



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT 299 OF 2010**

**SHAZMEER ENTERPRISES LIMITED .....PLAINTIFF**

**VERSUS**

**MWINYI DAO .....1<sup>ST</sup> DEFENDANT**

**ABDULREHMAN .....2<sup>ND</sup> DEFENDANT**

**ALI .....3<sup>RD</sup> DEFENDANT**

**JANET N. EKUMBO .....4<sup>TH</sup> DEFENDANT**

**ABUBAKAR JUMA MANYENZE .....5<sup>TH</sup> DEFENDANT**

**RAMA H. BINDO .....6<sup>TH</sup> DEFENDANT**

**RULING**

This is an application dated 31<sup>st</sup> August, 2010 seeking an order for a temporary injunction to restrain the Defendants by themselves, servants or agents or other persons or howsoever otherwise from continuing and remaining in occupation of Mombasa/Mainland South/1674 until further orders of this court.

The grounds of which the application is based are that:-

- (i) The Defendants have without shade or colour of right trespassed and encroached upon the Plaintiff's land.**
- (ii) The Plaintiff's quiet enjoyment of the land has been interfered with.**
- (iii) There is likelihood that there are strangers related to the Defendants who may occupy the land.**

The application is supported by an affidavit sworn by A Director of the Plaintiff Company one Alnoor Habib Jiwan sworn on 31<sup>st</sup> August 2010. In the affidavit the Applicant's director depones, inter alia, that:-

**“(1) That I am the director of the Plaintiff Company and am duly authorized to swear this affidavit on its behalf.**

**(2) That the Plaintiff is the registered proprietor of Mombasa/Mainland South/1/1674 (hereinafter referred to as the “Suit Property”). I annex hereto a true copy of the title deed in respect thereof dated 17<sup>th</sup> September and mark it as Exhibit “ AHJ-1”.**

**(3) That sometimes last week I personally saw some three illegal structures sprouting from the suit property. Neither the Plaintiff nor any of its officers had been approached for permission to build nor was any notice of intention given to the Plaintiff in any form whatsoever.**

**(4) That I was alarmed and immediately instructed that our surveyors be consulted to verify whether the structures were erected on our plot or indeed on a neighbouring plot unconcerned with ours.**

**(5) That a copy of the report by our surveyors is annexed hereof together with plan of the illegal structures and jointly marked as exhibit “AHJ-2”.**

**(6) That the report confirms the encroachment; the erection of the illegal buildings; the extreme proclivity to violence of the Interested Parties; the urgent need to curb the forceful confiscation of legally acquired proprietary rights of the Plaintiff.**

**(7) That the Applicant has obtained the permission to construct a boundary wall around the suit property provided it commences within 6 months. This will protect the suit property from the marauders. I annex hereto a copy of the said permission and the plan and mark them collectively as Exhibit “AHJ-3”.**

**(8) That it will be apparent that the Defendants’ acts of impunity go against the grain of the rule of law and the Court needs to impose its authority to ensure that the sanctity of title is not negated in the fashion demonstrated herein.**

**(9) That it is important for this Court to protect the lawfully acquired interests of the Applicant and unless orders are granted the Applicant will lose his said interests and suffer immense loss and damage. Therefore the status quo obtaining before the trespass ought to be restored awaiting any adjudication by this Court”**

The Defendant opposes the application. Before that, with the leave of the court, more Defendants were enjoined as purchasers.

In one of their affidavits sworn by Mrs. Janet N. Ekumbo on 3<sup>rd</sup> December 2010 the Defendants deny the allegations of the Plaintiff and aver that :-

- “1. ....**
- 2. ....**
- 3. ....**
- 4. ....**

**5. That further to the fore going it is the Plaintiff who has breached the terms of the consent by constructing a booth for its watchman sometimes between 26<sup>th</sup> and 27<sup>th</sup> November 2010 on plot Number Mombasa / Mainland South/Block 1/252 which does not belong to him thus attracting the wrath of the residents of the area and I put the deponent to strict proof thereof.**

**6. That in reply to the claim made in paragraph 4 of the further affidavit I state that the deponent is a rich man and his neighbours are poor people and he harasses them by demolishing their structures and wanting to annex some parts of Plot Number Mombasa/Mainland South/Block 1/252 which does not belong to him and therefore his claim is false and misplaced.**

**7. That in reply to the allegations made in paragraph 5 of the further affidavit I state that it is**

not true that the O.C.S was unable to do anything as it was the police who demolished the 4<sup>th</sup> to 6<sup>th</sup> Defendants structures but the police confirmed that the deponent had provoked the residents by encroaching into their plot and I urge this Honourable court not to allow the construction of the wall which is constructed in our plot as his plot is already surrounded by a barbed wire.

**8. That for the reasons I have given above I agree that the situation is getting pretty grave given the conduct of the deponent of the further affidavit and I wish to urge this Honourable Court to visit the disputed area.”**

By a consent made on 14<sup>th</sup> March 2011, the parties through consent agreed to file and exchange written submissions within a specified period i.e., the Plaintiff within 7 days from the said date and the Defendants within 14 days of service.

By the date of the hearing date it is only the Plaintiff which had filed its written submissions. Counsel for the Defendants told the Court as follows:-

**“Plaintiffs have filed and served their written submissions. We have not filed the written submissions. We wish to rely on the Replying Affidavit and other affidavits on record. The Court can determine on the basis of the record”**

In the application the Plaintiff seeks to restrain the Defendants from continuing and remaining in occupation of Mombasa/Mainland South/1674 and further for the OCS Likoni Police Station to ensure compliance of the same.

It is an undisputed fact that Plaintiff is the registered proprietor of parcel No. 1674 which abuts Mombasa Mainland South/252, which is owned by the Government of Kenya.

In an affidavit sworn on 4<sup>th</sup> October 2010 to support the joinder of more Defendants, the present Fourth Defendant deponed in two relevant paragraphs as follows:-

“(1) .....  
.....

**(11) That I and other residents of Likoni in Mombasa South were informed by the Government through the Provincial Administration that Plot No. 252 had been leased by the Government to Evans and Company Limited which lease had ended since the 99 years period was already over and the Government has not renewed the lease because the said company never developed the said land as expected but instead the Government has promised the residents that it is going to demarcate and allocate the resultant plots to the local community for purposes of constructing residential houses thereat.**

(12) .....

**(13) That Plot No. 252 is a Government land which is intended to be allocated to the local community and I and my co-Applicants have presented building plans to the Municipal Council of Mombasa and obtained approval. At pages 1 to 3 of the annexure marked “JME1” are copies of the said building plans.**

**(14) That the Municipal Council of Mombasa advised us that we could proceed to construct the said residences while awaiting the allocation of the said land to us by the Government.” (emphasis mine)**

The Defendants did not produce the title document or any other document in respect of Plot No. 252 which belongs to a third party. They did not produce any document or correspondence that they had been allocated the said property to themselves and the local residents as alleged.

They do not have any registered interest in respect of parcel No. 252.

Of more significance is that the Plaintiff has produced the title document deed to Parcel No. 1674 and there is no dispute that it is the registered owner. This is the suit property and not Plot No. 252. There is no boundary dispute between the registered owners of the Plot 252, Evans and Company Limited and the Plaintiff. Even if any dispute existed, the Defendants clearly have no locus standi to prosecute any claims for and/or on behalf of the owner of Plot No. 252 as against the owner of Plot No.1674.

I have considered the surveyor's report dated 23 August 2010 and marked "AHJ 2" annexed to the Applicant's first affidavit. It confirms encroachment and trespass on the Plaintiff's land by third parties. By a letter dated 22<sup>nd</sup> December 2010 the District Surveyor also confirms that the 3 foundations erected on the Plaintiff's land had encroached on Plot No. 1674 by an area of 242.01 square metres, 263.75 square metres and 182.08 square metres respectively.

On 8<sup>th</sup> December 2010 the Court ordered inter alia that:-

1. **The Defendant shall procure a surveyor to survey area they occupy showing the boundaries with the Plaintiff's land Plot No. 1674.**
2. **The Surveyor shall show if there is any public road between the two areas of road between the two acres of land.**
3. **The Defendant's Surveyor to submit his report within 14 days.**

The Defendant's did not procure and present any Survey Report to assist the Court. The court is not surprised having all the facts now including that these plot is no evidence that the Defendants have any legal interest in respect of Plot 252. The absence of a surveyor's report to support their claim leaves only the Surveyor Reports and evidence presented by the Plaintiff.

In the light of the foregoing and applying the principles laid down by the **GIELLA CASE**, I do find that the Plaintiff has shown a prima facie case with a probability of success. I agree with the Plaintiff's submissions that it needs protection of its property pending the hearing of the suit to acquire plot 252 if indeed they can as it does not belong to them. The theatrics and outburst of the Defendants in court was uncalled for and is condemned by this court.

I do hereby grant prayer (b) and (c) of the Application dated 31<sup>st</sup> August 2010. The Respondent/Defendants shall pay to the Applicant the costs of the Application. Orders accordingly.

**DATED AND SIGNED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JULY 2012**

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

**DATED AND DELIVERED AT MOMBASA ON THIS 24<sup>TH</sup> DAY OF 24TH 2012.**

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