



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC NO. 812 OF 2012**

**MIMOSA INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**TOM ONYANGO.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff by a plaint dated on 31st October, 2012 and filed in court on 8<sup>th</sup> November, 2012 sought judgment against the Defendant inter alia for vacant possession of the suit premises, mesne profits and general damages for trespass and nuisance. On 19<sup>th</sup> November, 2012 the plaintiff filed a Notice of Motion application expressed to be made pursuant to Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law. The plaintiff's application inter alia under prayers 3, 5, 7 and 8 sought the following orders:-

3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue injunctive orders restraining the respondent whether by himself, his servants, agents or howsoever from destroying the suit property; pulling up temporary structures on trees on the suit property, or abusing and/or wasting the suit property in any way whatsoever.

5. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue mandatory orders compelling the respondent whether by himself his agents, servants or howsoever otherwise to remove all structures they have illegally erected on the suit property and do all necessary repairs to return the suit property to the position it was in before the y embarked on its abuse and/or waste.

7. That pending the determination of this suit, the Honourable court be pleased to issue mandatory orders compelling the respondent, his agents, servants or whosoever otherwise in illegal occupation of the suit property to immediately vacate the suit property and with the help of the court bailiff to put the plaintiff in possession.

8. That the Honourable court be pleased to issue an order directing the OCS Kabete Police station and/or

under his direction to give assistance to the Court Bailiff in enforcing the order in prayer No. 6 and/or 7 above.

The plaintiffs application is premised on the grounds set out on the face of the applications thus:

1. That the applicants re the proprietors of all the suit property who purchased the said land sometime in the year 1989.
2. That on or about November, 1990 the applicant granted a revocatable license to one Ashok Sood (hereinafter referred to as the licensee) to occupy the land and the dwelling house erected there on terms that the license may be revoked anytime thus licensee had no proprietary interests in the suit property but was a mere beneficiary of the plaintiff's goodwill.
3. That the licensee illegally and without a colour of right licensed the respondent to live with him on the said premises where the said respondent occupied the servants quarter of the main house.
4. That on or about the 14<sup>th</sup> September, 2011 the licensee passed away whereupon the plaintiff discovered that the respondent was occupying the suit property.
5. That since the discovery of the respondent on the suit property after the death of the licensee the plaintiff has tried on diverse occasions to peacefully eject the respondent from the said property but the respondent has vehemently opposed his ejection to the point of issuing threats of violence on anyone who tries to eject him from the property.
6. That the respondent had been adamant in harassing the legitimate tenants of the plaintiff by locking them outside the premises, verbally abusing them together with their guests and threatening them that in the event they do not move out of the main house of the suit premises there shall be dire consequences.
7. That the respondent has now ejected all legitimate tenants form the Applicants premises and has now embarked on a wanton destruction of the premises which he has done by cutting down trees without the permission of the Applicants or permission from National Environmental Management Authority Contrary to law.
8. That in all aspects the respondents remains a trespasser as defined by section 5 of the Trespass Act as he has gained access to the applicants land without his permission with intent to annoy and inconvenience the applicant.

The applicants application is supported by the annexed affidavit by Anil Mandal a director of the applicant sown on 19<sup>th</sup> November, 2012, a supplementary affidavit sworn on 6<sup>th</sup> March, 2013 a further supplementary affidavit sworn on 12<sup>th</sup> April, 2013 and a further supplementary affidavit sworn on 14<sup>th</sup> June, 2013. The applicant additionally filed written submissions in support of the application on 23<sup>rd</sup> April, 2013.

For his part the defendant/respondent filed a replying affidavit sworn on 9<sup>th</sup> January, 2013 and a further affidavit dated 3<sup>rd</sup> June, 2013. The Defendant/respondent filed his written submissions on 22<sup>nd</sup> May, 2013 and the parties appeared before me 19<sup>th</sup> June, 2013 when they highlighted their filed submissions. The defendant's notice of motion application dated 8<sup>th</sup> May, 2013 that sought virtually sought similar orders to those sought in the plaintiff's application albeit now in favour of the Defendant was not pursued and hence the determination of the plaintiff's application will equally dispose of this application.

