



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

**AT EMBU**

**CIVIL APPEAL NO 20 OF 2011**

*(An Appeal from the Ruling/Order of D.W. Mburu (Mr) RM sitting at Garissa in Civil Suit No. 1 of 2011)*

AMINA HAJI ABDI .....APPLICANT  
VERSUS  
MARIAM HUSSEIN WARAB.....1<sup>ST</sup> RESPONDENT  
ABDILATIF MOHAMED HAJI .....2<sup>ND</sup> RESPONDENT

**RULING**

There is an appeal from the ruling of Resident Magistrate at Garissa who on 20<sup>th</sup> January 2011 dismissed with costs the Applicant's application for interlocutory injunction against the Respondents. The Applicant was aggrieved by the decision. The dispute is over a plot of land described as GSA/2337 which the Applicant claimed was his following its allocation to him by the Municipal Council of Garissa on 30<sup>th</sup> June 1998. He allegedly took possession of the plot and has been developing it and paying rates annually to the Council. His case was that on/or about 3<sup>rd</sup> January 2011 the Respondents had without any justification trespassed on the plot, deposited building materials thereon and began construction works. He filed suit for a permanent injunction and a declaration that he was the legal owner of the plot. With the suit was filed an application under Order 40 rule 1 of the Civil Procedure Rules for a temporary injunction to restrain the Respondents, by themselves, their employees, servants and/or agents from trespassing, constructing or alienating the plot pending the hearing and determination of their application.

The Applicant swore an affidavit to support the application. He stated that he was the owner of the plot which he said measured 3 acres. He annexed a letter dated 20<sup>th</sup> May 2006 from the Town Clerk of Municipal Council of Garrisa (Annexure "AHA4") saying that the plot, which measured 200 x 100 ft, was registered with the Council in his names. He also produced a letter dated 30<sup>th</sup> June 1988 from the Ministry of Agriculture (Annexure "AHA1") to the clerk of Garissa County Council showing that the land was 3 acres and that he was its owner. He produced receipts (Annexure "AHA2") to show he was paying rates for the plot.

The 2<sup>nd</sup> Respondent filed a replying affidavit to say that he had no personal interest in the disputed plot, but that he was a director of a limited liability company called HAGAR CONSTRUCTION COMPANY LIMITED which had been awarded a contract by the Ministry of Youth Affairs and Sports of the Government of Kenya to construct a Youth Empowerment Centre Library Block on the plot. It was for this reason that he was on the plot. His case was that the company was therefore on the plot for a known principal who ought to have been either sued or joined on the suit. The 1<sup>st</sup> Respondent stated that she was a civic leader appointed by the Ministry for Local Government and attached to the Municipal

Council of Garrisa and she was here merely to supervise the construction of this public project. She stated that she had no personal interest in the plot.

The learned magistrate considered the application and dismissed it. The Applicant seeks that, pending the hearing and determination of the appeal, there be a temporary injunction to restrain the Respondents from continuing to trespass on the plot or carrying on with construction. The respective affidavits raise the same issues that were before the trial court. The 2<sup>nd</sup> Respondent further availed an extract of minutes from the Municipal of Garissa's Town Planning Committee for 2<sup>nd</sup> June 2010 indicating that the Council had allocated six acres on which the Youth Empowerment Centre was to be constructed. This is the plot, according to the 2<sup>nd</sup> Respondent, on which his company is constructing a Centre. The present application was brought by way of motion under section 3A of the Civil Procedure Act and Order 40 rule 1 of the Civil Procedure Rules.

At the hearing of the application for injunction pending the hearing of the Appeal, the court did not call upon to finally resolve the issues in dispute between the parties as it would be for the court hearing the appeal to do so. In **EXLUSIVE ESTATES LTD vs KENYA POSTS AND TELECOMMUNICATIONS AND ANOTHER, CIVIL APPLICATION No. NAI 62 OF 2004**, the court of appeal observed that a temporary injunction is issued in a suit to preserve the property in dispute or the rights of the parties under determination in a suit pending the disposal of the suit and similarly an injunction is issued in an appeal to preserve the subject matter of the appeal. I am also mindful of the fact that the Applicant is appealing, exercising his undoubted right of appeal, and the court should see that the appeal if successful is not rendered nugatory (**MADHUPAPER INTERNATIONAL LIMITED Vs KERR [1985] KLR 840**).

I have considered the dispute, the respective affidavits and annexures and the written submissions by Mr. Adere for the Applicant and Mr. Onono for the Respondents. It does appear that the Applicant will have to show that he has a formal allocation from the Council of the disputed plot. If this was trust land and the Council was empowered to allocate it, was the allocation done and with what conditions? Secondly, there will be the issue about the size of the plot. Was it 3 acres or 200x100 ft? Thirdly, is the plot identifiable regarding its physical location? Is the plot related to the 6 acres that have allegedly been allocated to the Ministry of Youth Affairs and Sports for the development of the Centre?

The fact that the 2<sup>nd</sup> Respondent is being sued in his personal capacity for a contract that a limited liability company is undertaking raises a legitimate complaint that the court will have to deal with. Lastly, it is also a legitimate issue for the Respondents to argue that there is a known principal who has taken possession of the plot and is developing a Centre thereon, this is the Ministry of Youth Affairs and Sports. Why the Ministry is not a party will be to be explained by the Applicant. If the Council is one that has given the 6 acres to the Ministry, why is it not a party?

An injunction is an equitable remedy that cannot be granted in vain. It can only be granted a deserving case. I also bear in mind the balance of convenience to the parties, now that there is an apparent dispute regarding the Applicant's right to the plot or his capacity to mount this suit altogether.

In conclusion, I dismiss the application with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2011.

**A.O. MUCHELULE**  
**JUDGE**