



**MOMBASA AUTOCARE LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**1. JUMA KAPANGA**

**2. SHARIFF KAPANGA**

**3. NDAHIE NDAZE**

**4. MZEE MWANGOMBE**

**5. LOMOLO WANJE**

**6. NZAI KAZUNGU MBUZI**

**7. MAJANI NAJABU**

**8. MZEE MUDARIS.....DEFENDANTS**

**R U L I N G**

1.Mombasa Autocare, the plaintiff herein by the application filed on 16-2-2009 seeks in the second prayer:

“THAT a temporary injunction be issued against the defendants, restraining the defendants by themselves, their agents and or servants or anybody else working under their authority and or instructions from trespassing and or interfering and or destroying, obstructing and or restricting and or intermeddling in any manner whatsoever with the applicants, his servants and or employees and or denying the applicant access onto the applicant’s plot portion No. 123/Mtangani within the Malindi Municipality pending the hearing of this suit” (sic).

2. The application is premised on three grounds as expanded in the supporting affidavit;

(a)That the plaintiffs are the legal owners of the suit property pursuant to an indenture dated 29-9-08, having paid USD 300,000 as purchase price.

(b)That the defendants trespassed on the suit land on 8-2-09 and destroyed the perimeter fence erected by the plaintiff on the suit property.

3. In their reply to the application, the defendants dispute the plaintiff’s title to the suit land and the validity of the indenture.The defendants assert that they have occupied the suit land since 1989 and that the title of the original proprietor has thereby been extinguished, and the property became vested in them by adverse possession.

4. The application was disposed of by way of written submissions. The submissions basically highlight

the contents of the respective affidavits as well as the applicable law.

5. The principles governing the grant of interlocutory injunctions were settled in the classic case of **GIELLA VS CASSMAN BROWN AND CO. LTD.**

6. An applicant must first of all show a prima facie case with a probability of success. The plaintiff's claim is based on an indenture dated 29-9-08 which is annexure "SJ2", but as the defendants rightly observed, the applicants have not tendered an official search in respect of the suit property. Secondly, according to annexure "SJ3" the previous owners of the property were seemingly based in Abudhabi, United Arab Emirates at the time of acquiring property in 1987.

7. According to annexure "SJ2" the indenture in favor of the plaintiffs was signed by one Mansur Satchu described as "The duly appointed attorney of the vendors," particulars thereof shown to be PA (I presume Power of Attorney) 13843 and 13930. However no copy of these documents was annexed to the supporting affidavit.

8. On their part, the respondents assert that they have been on the land since 1989. This assertion has not been controverted by the applicants. The manner in which prayer 2 of the application is drafted appears to support the respondent's assertions. The second limb of the prayer is asking the court to restrain the respondents from "denying the applicant access into the applicant's portion..."

9. In my considered view, the applicant has failed the first hurdle, by failing to establish a prima facie case. No useful purpose will be served by considering whether damages would be an adequate remedy, but on the face of it, any likely damage is quantifiable.

10. In view of the foregoing I find no merit in the plaintiff's application and will dismiss it with costs.

Delivered and signed on this 24<sup>th</sup> day of **February, 2012** at Malindi in the presence of Mr. Mwadilo holding brief for Mr. Okongo for the plaintiff,

Defendant – no appearance.

cc Mungai.

**C. W. Meoli**

**JUDGE**