The brief facts of this matter are that the plaintiff claims to have purchased the suit premises being L.R. No.1870/V/63 in 1989 from Nation Wide Finance Company Limited in 1989 for the consideration of Kshs. 1,500,000/= and a conveyance/indenture dated 23<sup>rd</sup> February, 1989 annexed to Anil Mandal's supporting affidavit marked 'AM-3' conveyed the property to the plaintiff and was registered in the government lands Registry in Nairobi in Volume No. 36 Folio 128/21 Rile 11436. That as the lease was due to expire in 2003/2004 the plaintiff/applicant applied for extension /renewal of the lease from the commissioner of lands that was duly granted and the title converted into a registration under the Registration Titles Act and a grant issued in favour of the applicant and a copy of the grant dated 1<sup>st</sup> November, 2006 in favour of the plaintiff for a term of 50 years from 1<sup>st</sup> March, 2004 registered as I.R 104581/1 and a copy thereof is annexed to the plaintiff's supporting affidavit and marked 'AM-4'. The

plaintiff has been paying outgoings on the suit property in form of rates to the City council of Nairobi.

The plaintiff avers that one of the plaintiffs directors gratuitously allowed his brother one Ashok Sood to occupy the land and dwelling house as a licensee and that he said Ashok Sood in turn allowed the respondent to come and live with him on the property as a servant. The said Ashok Sood passed away on 14<sup>th</sup> September, 2011 and thereafter the plaintiff requested the Defendant to vacate and yield possession of the suit premises. The defendant has refused to vacate and yield vacant possession of the suit premises claiming that the said Ashok Sood had intended to gift the suit premises to him and he therefore is entitled to the suit premises as a beneficiary. The plaintiff claims that the defendant has harassed and threatened the plaintiff's tenants who have all vacated the premises and the defendant has placed goons on the property with the object of ensuring the plaintiff though it's duly appointed representatives do not access the property.

The defendant in his replying affidavit claims to have lived with the deceased Ashok Kumar Sood for 33 years and that the said Ashok Kumar Sood was the registered proprietor of the suit property. That owing to the deceased failing health and frequent attacks by thugs the defendant states that Mr. Sood's business partner Mr. Anil Mandal and one Mr. Singh suggested that Mr. Sod moves to a small apartment in Westlands where it was more secure and so that the main house could be rented out to supplement the rising medical bills. The property was rented to Kinganjo Property Development Limited in or about May 2011. The defendant claims that Mr. Sood left him with the title of the suit property when he went for treatment in India (see paragraph 12 replying affidavit) and told him he would consider transferring to the property to him as a gift in gratitude for all the kindness the defendant had accorded him. Under paragraph 14 of the replying affidavit the defendant states that Mr. Sood died before he had the opportunity to transfer the title which he had given to him. A copy of the alleged title is annexed and marked as "TO-1".

The plaintiff/applicant following receipt of the defendants replying affidavit sought to have the copy of the alleged title produced by the defendant authenticated and it is the plaintiff's contention that the said title alleged to be in the name of Ashok Kumar Asood over the same property is a forgery. The assistant Commissioner of Lands R. N. Mule vide a letter dated 13<sup>th</sup> February, 2013 addressed to the plaintiff wrote as follows:

**RE: OWNERSHIP OF PROPERTY L.R. No. 1870/V/63-IR 104581**

**In reference to your letter, dated 30<sup>th</sup> January, 2013, please be informed that the attached copy of IR104581 in respect of the above property bearing the name of ASHOK KUMAR ASOOD is a forger. The said title did not originate from this office.**

**Signed**

**R. N. MULE**

**ASSISTANT COMMISSIONER OF LANDS (R)**

On 23<sup>rd</sup> January, 2013 the same R. N. Mule writing on behalf of the Chief Land Registrar and responding to the plaintiffs letter on 10<sup>th</sup> December, 2012 in the second paragraph stated thus:-

***"Kindly note that our records indicate that the registered proprietor of L.R. No. 1870/V/63 registered as I.R 104581 is Mimosa Investments Limited".***

The defendant by a further affidavit sworn on 19<sup>th</sup> March, 2013 annexed a certificate of search said to have been applied for by Ashok Kumar Asood on 12<sup>th</sup> March, 2013. The certificate of search was stated to have been issued on 14<sup>th</sup> March, 2013 and signed by B. F. Atieno Registrar of Titles. The plaintiff by a further supplementary affidavit sworn on 14<sup>th</sup> June, 2013 responded to the defendants further affidavit

sworn on 3<sup>rd</sup> June, 2013 where the defendant claimed that the Chief Land Registrar had confirmed the registration of Ashok Kumar Sood in regard to the suit property and that the Registrar of companies had confirmed that Nationwide Finance Co. Ltd was not on the records held in their database. The plaintiff states that this matter has been referred to the CID forensic experts who have after examination of the documents the title and the official search produced by the Defendant have come to the conclusion that the same are forgeries tendered with the intention of misleading the court.

