



**Civil Practice and Procedure**

**Temporary injunction pending determination of the suit.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 233 OF 2009**

**JANENDRA RAICHAND SHAH.....RESPONDENT**

**VERSUS**

**NASSOR MOHAMED NAHDY.....APPLICANT**

**RULING**

The plaintiff in filing this case sought mandatory injunction to order the defendant to forthwith pull down and remove from the Parcel known as sub-division No. 890 (Original No. 284/99) section III Mainland North under certificate No. 39208 (suit property). The plaintiff also seeks in his plaint an injunction to restrain the defendant from preventing the plaintiff from accessing the suit property and an injunction to restrain the defendant from remaining on the suit property. The plaintiff finally prays for an order of demolition of illegal structures on the suit property.

Although interlocutory judgment and final judgment was entered against the defendant, the defendant was successful in having it set aside by this court's ruling dated **4<sup>th</sup> August, 2011**. The court by that ruling granted the following orders:

***1. The Plaintiff/Respondent by himself, servants, or agents or otherwise howsoever be restrained from taking possession of the suit property, known as Subdivision Number 890 (Original No. 284/99) Section III M.N, dismantling and wasting the erected structures thereon, evicting the people therein, or disposing of, alienating, transferring, charging, leasing or in any manner whatsoever dealing with suit property.***

***2. The Plaintiff/Respondent by himself, his servant or agents or anyone else claiming by, through or under him otherwise howsoever is compelled to immediately surrender and deliver up the suit property in vacant possession with all buildings and assorted fittings and fixtures erected on the suit property comprising the defendant's property to the defendant to hold quietly, use and enjoy the same.***

**3. The judgment entered on the 1<sup>st</sup> September, 2009 and 30<sup>th</sup> October, 2009, and all consequential orders issued against the defendant in default of the appearance and defence, be and are hereby set aside.**

**4. That the defendant be allowed to enter appearance and file defence and the matter be decided on merit.**

What followed the execution of the above order by the defendant is what has provoked the notice of motion dated **9<sup>th</sup> September, 2011** which is under consideration in this ruling. That notice of motion which is filed by the plaintiff seeks an injunction to restrain the defendant from constructing or erecting buildings on suit property; a restraining order to stop the defendant from demolishing buildings on the suit property; restraining orders stopping the defendant from selling the suit property; and an order for review on the ruling of **4<sup>th</sup> August, 2011**. The plaintiff in support of that application relies on the following grounds:

- **following the ruling of 4<sup>th</sup> August 2011 the defendant commence construction of building whilst the said ruling did not authorize him to do so.**
- **That if he does continue with that construction it will prejudice the plaintiff**
- **That the defendant may let alienate or subdivide the suit property to the prejudice of the plaintiff.**

The defendant in his replying affidavit referred to a judgment of this court being **HCC NO. MSA 346/93 NASSOR MOHAMED NAHDY –VS- RAVJI RAMJI MANJI**. The defendant deponed that **RAVJI RAMJI MANJI (MANJI)** allegedly sold the suit property to the plaintiff in this case. That since the judgment in **HCC MSA 346 of 1993** determined that Manji did not have a good title he was therefore incapable of passing a good title to the plaintiff herein. The defendant further deponed that he is a beneficial owner of the suit property by virtue of being the administrator of the estate of his late father who was the owner of the suit property. To that end the defendant annexed a grant issued by this court on **1<sup>st</sup> April 1975** appointing him as an administrator of the estate of **Nassor Ali Nahdy**.

I have considered the arguments of both parties in this case. The ruling of **4<sup>th</sup> August, 2011** reproduced above did not in my view authorize nor did it restrict the defendant from constructing any building on the suit property. It therefore follows that if an order is now issued of injunction to restrain the defendant from constructing a building on that property that would not amount to a review of the ruling of **4<sup>th</sup> August, 2011**.

The plaintiff's reliance of **High Court Msa 346 of 1993** to show that he is the owner of the suit property is in my view misconceived. The orders that the court was deciding in that case were the eviction of **MANJI** from parcel No. 284 section III; **mesne profits** from Manji; and costs of the suit. Manji did not offer evidence in his defence. The court granted orders of eviction and **mesne profits** against him in favour of the defendant herein. That judgment therefore, did not determine ownership of the suit property. The plaintiff relied on the grant in succession cause No. 24 of 1996 to prove what he calls beneficial ownership of the suit property. That grant as far as I can see was not confirmed it also related to the estate of **Nassor Ali Nahdy**.

There is no evidence before court to show that the suit property was registered in the name of **NASSOR ALI NAHDY**. The defendant in his counter claim alleges that the property does not belong to the plaintiff. I have looked at the affidavit sworn on **4<sup>th</sup> and 20<sup>th</sup> December 2009**. The positions in those

affidavits lead me to find that the plaintiff has shown a *prima facie* case with probability of success. Order 40 rule 1 in providing that a court can issue a temporary injunction provides;

***“The court may by order grant a temporary injunction to restrain such acts, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or the deposition of the property as the court thinks fit until the disposal of the suit or until further orders.”***

In the book of **Mulla “The Code of Civil Procedure” 16<sup>th</sup> Edition page 3703** further provides in respect of granting temporary injunction that;

***“A temporary or interim injunction, on the other hand, may be granted on an interlocutory application at any stage of the suit. The injunction is called temporary, for it endures only until the suit is disposed off or until the further order of the court. An injunction is a judicial process whereby a party is required to do or to refrain from doing any particular act. It is in the nature of a preventative relief granted to a litigant quia timet, that is, because he fears future possible injury.”***

There is no doubt that the fear of the plaintiff is that the suit property may have changed not only in character but in ownership by the time the suit is heard and yet at the heart of this dispute is its ownership. The defendant did not deny that he is carrying out construction on the suit property. For that reason the prayers sought in the notice of motion dated **9<sup>th</sup> September, 2011** are merited. I grant the following prayers:

- 1. The defendant/respondent by himself or his agents, servants or otherwise howsoever be and is hereby restrained from developing, constructing, putting up, erecting any building, structures, fixtures or any other thing on the property known as Sub-Division No. 890 (Org. No. 284/99) Section III, North of Mombasa Municipality or in any way whatsoever interfering or wasting the same pending the hearing and determination of this suit.***
  
- 2. The defendant/respondent by himself, or his agents, servants or otherwise howsoever be and is hereby restrained from demolishing, dismantling, destroying or in any other manner howsoever interfering with the structures, buildings or erection on the property known as Sub-Division No. 890 (Org. No. 284/99) Section III, North of Mombasa Municipality pending the hearing and determination of this suit.***
  
- 3. The defendant/respondent by himself or his agents, servants or otherwise howsoever be and is hereby restrained from selling, disposing of, letting, alienating, subdividing, transferring, charging or in any other manner whatsoever interfering with the ownership of the property known as Sub-Division No. 890 (Org. No. 284/99) Section III, North of Mombasa Municipality pending the hearing and determination of this suit.***
  
- 4. The plaintiff is awarded costs of the notice of motion dated 9<sup>th</sup> September, 2011.***

**DATED and DELIVERED at MOMBASA on this 10<sup>th</sup> day of November, 2011.**

**MARY KASANGO  
JUDGE**