



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

Civil Suit 341 of 2010

**JANE NJERI**

**MAINA.....PLAINTIFF**

**VERSUS**

**MWANAJUMA MOHAMED MWAJINGA & 9  
OTHERS.....DEFENDANTS**

**RULING**

The Plaintiff filed a plaint dated 23<sup>rd</sup> September 2010 seeking inter alia an injunction restraining the defendants from entering, trespassing upon, dealing in, selling, transferring, disposing of, alienating, developing, letting out or in any way undermining plaintiff's title described as Kwani/Diani/101 or any succeeding subdivisions derived therefrom. The plaint was accompanied with a chamber summons application dated 23<sup>rd</sup> September 2010 under certificate of urgency. It was supported by the affidavit of the plaintiff sworn on the same date. The plaintiff sought a temporary injunction to in terms of the injunction set out in the plaint pending *inter partes* hearing. Counsel for the plaintiff appeared before me ex parte and was granted a temporary injunction pending *inter partes* hearing and directed the plaintiff to serve the defendants through an advertisement in one local daily. The ex parte order has been extended from time to time and is still in force.

Subsequent to service of the application on the defendants they have filed respective replies to the application. Jembe Mohamed Jembe the 9<sup>th</sup> defendant filed a replying affidavit on 5<sup>th</sup> October 2010. A.A. Mutua the 10<sup>th</sup> defendant filed his replying affidavit also on 5<sup>th</sup> October 2010. Said Hassan Kabangi the 6<sup>th</sup> defendant filed his replying affidavit on 26<sup>th</sup> October 2010. Mwanajuma Mohamed Mwajinga the 1<sup>st</sup> defendant filed a replying affidavit on 2<sup>nd</sup> November 2011. Barbara Mueni Gideon the 3<sup>rd</sup> defendant filed a replying affidavit on 23<sup>rd</sup> February 2011. Yahya Mwinyi Mwakurauka the 2<sup>nd</sup> defendant also filed a replying affidavit on 23<sup>rd</sup> February 2011. Abdillahi Huri Ibrahim the 5<sup>th</sup> as well as 7<sup>th</sup> defendant filed his replying affidavit on 3<sup>rd</sup> December 2010. The plaintiff filed further supplementary affidavits on 7<sup>th</sup> February 2011, 25<sup>th</sup> February 2011 and 2<sup>nd</sup> March 2011. The plaintiff is also relying on an affidavit by Nelson Rintari Mbuko filed on 7<sup>th</sup> February 2011. This affidavit is contested as inadmissible by the defendants. The 1<sup>st</sup> defendant filed a further affidavit on 16<sup>th</sup> February 2011.

On 2<sup>nd</sup> March 2011 I directed that the application proceeds by way of written submissions and

submissions be highlighted on 14<sup>th</sup> April 2011. While the application was pending the plaintiff filed an application seeking to enjoin the Attorney General on 31<sup>st</sup> March 2011. The application was granted. On 14<sup>th</sup> April 2011 parties confirmed that written submissions had been filed by the plaintiff and the 1-8<sup>th</sup> defendant. Counsel for the 9<sup>th</sup> and 10<sup>th</sup> defendant informed the Court that they did not wish to file written submissions. Counsels were in agreement that there was no need to highlight the submissions and accordingly I gave directions that ruling would be on notice. I have taken time to consider the written submissions of the parties. I will try to summarise the gist of the respective parties submissions starting with the plaintiff submissions.

The plaintiff submits that she is the registered proprietor of al that parcel of land described as Kwale/Diani/101. That she purchased the same from one Nelson Rintari Mbuko for a consideration of Kshs. 1,250,000 on or about 20<sup>th</sup> April 1995. The land was under formerly under the Diani Settlement Scheme. It measured approximately 2.2. Ha. That Nelson Rintari Mbuko surrendered the Certificate of Outright Purchase to the plaintiff and that the plaintiff was registered as proprietor under the Registered Land Act on 20<sup>th</sup> April 1995 as entry No. 4. The plaintiff conducted a search on the same day and obtained a certificate of official search issued confirming that the plaintiff was registered as proprietor as at 20<sup>th</sup> April 1995. That she again conducted an official search on 3<sup>rd</sup> October 2007 and she was still registered as proprietors. She has been paying land rates until 2010 when the fraudulent transactions occurred. She contends that she is an absolute proprietor under section 27 of the Registered Land Act (now repealed) and that by virtue of section 28 of the Registered Land Act she acquired an indefeasible title that was a first registration. That she has not passed on title to the defendants or any other person.

It is contended that the Defendants created a fraudulently title over the suit property and succeeded to cause the same to be sub-divided and registered in the names of the Respondents. That the 1<sup>st</sup> defendant has lied about her acquisition of the suit property. Whereas she deponed in the first affidavit that she had resided on the suit premises since marriage she changed in the further affidavit and deponed that there is still remnants of her residence on the suit property. The plaintiff contends that the property has never been resided upon and invites the court to visit the site if in doubt. That it is not true that the 1<sup>st</sup> defendant was ever allocated the suit premises in the year 1978 as alleged and that records from Director of Land Adjudication & Settlement can prove this. The documents annexed to the replying affidavit of the defendant were contended to be forgeries.

The Plaintiff also took issue with the 10<sup>th</sup> defendant contending that the 10<sup>th</sup> defendant was well aware of the scheme to deprive the plaintiff of the suit property. The plaintiff contends that the 6<sup>th</sup> defendant is an agent of the 10<sup>th</sup> defendant who finds land buying customers for 10<sup>th</sup> defendant. It is alleged that the 10<sup>th</sup> defendant had refused to allow the plaintiff have access to the searches in respect of the subdivisions of the suit property and that it took the intervention of the Chief Lands Registrar for the 10<sup>th</sup> defendant to register cautions and provide searches. In summary the plaintiff contends that the 1<sup>st</sup> defendant had no title to give to the other defendants. The subdivisions amount to nothing because they came from nothing. Plaintiff contends that if the fraudulent tile were to be considered then equities would be equal and hers been first in time should prevail.

The Plaintiff contends that she has lodged complaints with Kenya Anti-Corruption Commission (as it then was), Chief Land Registrar, the Public Complaints Standing Committee among other government offices. That her conviction should lead to the inference that the suit property belongs to her. The plaintiff asks the court to find that she has established a *prima facie* case with a probability of success and to grant the orders sought. She contends that damages would not be an adequate remedy because she has been unduly tortured by the fraudulent claims to her land and is sentimentally attached to it. She contends that the balance of convenience tilts in her favour.

Counsel for the 1<sup>st</sup> defendant in the written submissions contends that the application should be dismissed as lacking in merit. The plaintiff must satisfy the principles set out in **Giella vs Cassman Brown case**. That the plaintiff has not established a *prima facie* case. The documentation in support of her claim is not consistent. It is contended that she could have cheated on stamp duty and she has not come to court with

clean hands. The plaintiff is not consistent on who is the original allottee of the land and that she has been bringing her documents in installments which would seem to suggest that she is doctoring the documents to suit her case. The 1<sup>st</sup> defendant puts forward the case that she was registered as owner of the suit property after pursuing a discharge from the Settlement Fund Trustees. The land was initially allotted to her husband who died before processing the title. The 1<sup>st</sup> defendant contends that her documents are more consistent because the register and title show that the Register was opened on 10<sup>th</sup> March 1993. Parcel No. Kwale/Diani/101 was registered first in the name of the Settlement Fund Trustees, then on 15<sup>th</sup> December 2005 the 1<sup>st</sup> defendant was registered as the owner thereof. Entry No. 3 shows that on the same day 15<sup>th</sup> December 2006 the title deed was issued.

1<sup>st</sup> Defendant contends that damages would be an adequate remedy and that the balance of convenience if the court is in doubt tilts in favour of the 1<sup>st</sup> defendant. Counsel for 1<sup>st</sup> defendant urges the court to reject the application for temporary injunction.

Counsel for 5<sup>th</sup> and 7<sup>th</sup> defendant contend that the plaintiff has not established a *prima facie* case. The plaintiff does not allege that the 5<sup>th</sup> defendant acquired his registration by fraud or mistake and that he had knowledge of such mistake or fraud or that he contributed to the same by his act neglect or default. 5<sup>th</sup> defendant contends that he is a bona fide purchaser for value without notice. On damages the 5<sup>th</sup> defendant contends that damages would be an adequate remedy and that if the court is in doubt then the balance of convenience tilts in favour of the 5<sup>th</sup> defendant since he is in possession of the subdivided plots been Kwale/Diani/1986 and Kwale/Diani/2195.

Counsel for 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 8<sup>th</sup> defendant also contends that the plaintiff has not established a *prima facie* case. They are innocent purchasers for value of subdivided plot numbers Kwale/Diani/2108, 2057 and 1990. That it is wrong for the plaintiff to sue the 10<sup>th</sup> defendant in his individual capacity while he was acting in his official capacity as Kwale District Land Registrar. This offends the Government Proceedings Act. That the affidavit sworn by Nelson Rintari Mbuko should be struck out as he is not a party to the suit.

Counsel for the 6<sup>th</sup> defendant also contends that the application should fail for two reasons. Firstly, it was filed by a firm of advocates that was not on record. There has been no change of advocates from the firm of Lumumba, Mumma & Kaluma Advocates to the firm of Lumumba & Lumumba Advocates.

I have considered the well articulated submissions of the parties. Counsel for the 6<sup>th</sup> defendant has observed that the firm of advocate appearing on the plaint is not the same firm as that appearing on the chamber summons application dated 23<sup>rd</sup> September 2010. This observation though valid is technical in nature. The plaint and the chamber summons application were filed together on the 23<sup>rd</sup> September 2010. The same advocate Mr. Peter Kaluma has been appearing for the plaintiff in this matter. I would treat this omission as a 'copy and paste error' that has not occasioned any prejudice to the parties. The point was too technical and it was properly omitted by the other defendants. The question of substance is whether the plaintiff is entitled to the temporary injunction pending hearing and determination of this suit.

The principles upon which this court proceeds in applications of this nature are well settled. The plaintiff must demonstrate that she has a *prima facie* case with a probability of success. Normally an injunction will not be granted unless damages would not be an adequate remedy. If the court is in doubt it will decide the application on the balance of convenience. (*Giella vs Cassman Brown case*). The purpose of a temporary injunction is to preserve the status quo so that a plaintiff who has shown that his legal rights have been infringed is not deprived of an effective remedy.

Has the plaintiff shown a *prima facie* case in this matter? I do not think so. Issues are raised for consideration by the court by way of pleadings and not affidavit evidence. The plaint dated 23<sup>rd</sup> September 2010 does **not** allege fraud, misrepresentation or mistake to which the defendants are privy or are shown to be parties. In order to invoke the powers of the Court under section 143 of the Registered

Land Act (now repealed) an applicant must establish a connection between the fraud and the registered proprietor by way of knowledge. Particulars of the fraud, misrepresentation or mistake that brings the registered proprietor within the section should be pleaded. It is unfortunate that the plaint has not pleaded fraud with sufficient particularity as required by law. I find that there is no prima facie case as pointed out by the Court of Appeal in **Central Kenya Limited vs. Trust Bank Limited and 4 Others 1996 eKLR** where the appellant had failed to plead particulars of fraud in an application for temporary injunction. The appeal was dismissed.

It appears to me that the plaintiff was contend with presenting her case on the basis that she was the first to be registered as proprietor of the suit property as from 20<sup>th</sup> April 1995 and that as late as October 1997 an official search still indicated that the plaintiff was the registered proprietor. According to the plaintiff it is implausible that the 1<sup>st</sup> defendant could have been registered proprietor as at 15<sup>th</sup> December 2006. The plaintiff has not sued the District Land Registrar Kwale as the custodian of the land records involving the suit premises. The absence of the Kwale District Land Registrar leaves the plaintiff in a weak position. The 10<sup>th</sup> defendant has been sued in his individual capacity though he was occupying the office of Kwale District Land Registrar. In his replying affidavit he has deposed that the 1<sup>st</sup> defendant was registered as proprietor before he was posted to Kwale. That the subdivisions of the suit property were undertaken before he was posted to Kwale. He was not called upon to explain in his official capacity why the plaintiff had a search bearing her name as registered proprietor as at October 2007 whereas the 1<sup>st</sup> defendant was registered as owner on 15<sup>th</sup> December 2006. The District Land Registrar was a necessary party for the plaintiff to establish a prima facie case.

Counsel for the plaintiff contends that the 1<sup>st</sup> defendant had no title. In his words the “fraudulent document wielded by the 1<sup>st</sup> defendant as title deed for the suit property is a mere piece of paper incapable of vesting/transferring interest in the property; *ex nihilo nihil fit* – from nothing comes nothing”. I express doubt as to whether the maxim *ex nihilo nihil fit* applies in the circumstances. Accordingly, to the 10<sup>th</sup> defendant the 1<sup>st</sup> defendant had registrable documents. She was initially registered as proprietor of the suit property before undertaking subdivision of the same into six plots. The mutation plans have been produced as exhibits in the replying affidavit of 10<sup>th</sup> defendant. It is not correct to contend that the 1<sup>st</sup> defendant had nothing. She had a title that formed the basis of subdivisions and transactions with the other defendants. She has explained how she came to be registered as proprietor. The veracity of the process is something that needs to be investigated at trial. The principle that a person cannot give a title that he does not have (*nemo dat quod non habet* under Sale of Goods law) has limited application in Torrens System of Land registration. Under Torrens system a purchaser transacts on the basis of the register and unless the purchaser has notice of any fraud, misrepresentation or mistake he obtains a good title free from all other defects. The plaintiff has not succeeded to convince the court that on a *prima facie* basis the defendants who bought the subdivisions from the 1<sup>st</sup> defendant knew or had notice that the 1<sup>st</sup> defendant had a fraudulent title.

I am therefore inclined to disallow this application. I also note that some of the Defendants are in actual possessions of their respective portions and have certificates of title. The validity of these certificates or otherwise can only be investigated in a full trial.

For these reasons I hereby dismiss the chamber summons application dated 23<sup>rd</sup> September 2010 with costs to the defendants. Subsisting interim orders are discharged.

DATED AND SIGNED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY 2012.

**M.K IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF JULY 2012

**R.M. MWONGO**  
**JUDGE.**

In the presence of: