



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Commercial Cause 69 of 2006**

**ALI MZEE SAID & 3 OTHERS .....PLAINTIFFS**

**VERSUS**

**MAWANI HARAMBEE COMMITTEE .....DEFENDANT**

**R U L I N G**

In a Motion premised on the provisions of order XXI rule 28, order XXXIX and order L rule 1 of the Civil Procedure rules and sections 3A and 63(c) and (e) of the Civil Procedure rules the plaintiff herein sought for the following orders against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants:

- (a) An order of injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from dealing with, selling and or disposing of Plot No.546 of Malindi township, Maweni, hereinafter referred to as the suit property pending the hearing and determination of this motion.
- (b) An order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to deliver the title documents to the plaintiffs' advocate to enable him transfer to the plaintiffs their respective plots as per this court's orders.
- (c) costs of the application.

The 1<sup>st</sup> plaintiff, Ali Mzee Said swore an affidavit in support of the motion.

When the motion was served upon the defendants, they opposed it through the replying affidavit of Richard Baya sworn on 3<sup>rd</sup> November 2005. The defendant's advocate's application to have the hearing of the motion adjourned on 4.5.2006 was refused consequently the motion proceeded for hearing in the absence of Mr. Hare Mwarandu since Mr. Kinyanjui advocate who held Mr. Mwarandu's brief had no instructions to proceed with the hearing of the motion. Of course this court is enjoined by law to consider the replying affidavit filed on record in such circumstances.

To begin with, prayer (a) above has already been dealt with. What is now before this court for determination is prayer (b) i.e. whether or not to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to surrender title documents in respect of Plot No. 546 Malindi Township, Maweni to the plaintiffs' advocates. The facts in support of motion are set out in the affidavit of Ali Mzee Said. It is averred by the plaintiffs that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were ordered to transfer to the plaintiffs their respective pieces of land to be excised from the aforesaid parcel of land in a judgment of 5<sup>th</sup> September 2004. The plaintiffs have annexed to the affidavit of Ali Mzee Said a copy of the judgment and a demand letter from their advocates requesting for the title to be availed to finalize the exercise. The plaintiffs accused the 1<sup>st</sup> defendant of continuing to sell the a land to third parties as they are kept waiting. The plaintiffs fear that they may be left out without anything to cling on. On this account the plaintiffs were of the view that they are likely to suffer irreparable loss.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied having sold the land in dispute. They however admitted that the 4<sup>th</sup> defendant transferred his interest to the 1<sup>st</sup> defendant. They also conceded that they have now caused the suit land to be subdivided and that the delay to give the plaintiffs their titles is due to the fact that the deed plans have not been approved and registered as required hence it is not possible to register transfers.

I have perused the motion plus the supporting affidavit and the replying affidavit in opposition. I have

also considered the submissions of Mr. Omondi advocate for the plaintiffs. It is not denied that this court made an order for specific performance against the defendants on 5<sup>th</sup> September 2001. It has been said that the delay to give effect to the judgment of 5.9.2001 is due to the fact that the deed plans have not been registered. There is also an allegation that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have started selling part of the land to third parties. This fact is denied in the replying affidavit. The denial can be seen through as a ploy to cheat this court. It is clear from a copy of the agreement dated 27.1.05 annexed to the affidavit of Ali Mzee Said that the defendants through the 4<sup>th</sup> defendant have sold part of the suit premises to third parties not named in this suit.

It is clear from the provision of order XXI rule 28(5) of the Civil Procedure Rules that this court has wide discretion to enforce an order of specific performance either through the decree holder or by appointing another person to do so at the cost of the judgment debtor. In this case it appears the defendants are not in a hurry to actualize the order for specific performance issued on 5.9.2001. It is not true that the deed plans have taken long. It would appear the defendants are taking their sweet time in the matter. There is no evidence that the defendants have even prepared and lodged the deed plans. The dispute must come to a rest. The only way the matter can come to a rest is by dispossessing the title documents of the suit premises from the defendants and giving them to the decree holder to actualize the order for specific performance.

In the end I am satisfied that the motion is well established. It is allowed in terms of prayer (4) with costs.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of June 2006.**

J.K. SERGON

J U D G E