



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**CIVIL SUIT NO. 137 OF 2009**

**REHEMA ESTATE LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

- 1. MOHAMED SWALEH ATHMAN**  
**2. KANZIBAY COMPANY LIMITED     ..DEFENDAN**  
**3. THE REGISTRAR OF TITLES**

**TS/RESPONDENTS**

**RULING**

In this intensely-canvassed application, it emerges that some three persons are each armed with proprietary documents for one and the same piece of land, located on the sea-shore at Kanamai in Kilifi, and each one is asking the Court to treat him as the genuine owner. This Ruling, with the directions which must be given, indicates plainly that the core issues in the dispute must abide the consolidation of several suits, and resolution by trial of the main cause. Although complex factual details and submissions have been placed before this Court, such orders as can be made at this stage must remain tentative, and founded only on *prima facie* perceptions.

The disputed property originally belonged to one **Androniki Philotas Ghikas**, and the administrator of that man's estate has filed suit against the plaintiff herein: **Ushwin Khanna as Administrator of the Estate of Androniki Philotas Ghikas v. Rehema Estate Ltd**, Mombasa HCCC No. 315 of 1997. But the plaintiff now comes before this Court as the beneficiary of a vesting order of **27<sup>th</sup> May, 1996**, made in Nairobi HCCC No. 2173 of 1994, **James Kanyitta Nderitu** and **Hellen Njeri Nderitu v. Marios Philotas Ghikas**.

The plaintiff avers that, by virtue of the said vesting order, the plaintiff became the registered owner of Subdivision **No. 2720 [Original No. 181/13]/III/MN** which was allegedly carved out of Plot **No. 181/III/MN**; the plaintiff is said to have become the owner of 2.420 hectares being subdivision **No. 2720/III/MN after the original title was closed**.

The plaintiff's contention is in conflict with the position of 1<sup>st</sup> defendant: this defendant filed Mombasa HCCC No. 108 of 2008 (O.S.), **Mohamed Swaleh Athuman v. The Commissioner of Lands and the Registrar of Titles**, and is said to have won the suit and, on that basis, obtained Orders on **3<sup>rd</sup> September, 2008** to be registered as the proprietor of the whole plot [the title for which the plaintiff says, has been

closed], namely, plot No. **181/III/MN**; 1<sup>st</sup> defendant proceeded to secure vesting orders in his favour (notwithstanding suits against him on that account), and then he sold off the said land to 2<sup>nd</sup> defendant at Kshs. 28,000,000/=.

While both 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that 1<sup>st</sup> defendant is no longer the title-holder for Plot No. **181/III/MN**, because he has already sold and transferred it to 2<sup>nd</sup> defendant, the plaintiff has moved this Court to issue injunctive orders against **1<sup>st</sup> and 2<sup>nd</sup> defendants**, in respect of any attempts to sell, lease, mortgage, alienate, transfer, dispose, develop, carry out any works upon, or indeed enter “ALL THAT property known and described as Plot No. **181/III/MN**”.

Were this a straightforward claim between the parties to this suit, and with regard to the suit land, the detailed documentation on file, and the sophisticated canvassing by counsel, would have been a basis for certain clear interlocutory orders. But, being concerned with the framework of justice in a total perspective, and with issues of the effectiveness of the High Court’s jurisdiction, I have to look at relevant files; and what emerges is that the very same suit land, Plot No. **181/III/MN**, is the subject of different proceedings lodged in the High Court at Nairobi, Mombasa and Malindi, involving substantially the same parties. I was able to note the following such cases:

- (i) **Nairobi HCCC No. 2173 of 1994** – *James Kanyitta Nderitu and Hellen Njeri Nderitu v. Marios Philotas Ghikas*;
- (ii) **Mombasa HCCC No. 315 of 1997** – *Ushwin Khanna as Administrator of the Estate of Androniki Philotas Ghikas v. Rehema Estate Ltd.*
- (iii) **Mombasa HCCC No. 108 of 2008 (O.S.)** – *Mohamed Swaleh Athuman v. The Commissioner of Lands and the Registrar of Titles*;
- (iv) **Malindi HCCC No. 40 of 2010** – *Mohamed Swaleh Athman v. Farid Faraji and Lilly Mohamed Ali*;
- (v) **Mombasa HCCC No. 137 of 2009** – *Rehema Estate Limited v. Mohamed Swaleh Athman, Kanzi Bay Company Ltd & The Registrar of Titles*;
- (vi) **Mombasa HCCC No. 236 of 2009** – *Swaleh Mohamed Badi, Justus Katana, Yusuf Juma & Others v. Mohamed Swaleh Athuman*;
- (vii) **Mombasa HCCC No. 1162 of 2009** – *Swaleh Badi Mwinyi and 50 Others v. Mohamed Swaleh Athman, Commissioner of Lands & Registrar of Titles, Mombasa*;
- (viii) **Malindi HCCC No. 11 of 2009** – *Mohamed Swaleh Athman v. Ali Mbwana Ali and Others*;
- (ix) **Mombasa HCCC No. 4 of 2006 (O.S.)** – *Lilly Suleiman v. Androniki Philotas Ghikas*.

Learned counsel, **Mr. Kiarie Kariuki**, for the plaintiff, has a detailed and cogent argument in support of the plaintiff/applicant’s prayers, even though there is, in my opinion, a void in the basis of the case and the cause of action which gave him the vesting orders for the suit property, and in the scheme of entry of the land - title transaction conferring upon him colour of right; but in the same way learned counsel, **Mr. Mabeya** for 2<sup>nd</sup> defendant, had a cogent case that his client was an innocent purchaser for value without notice of any defect of title. Of course, it takes the **full hearing**, given the multiplicity of claims upon the suit property, to establish the validity of that submission.

By contrast, the submissions made for 1<sup>st</sup> defendant mainly consisted of perverse comment intended to impugn the integrity of the plaintiff; and on this account, those submissions have not shed much light on the detailed elements of the dispute herein.

A perusal of the multiplicity of parallel causes regarding the very same property, title No. **181/III/MN**, however, raises the probability that there would be no clear view of the **prima facie** case, for the purpose of making interlocutory orders on just the **one** application herein. All the nine causes, with their multiplicity of interlocutory applications, are **intimately related**, and are in respect of one property, with **1<sup>st</sup> defendant** herein as a constant. In a number of the cases, **fraud** is attributed to 1<sup>st</sup> defendant, in the procuring of what appear as **vesting Orders**, which he used to secure a change to the Land Registry records, to assign him title as proprietor. Such fundamental queries cannot be resolved by way of

interlocutory applications, and must be reserved to the **full trial**. I believe such a perception to have guided my sister, **Lady Justice Omondi**, when she made Orders on 1<sup>st</sup> defendant's [in the instant case] Chamber Summons application of **20<sup>th</sup> April, 2010** in Malindi HCCC No. 40 of 2010, **Mohamed Swaleh Athman v. Farid Faraj and Lilly Mohamed Ali**, on **23<sup>rd</sup> June, 2010**; she thus ordered:

"1. **THAT** the suit property herein be jointly guarded and each party provide two security guards and meet their costs.

"2. **THAT** the suit property shall remain neutral, without any party going on or remaining at the site, pending the hearing and determination of the application.

"3. **THAT** the officer Commanding Kijipwa Police Station to supervise compliance".

The issues arising in the application now before the Court are substantially the issues arising in the **several parallel matters** concerned with the suit property. It is not appropriate, in these circumstances, to make any far-reaching orders in the instant application, that are apt to stand in conflict with any such orders as may be made by the different stations of the High Court, and by different Judges, in the various other causes. In terms of case-management, this Court will not allow the multiplicity of cases to run spontaneously in their separate directions, as this would occasion loss in Court-time, and may compromise the integrity of Court Orders, in the event they are mutually in conflict. Unco-ordinated progress of the several causes is also likely to subject counsel to much loss of time, as they attend different Courts where decisions taken may run into conflict and inefficacy.

I will make orders as follows:

- (1) **all cases and all applications, whether already filed or yet to be filed, in regard to the status of Plot No. 181/III/MN, shall be consolidated and heard as one matter;**
- (2) **all the case files relating to Plot No. 181/III/MN shall be heard before the High Court at Malindi;**
- (3) **the Deputy Registrar shall have all the files in question transferred to the High Court at Malindi, for mention and directions;**
- (4) **in the meantime, all parties shall maintain the status quo prevailing on Plot No. 181/III/MN;**
- (5) **the Officer Commanding Kijipwa Police Station shall ensure compliance with Order No. (4) herein;**
- (6) **costs in the cause;**
- (7) **these orders shall be served on all counsel with the conduct of the series of matters touching on Plot 181/III/MN.**

**DATED and DELIVERED at MOMBASA** this 15<sup>th</sup> day of April, 2011.

.....  
**J. B. OJWANG**  
**JUDGE**