Mr. Fredrick Lubullelaha Land Registrar who is indicated as having registered the title held by the defendant has made a statement annexed and marked as 'AM2' in the plaintiff supplementary affidavit where he states:-

***"I would wish to state that today the 22<sup>nd</sup> day of January, 2013 I have been shown a copy of grant IR104581 land reference No. 1870/V/63 registered in the name of MIMOSA INVESTMENTS LIMITED by a police officer from CID Headquarters. I would wish to confirm that I have checked from our records and confirmed that I am the one who registered the said grant and I also confirm that he said documents bears my signature.***

***I have also been shown another grant (a copy) bearing the same IR number 104581 and Land Reference Number 1870/V/63 but purportedly registered in the name of Ashok Kumar Asood. Upon checking the signature thereon it is an imitation of my signature and rubber stamp. I categorically state that he signature on this grant is not mine according to me it is a clear forgery".***

Betty Atieno, a registrar of titles Ministry of Lands on 21<sup>st</sup> March, 2013 made a Statment to the CID annexed as 'AM-3' in the supplementary affidavit by the plaintiff and states inter alia thus:-

***"That on 21<sup>st</sup> March, 2013 I have been shown a copy of title IR104581 L.R. No. 1870/V/63 by officers from the criminal investigations department, land fraud.***

***The said copy of title in names of ASHOK KUMAR ASOOD is a forgery and does not form part of our records.***

***I wish to state that the title number IR 104581 .R. no.1870/V/63 is registered in the name of MIMOSA INVESTMENT LIMITED. A certified copy of the title is herewith attached. I further wish to state that the signature appearing on the forged copy of title in name ASHOK KUMAR ASOOD are not mine and is a forgery. I also wish to state that he stamp impression and signatures on the search are not mine".***

Mr. J. W. Kamuyu a Registrar of Titles vide his statement made on the CID on 21<sup>st</sup> March, 2013 marked 'AM5' states as follows:

***"On 22<sup>nd</sup> January, 2013, I retrieved the property's relevant parcel file and confirmed that vide an indenture (transfer) dated 23<sup>rd</sup> February, 1989 MIMOSA INVESTMENT LIMITED had purchased the property from NATIONWIDE FINANCE COMPANY LTD for Kshs. 1,500,000/=. I further established that upon expiry of the lease term of 99 years (from 1904) MIMOSA INVESTMENT LTD applied for its renewal and thereafter. Title No. IR 104581 was issued in their name".*** By a further statement to the CID the said officer reacted to the letter dated 16<sup>th</sup> May, 2013 marked as TO2 in the defendant's further affidavit thus:-

***"I have read the said letter which indicates that I have confirmed that records held in the Lands office show one ASHOK MUAR SOOD to be the owner of Land Parcel IR104581 and that there is no contradiction of the same. Having read the said letter, I wish to state that:-***

***"It is a forgery and I did not write it, sanction its writing (authorship) or even signed it. My signature on the said document is a forgery".***

The forgoing is the scenario where the plaintiff asserts they are the lawful and legal owners of the suit property and that the defendant is but a trespasser who was let into the property by a licensee, ASHOK KUMAR SOOD who apparently was related to and had business relationship with the directors of the plaintiff. Following the demise of the licensee the plaintiff's attempts to take possession were resisted by the defendant. The defendant has set up a title and claims the late ASHOK KUMAR ASOOD was the registered owner of the suit property and that before his death he had intended to gift the land to the defendant and on that account the defendant contests the plaintiff's right to the property.

On account of the plaintiff there is clear evidence as to how they came to own the property going back to the purchase of the property from Nationwide Finance Company Ltd in 1989. There is an indenture evidencing this transaction dated 23<sup>rd</sup> February, 1989 which is duly registered. There is ample evidence that the plaintiff applied for the extension/renewal of the lease MR. Ramesh Sharma Advocate acted for the plaintiff in the lease extension and has sworn an affidavit dated 10<sup>th</sup> April, 2013 verifying what he did. Equally Mr. N. P. Sheth Advocate acted for the plaintiff in 1989 when the plaintiff purchased the suit property from Nationwide Finance Company Limited and has sworn an affidavit dated 10<sup>th</sup> April, 2013 and confirms that he handed over the indenture to the property on completion of the transaction.

