



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL SUIT NO. 27 OF 2010 (O.S)**

**ABUD MOHAMED ABUD.....PLAINTIFF**

**VERSUS**

**TWAHIYA MOHAMED BIN ABDULLA.....DEFENDANT**

**R U L I N G**

The application dated 29<sup>th</sup> March 2010, is by way of Chamber Summons pursuant to provisions of Order XXXIX Rule 1(a), (b), 2, 2A and 3 Civil Procedure Rules, section 3A and 63(e) Civil Procedure Act, seeking that temporary restraining orders do issue against the Defendant/respondent, her servants, agents, representatives, assignees or any other person acting under the defendants' authority, from trespassing, encroaching, subdividing, selling off, building out, alienating, damaging, wasting, disposing off and/or in any other manner whatsoever, carrying out any activities on the property known as Plot No. 390 Malindi, pending hearing and determination of the Originating Summons.

Further that a mandatory injunction do issue to respondent to forthwith vacate and yield vacant possession of the land measuring approximately 7.5 acres in the suit property and to demolish and remove any structures built there.

The application is premised on grounds that the plot no. 309 Malindi is registered in the names of one HAMED BIN SAID BIN OMAR, together with SAID BIN OMAR.

The applicant is an heir to the said SAID BIN OMAR (deceased) through the late ESHA SAID ABDALLAH. The heirs to the estate were established in Kadhi Court Succession Case No. 55 of 2009 (Msa) and the properties of each singular heir to that Estate was determined.

The respondent/defendant is neither an heir nor a registered proprietor, nor is her occupation lawful or sanctioned by the heirs of the registered properties. The defendant has declined to give up possession and/or to regulate her possession by Purchase, thereby rendering this application necessary.

The respondent does not deny being in possession of a portion of the suit property registered in the names of the proprietors.

The application is supported by the affidavit sworn by ABUD MOHAMED ABUD, (applicant) who has annexed a certificate of titles and Postal search showing the registered owner of the land and the heirs were recently established by the Kadhi's decision in Succession Cause No 55 of 2009 (annexed as AMA

2).

The respondent apart from being in occupation of the land and declining to vacate or recognize the applicant's proprietorship, has now begun to assert her claim over the property by surveying and demarcating to herself a portion of approximately 7.5 acres without the knowledge and/or acquiescence of the applicant or the other heirs. (a copy of the plans instructed by respondent is annexed as AMA3), an agreement and an area map plan showing the respondents intentions are annexed as AMA5. So unless she is restricted, the applicant is apprehensive, she may pursue her unlawful claim further by attempting to excise that portion and securing a separate title and/or selling the property by a local agreement, to a 3<sup>rd</sup> party and this will be a great loss and damage to applicant in terms of reverting the unlawful transactions which respondent may engage in further.

The application is opposed, and in a replying affidavit sworn by the respondent, she depones that she is the daughter of one Mohammed Bin Abdulla who is now deceased. On 2<sup>nd</sup> September 1943, the late father bought a piece of land measuring 7½ acres from the heirs of Ali Bin Hassan, Bin Abubakar Ba-Ghalf, Abdulminih Bin Abdulkadir and Said Bin Ahmen Mubarak Baryun through their power of attorney, for Sukua Zana, Said and Aisha (as per a copy of agreement marked Ex. TMA1).

She and her other siblings reside on the said plot no. 309 where they were born and brought up and they have no interest in plot no. 390 where the court is being asked to issue an injunction. Further, that applicant has failed to disclose the fact that she has been in occupation of the premises since 1943, and the descendants of Mohammed Bin Abdalla are in actual possession and occupation of the 7½ acres and she relies on the doctrine of adverse possession to stake a claim on the property. Further that applicant has no locus on this matter.

