birth Certificate). That his father Nicholas Andrew Werikhe (deceased) was the first biological child of Hannah John Werikhe (deceased) who died intestate in the Year 1995. That property known as Mombasa/Block XII/104, Kwale/Diani/377, Kilifi/Mtwapa/92 and Plot No. 11/36 have been part of the assets of the estate of Hannah John Werikhe (deceased) as shown in the annexures marked MAM-1, MAM-2 and MAMS of the Supporting Affidavit of Mwanamaka Amani Mabruki. That before their demise, Hannah John Werikhe and Nicholas Andrew Werikhe were proprietors in common in equal shares of Mombasa/Block XII/104 the subject matter of the suit herein. (marked IMN-2 is a copy of the Land Certificate

of Mombasa/Block XII/104). That he learnt of the Plaintiffs' Mombasa High Court Succession Cause No. 257 of 2007 seeking the Grant of representation of the estate of Hannah John Werikhe (deceased) when he was served with the Summons to Enter Appearance and the pleadings in the suit herein. That the Plaintiffs concealed material fact to the Court when they filed Mombasa High Court Succession Cause No. 257 of 2007 by failing to disclose that Hannah John Werikhe (deceased) had a son Nicholas Andrew Werikhe who is his deceased father and as such, they cannot allege to be the sole heirs and beneficiaries of the estate of Hannah John Werikhe (deceased) in equal shares. That he followed procedure in obtaining Letters of Administration to the estate of Hannah John Werikhe (deceased) in Mombasa Chief Magistrates Probate and Administration Cause No. 452 S'B" of 2019 and notified the public vide a Gazette Notice Number 12021 dated 20th December 2019. That he also obtained the Letters of Administration to the estate of Nicholas Andrew Werikhe (deceased) vide Mombasa Chief Magistrates Probate and Administration Cause No. 453 "B" of 2019 and notified the public vide a Gazette Notice Number 12021 dated 20.12.2019. That annexed hereto and marked IMN-3 is the Gazette Notice dated 20.12.2019. That the Plaintiffs knowing that they had fraudulently obtained another grant to the estate of Hannah John Werikhe (deceased) through concealment of material facts, failed to object to the Court granting him the Letters of Administration to the said estate. That having lawfully obtained the grant of letters of administration to the estates of Hannah John Werikhe (deceased) and Nicholas Andrew Werikhe (deceased) and the same being confirmed, he duly disposed of Mombasa/Block XII/104 to Abubakar Noor Habib the 2nd Defendant herein who is now the owner. That annexed hereto and marked IMN-4 are copies of the grants and certificates of confirmation of the estates of Hannah John Werikhe (deceased) and Nicholas Andrew Werikhe (deceased). That Abubakar Noor Habib the 2nd Defendant herein legally owns Mombasa/Block XII/104 and being the registered proprietor thereof, cannot be restrained from using his property. That since the demise of Hannah John Werikhe in the Year 1995, his father Nicholas Andrew Werikhe (deceased) had been peacefully using Mombasa/Block XII/104 until his demise in 2000 and since then to 2019, the said property had been vacant and was physically deteriorating when he decided to follow due process in disposing it off to the 2nd Defendant. All this time (1995-2019), the Plaintiffs laid no claim on Mombasa/Block XII/104. That in the year 2009 when the Plaintiffs sold Hannah John Werikhe's house in Sparki Area, they excluded him from the said transaction, knowing very well that he was entitled to part of his grandmother's share as the son of Nicholas John Werikhe, Hannah John Werikhe's deceased son. That the Plaintiffs have come to this Honourable Court with unclean hands seeking an injunction against himself while aware that they concealed a material fact to the Court during Mombasa High Court Succession Cause No. 257 of 2007 by failing to disclose that Hannah John Werikhe (deceased) had a son Nicholas Andrew Werikhe who is his deceased father and as such, they cannot be the sole heirs and beneficiaries of the estate of Hannah John Werikhe (deceased) in equal shares. The 2nd Defendant/Respondent states that he is an innocent purchaser for value.

This court has considered the application and submissions therein. 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. The applicants submitted that the Parcels of land known as Mombasa/BlockXII/104, Kwale/Diani/377, Kilifi/Mtwapa/92 and PLOTNO.11/36 are part and parcel of the Estate of Hannah John Werikhe (Deceased). That in Mombasa High Court Succession Cause No. 257 of the Plaintiffs were appointed 2007, the Administrators of the Estate of Hannah John Werikhe. That on or about 20th August 2009 the Plaintiffs were issued with the Certificate of Confirmation of a Grant. That the 1st Defendant has fraudulently obtained Letters of Administration to the Estate of Hannah John Werikhe (Deceased) in Mombasa Chief Magistrates P & A Cause No. 452 "b" of 2019. That the 1st Defendant has fraudulently sold and transferred to the 2nd Defendant the parcel of land known as Mombasa/Block XII/104. The 1st Defendant/Respondent stated that he is a grandson of Hannah John Werikhe (deceased) whose children include the Plaintiffs herein and his father Nicholas Andrew Werikhe (deceased). The 2nd Defendant/Respondent states that he is an innocent purchaser for value. I find that the applicants have established a prima facie case. I find that there are still administrators of the estate of the deceased Hannah John Werikhe. I find this application is merited and order that status quo be maintained pending the hearing and determination of this matter. Cost to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE