



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**Civil Suit 143 of 2011**

**WALADI AHMED.....PLAINTIFF**

**VERSUS**

**COMMISSIONER OF LANDS**

**THE CHIEF**

**LANDS REGISTRAR**

**THE DISTRICT**

**LAND REGISTRAR, KILIFI**

**LA MARINA LIMITED.....DEFENDANT**

**R U L I N G**

1. The plaintiff's Notice of Motion filed on 14<sup>th</sup> September, 2011 and brought under certificate of urgency is expressed to be brought under Order 40 (presumably rule 1a) of the Civil Procedure Rules and Section 128(1) of Registered Land Act (Repealed).

2. For purposes of this ruling, the relevant prayers are No. 4 and 5, seeking:-

4. That pending the hearing and determination of this suit here be an order restraining the 4<sup>th</sup> defendant from selling alienating or in anyway dealing with plot nos. Chembe/Kibambamshe 635 and 644.

5. That pending the hearing and determination suit there be an order inhibiting the registration of any dealing with respect to plot No. Chembe/Kibambamshe 381 and the resultant sub-divisions namely Plot Nos. Chembe/Kibambamshe 633,635, 636, 644 and 741.

3. The application is supported by the affidavit of the plaintiff which expands upon the 6 grounds on the face of the application, namely:

1. That the plaintiff is the original owner and allottee of Plot No. Chembe/Kibambamshe381 (the suit property)

2. The defendant have unlawfully sub-divided the suit property and transferred two portion thereof to the 4<sup>th</sup> defendant.

3. That the sub-division and allocation of the two portions to the 4<sup>th</sup> defendant was unlawful
4. That unless the application is granted the plaintiff would suffer irreparable loss and/or damage.
5. It is in the interest of justice to grant the application
6. The plaintiff has established a prima facie case.

4. The interim orders issued in favour of the plaintiff on 15<sup>th</sup> September, 2011 and the application were served on the four defendants herein. However, the 1<sup>st</sup> to 3<sup>rd</sup> respondents did not put in a replying affidavit or grounds of opposition. For its part the 4<sup>th</sup> defendant has put in an affidavit sworn by a director by the name of Philip Munge Ndolo.

5. Both the supporting affidavit and the reply thereto contain voluminous documents setting out the chequered history of the dispute as well as the respective positions asserted by the disputants.

6. It was agreed by the plaintiff and the 4<sup>th</sup> defendant's counsel to canvass the application by way of written submissions. I have had the advantage of reading the respective affidavits and perusing through the documents annexed thereto. I have also looked at the written submissions.

7. I note that this is not the first legal dispute between the parties over the suit land described as CHEMBE/KIBAMBAMSHE/381. Annexed to the affidavit of the plaintiff is a lengthy ruling of this court in Miscellaneous Application (Judicial Review) No. 72 of 2006, involving the current 4<sup>th</sup> defendant and several interested parties, including the plaintiff, named therein as the 1<sup>st</sup> Interested Party. I have carefully read that ruling, and in my opinion it summarises exhaustively the history and the nature of the dispute between the plaintiff and defendants herein, with respect to the original land parcel No. CHEMBE/KIBAMBAMSHE/381.

8. With regard to other interested parties in MISC. 72 of 2006, the dispute related to land parcels no. 393 and 395 among others. These have no relevance to the present case.

9. The history of the dispute over CHEMBE/KIBAMBAMSHE/381 as contained in the ruling in the Judicial Review Application tallies in many respects with the affidavits filed by the plaintiff and the 4<sup>th</sup> defendant in the instant suit. In my considered view, no useful purpose will be served in rehashing the same. For our purposes it is possible to give a very brief summary of the positions taken by the parties.

10. The plaintiff claims to have occupied the suit land since the 1950s having been born there. He has fought many battles and sought assistance from every conceivable office to have this land registered in his name. The earliest battle was against a company known as Western Sunshine Company Limited which he alleges was fraudulently issued with a lease over the suit land in 1999. After the plaintiff protested, the said lease was cancelled. According to a letter dated 27<sup>th</sup> January, 2000 signed by Mary M. Kai then District Land Registrar Kilifi, and addressed to the Chief Land Registrar (annexture "D2")

***"The said title (to Western) was issued on 21<sup>st</sup> October, 1999 but was later cancelled. This was due to the fact that it was later realised that the plot was falling within Chembe/Kibambamshe Squatter Settlement Programme and indeed letters of offer to the respective allottees had been issued back. The parcel therefore reverted back to the Government land status" (sic)***

11. The plaintiff was issued with letters of offer in 1999 but despite making the necessary payments to the Settlement Fund Trustees he has not been issued with title documents. He has continued over the years to demand the same. Eventually, he discovered that his original plot was in 2001 subdivided into five plots, namely, CHEMBE/KIBAMBAMSHE/633, 635, 636, 644 and 721. He contends that the said subdivision

was irregular and the subsequent transfer of subdivision 635 and 644 to the 4<sup>th</sup> defendant fraudulent. As evidence of the irregularity he has annexed two letters marked “H” and “K”. These letters are authored by senior officials in the Ministry of Lands and the Ministry of Lands and Settlement. They highlight the anomalies detected while inquiring into this matter such as the question of transfer of plot 635 during an embargo and missing green cards. The plaintiff has accused officials of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant of collusion. He is apprehensive that the 4<sup>th</sup> defendant might alienate the suit property.

12. The 4<sup>th</sup> defendant’s contention is that the plaintiff defaulted in complying with the conditions of his Letter of Offer in the time provided. Thereafter, the “government” caused the subdivision of the original plot no. 381 into five parcels registered as CHEMBE/KIBAMBAMSHE/ Nos. 633, 635, 636, 644 AND 721. The clincher in the Replying Affidavit of the 4<sup>th</sup> Defendant was paragraphs 2(viii) to (x) which are reproduced here below:

“2 (viii) On 17-8-2001, Plot Number Chembe/Kibambamshe/635 and 644 were transferred to the defendant.

(ix) The defendant states that it has since then transferred Plot numbers 635 and 644 to other parties for consideration.

(x) As at the time of filing this suit, the fourth defendant had no interests on any of the plots mentioned in the suit and in particular Plot No. Chembe/Kibambamshe/635 and 644.”

13. In paragraph 4 of the said affidavit the 4<sup>th</sup> Defendant throws the gauntlet at the plaintiff’s feet challenging him to prove that the 4<sup>th</sup> plaintiff “owns any of the properties mentioned in the plaint...”

14. As can be seen, 4<sup>th</sup> defendant’s affidavit contains no details of the alleged transfer of plots 635 and 644 to “other parties for consideration”. Not even the date of transfer or the identity of the transferee(s). And as i have indicated, the plaintiff’s depositions alleging irregularity and fraud against the government officials (the 1<sup>st</sup> to 3<sup>rd</sup> defendants) in their dealings with the suit property have not been controverted. Besides the plaintiff’s statement that he has always been in occupation of the suit land has not been disputed.

15. Considering all the foregoing matters, I am satisfied that the plaintiff has mustered the threshold of establishing a prima facie case with a probability of success. It is unlikely that damages would be an adequate remedy if the plaintiff was to be uprooted from and deprived of his alleged home of five decades. Considering the overall history of this dispute, I think it would be a travesty of justice for this court to decline the plaintiff’s plea for injunction and thereby expose him to the risk of eviction merely because the defendants appear capable of paying any damages that may eventually be awarded. This is a court of equity. The balance of convenience also appears to tilt in the plaintiff’s favour.

16. Based on the principles enunciated in **GIELLA VS CASSMAN BROWN & CO. LTD (1973)EA**. I am persuaded that an injunction ought to issue in terms of prayer 4. Similarly, I am satisfied that the plaintiff has demonstrated sufficient reasons to warrant the issuance of an inhibition under Section 128(1) of the Registered Land Act as prayed.

I do therefore grant prayers 4 and 5 of the Notice of Motion dated 14<sup>th</sup> September, 2011 with costs to the plaintiff.

17. I further direct that this suit be set down for mention within twenty one (21) days together with HCCC No. 110 of 2005 Western Sunshine Co. Ltd vs Giorgio Sefis & Others, for purposes of consolidation and taking of a hearing date.

Delivered and signed at Malindi this **12<sup>th</sup> June, 2012** in the presence of: Ms. Njoroge holding brief for

Mr. Onyango for plaintiff. No appearance for 4<sup>th</sup> defendant:- Notified by telephone by court clerk Evans, on 11<sup>th</sup> June 2012.

1<sup>st</sup> – 3<sup>rd</sup> defendants - absent

CC- Evans & Leah

**C. W. MEOLI**  
**JUDGE**