The application was disposed of by way of written submissions. The applicant's counsel Mr. Mwadilo submits that applicant derives his right to the property by virtue of being an heir to Said Bin Omar through the late Esha Said Abdalla. Plot 309 is registered in the names of Hamed Bin Said Omar together with the heirs of Said Bin Omar. The plaintiff has attached photographs of ongoing construction being undertaken by defendant in disregard of the pending suit thus violating the doctrine of *lis pendens* and it's this kind of brazenness that causes applicant to fear that respondent may well dispose off portions of the property to 3<sup>rd</sup> parties.

Counsel refers to the legal treatise Mulla The Transfer of Property Act 1882, 9<sup>th</sup> Edition at page 367 which reads:

**“(3) *lis pendens***

***... the doctrine of lis pendens ...is expressed in the maxim lit lite pendetite nitul innovetem” it imposes a prohibition on transfer otherwise dealing of any property during the pendency of a suit...the principle on which the doctrine rests is explained in the leading case of Bellamy and Sabine (1857) DeG and J586) where Turner, L. J. said, “it is, as I think, a doctrine common to the courts both of law and equity, and rests, as I apprehend upon this forclation – that it would be plainly impossible that any action could be brought to successful termination, if alienations pendent lite were permitted to prevail – the plaintiff would be liable in every case, to be defeated by defendant’s alienating before the judgment or decree, and would be driven to commence his proceeding, de novo, subject again to be defeated by the same course of proceeding”***

As for the sale agreement which respondent relies on to justify her occupation, the same is termed as outdated. As at the date of writing this ruling, the respondent's counsel had not filed any written submissions.

Applicant's claim to the suit property is by virtue of being recognized in the orders by the Kadhi's court, as an heir to the registered owner. Respondent on the other hand claims a right to occupy and use the land

by virtue of long uninterrupted occupation and use under the doctrine of adverse possession.

The respondent's occupation of the land is not denied but it is contested. The fear and apprehension which applicant has is that

(a) The respondent is now carrying out construction at a place which is alarming

(b) She may easily dispose of the property to a third party while the suit is pending. This would then defeat the applicants pursuant in this suit and prejudice his interest. It is therefore appropriate that the suit property be preserved by maintaining the existing status quo and halting any further adverse activities such as construction, subdivision, alienating either by way of transfer or sale. I am satisfied that applicant has established a prima facie case with probability of success to warrant issuance of an injunction.

I however take note that respondent's claim to have been in occupation of the property for the past 43 years (whether uninterrupted or otherwise), it would be a traversing of justice to restrain them from trespassing or encroaching on what they already occupy and stake a claim under the doctrine of adverse possession and an order for their eviction at this point would in effect be determining the main suit before the same is heard.

(2) The applicant's counsel also submits that applicant would suffer irreparable loss which cannot be adequately compensated by way of damages if the order sought are not granted. This is because the landscape would be altered by the construction respondent is taking, which construction may not be what the applicant intends to use the property for, and were his claim to later succeed, then he would be saddled with the cost of bringing down the structures erected therein.

A worse scenario would be if the respondent in the interim disposes of the property either by subdividing it or selling it to a 3rd party – again undoing that may be a task not easily quantified by way of damages. The applicant has therefore satisfied the second limb of **Giella's case**.

(c) In whose favour does the balance of commerce tilt – certainly it is more convenient to maintain the status quo – let respondent continue in occupation but have further alienating activities until the suit is heard rather than let respondent carrying on with adverse activities then if the applicant succeeds in his claim, begin to undo. So that even if the other two limbs were to fail, the balance of convenience would still sway greatly in the applicant's favour.

Consequently, there is merit in the application and it is allowed to the extent of restraining subdivision, selling off, further building on or constructing upon, alienating by way of selling or disposing off in any other manner whatsoever, which order shall remain until the matter is heard and determined. The costs of this application shall be borne by respondent.

Delivered and dated this 30<sup>th</sup> day of **March 2011** at Malindi.

**H. A. Omondi**  
**JUDGE**