The defendant for his part has merely produced a copy of the title in the name of ASHOK KUMAR ASOOD and has not adduced any evidence to show how the property got to be registered in the said deceased name. The alleged title in the name of ASHOK KUMAR ASOOD has been declared and the land Registrar Mr. Lubulellah who is said to have registered it has disowned the title and declared that the same was not signed by him. Equally he Registrar B. F. Atieno who it is stated issued a search certificate has denied signing the official search issued on 14<sup>th</sup> March, 2013 stating that her signature on the search has been forged.

I have carefully evaluated all the material placed before me including the affidavits and annexures tendered by the parties and the submissions made on behalf of the parties and I have come to the conclusion that indeed the plaintiff is the true registered owner of the suit property and that the defendant has not established that the title he has tendered of the suit property in the name of SHOK Kumar Asood is genuine I have also come to the conclusion that the defendant has not demonstrated that he has any proprietary interest in the suit property capable of being protected under the law. At best it is my view that the defendant was occupying the suit property as a licensee of the deceased. I have accepted the evidence that the deceased, ASHOK Kumar Sood was in occupation of the suit property as a licensee of the plaintiff and the license ceased upon his demise and the defendant's license though the deceased likewise ceased with the death of the deceased. The defendant in the premises was obliged to vacate the suit premises upon demand by the owner for him to do so. The defendant's continued occupation of the suit premises is this as a trespasser.

Having held that the plaintiff is the rightful owner of the suit premises it is my view that the plaintiff has an indefeasible title pursuant to the provisions of Section 25 and 26 of the Land Registration Act No. 3 of 2012. Such a title can only be defeated/Challenged under section 26 on the ground of fraud or misrepresentation to which the registered owner is proved to be a party or if it is shown the title has been acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff in my view has shown how they acquired the title through purchase and no fraud has been alleged. I am persuaded that the defendant has on his part determined to use unscrupulous means to wrangle the property out of its true owners but the scheme has been laid bare by the Ministry of Lands Officers who have affirmed the property belongs to the plaintiff.

The defendant was never the registered proprietor of the suit property and the defendant's alleged claim through the deceased Ashok Kumar Asood cannot be sustained as the claim is not against the deceased estate and neither has the defendant shown that he has a contract as against the plaintiff or the deceased which he can enforce. Section 38(1) of the Land Act No. 2012 provides:-

38(1) No suit shall be brought upon a contract for the disposition of an interest in land unless:-

- a. The contract upon which the suit is founded:-

- i. Is in writing
  - ii. Is signed by all the parties thereto and
- b. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

I do not appreciate how the defendant can sustain this action unless he is claiming pursuant to a contract and/or by virtue of being a beneficiary and in that case he would need to have taken out letters of administration to the deceased estate. My view is that the defendant cannot have in answer to the plaintiff's claim whereas the plaintiff's prayer under the Notice of Motion are in the nature of mandatory injunctions I am inclined to grant the orders sought as I am satisfied that the plaintiff is indeed the true and lawful owner of the suit premises and that the plaintiff's case is plain and clear. The defendant cannot demonstrate his right to entitlement of the suit property. Prima facie the plaintiff has shown they are the registered owners of the suit property a position that has been fortified by Ministry of Lands Officers who are charged with maintaining the Land records. I am not satisfied that any purposes will be served by delaying the determination of the issues to any later state as suggested by the defendant. The plaintiff referred me to the case of LIBERTY CONSTRUCTION LTD VS. CENTENARY BANK LTD [2011] 1EA 260 where the High Court in Uganda held that:-

***“A mandatory injunction can be granted even if it resolves the main prayer in the suit. Where the right of the applicant that needs to be protected is obvious and the respondent has no possible defence to it a mandatory injunction has been granted. The question to decide is whether there is a possible defence to the application to release the excavator to the applicant”.***

I have held in this matter that the paper trail as to how the plaintiff acquired the suit property is unimpeachable and the issuance of the title in favour of the plaintiff under the registration of Titles Act Cap 281 laws of Kenya (now) repealed in 2006 is well supported. The same cannot be said in respect the alleged title to the deceased which the evidence irrespectively points to the same having been forged. I approve of the principle in liberty construction case (supra) and find the same applicable in the circumstances of this case.

I accordingly find and hold that the plaintiffs Notice of Motion dated 19<sup>th</sup> November, 2012 has merit and I hereby grant prayers 3, 5, 7 and 8 of the Notice of Motion and I award the costs of the application to the plaintiff.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... **for the Plaintiffs**

..... **for the Defendant**