



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

**CIVIL SUIT NO. 511 OF 2005**

**GODFREY KARUME ..... PLAINTIFF/APPLICANT**

**VERSUS**

**HUSNA MASOUD MUHASHAMY .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NUR MASOUD MUHASHAMY ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MOHAMED MASOUD MUHASHAMY.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**SALMA MASHOUD MUHASHAMY.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**AMINA LYDIA MAKAYA MUHASHAMY (*sued as authorized agent of***

***the 1<sup>st</sup> – 4<sup>th</sup> defendants the registered proprietors, or agents by virtue***

***of power and Attorney Registered as CR/P.A 6007) .....5<sup>TH</sup> DEFENDANT***

**JUSTIN KAZUNGU BAYA .....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RAMATHANI MWADONDO.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The plaintiff's application by Chambers Summons dated and filed on 11<sup>th</sup> May, 2005 was brought under Order XXXIX, rules 1,2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap. 21). The plaintiff's prayers were as follows:-

(i) that, a temporary injunction be issued restraining the defendants, their servants or agents from dealing or interfering with the plaintiff's quiet occupation of L.R No. 969 Malindi, pending the hearing and final determination of the suit;

(ii) that costs be provided for.

The application is premised on the following grounds:

(a) the plaintiff had leased the suit property in 1988, and agreed with the landlord that the plaintiff would renovate, redevelop, and make major improvements to the same, on the understanding that if the proprietors would wish to sell the suit premises, they would give the plaintiff the first option to

buy at market value – less the plaintiff's permanent developments;

(b) the defendants have now expressed their intention to sell the suit premises, but before offering the same to the plaintiff, in accordance with the earlier agreement;

(c) the plaintiff has invested over Kshs.2,00,000/= in the re-development of the suit premises, and if he is not given the first option to purchase the premises at market value, he, the plaintiff, will suffer irreparable loss.

In the plaintiff's supporting affidavit dated 11<sup>th</sup> May, 2005 he avers that he had leased from the late father of the present registered proprietors of L.R No. 969 Malindi, with effect from 1988, and that it was agreed he would renovate and do permanent improvements in the suit premises, on condition that if the premises should ever be sold, he would be given an option to purchase at market value. He deposed that between 1988 and the date of filing suit, he had spent more than Kshs.2,000,000/= in making permanent improvements. The deponent averred that the 5<sup>th</sup> defendant, who is a step-mother of the 1<sup>st</sup> to 4<sup>th</sup> defendants, had written to him, the plaintiff, informing him that he had been accorded the 1<sup>st</sup> option to purchase L.R 969 Malindi but had failed to respond to the said letter. The plaintiff had written back to the 5<sup>th</sup> defendant on 23<sup>rd</sup> April, 2005, informing her that he had not received any letter at all making an offer to him. The plaintiff then conducted a search at the Mombasa District Land Registry, confirming that the suit property had not been the subject of any sale transaction yet. The plaintiff then informed the 5<sup>th</sup> defendant that he was interested in negotiating to purchase the suit premises. He proceeded thereafter to lodge a caveat against the title to the suit property. He averred that he needed a court order to have the caveat retained until the hearing and determination of the suit.

The plaintiff's application was accompanied by his advocates' certificate of urgency, in which it is stated that –

**“the defendants and proprietors of L.R No. 969 Malindi are selling the premises before they have offered the plaintiff who has been their tenant from 1988 an option to purchase the property at market value although their late father the landlord had promised the plaintiff that he would be given first option and his re-development expenses would be taken into consideration.....”**

The defendants, on 27<sup>th</sup> May, 2005 filed grounds of opposition in which they assert as follows:

(i) that, the plaintiff's plaint does not disclose any cause of action against the defendant;

(ii) that, the plaintiff's claim is misdirected;

(iii) that, the applicant has shown no loss/damage that cannot be remedied by way of an award of general damages, and he fails to show that he would be entitled to the remedy of an interlocutory injunction;

(iv) that, the application has no merit.

The plaintiff filed a further affidavit on 30<sup>th</sup> May 2005 in which he deposes that his tenancy of the suit plot *continued* even after the demise of *Masoud Mohamed Muhashamy* and that this was evidenced by continued collection of rent from the plaintiff by the defendants or their agents. He averred that his tenancy was at stake, together with his permanent improvements which had cost more than Kshs.2,00,000/=. He deposed that the 5<sup>th</sup> defendant, *Amina Lydia Makaya Muhashamy*, had continued to be the landlady from the moment of the death of the original landlord, *Masoud Mohamed Muhashamy*. He averred that the 5<sup>th</sup> defendant had appointed *Mgongo Investments Co. Ltd* and *Kiunguu Building Contractors* to serve as her rent-collecting agents and to collect rents from the plaintiff. It is deposed that at a later stage, the 5<sup>th</sup> defendant appointed *Kitna Enterprises* and *Imara Homes* to be her rent-collecting

agents.

The plaintiff deponed that there was a vesting order signed inter alia by *Mrs Amina Lydia Makaya Muhashamy*, the 5<sup>th</sup> defendant, registered at the Mombasa Land Registry on 4<sup>th</sup> September, 2003 whereby the executors of the estate of the late *Masoud Mohamed Muhashamy* vested the suit property in the beneficiaries of the late *Masoud Mohamed Muhashamy*. It is deposed that the plaintiff has registered a caveat against the suit property claiming purchaser's interest.

The 5<sup>th</sup> defendant filed a replying affidavit dated 28<sup>th</sup> June, 2005. She depones that she is authorized by the 1<sup>st</sup> – 4<sup>th</sup> defendants (her step son and daughters respectively) to swear the affidavit on their behalf, and she swears it too for herself. She avers that she was one of the wives of *Masoud Mohamed Muhashamy*, who died on 25<sup>th</sup> May, 1999. She avers that the deceased left a will, in which he appointed herself, a daughter (*Salma Masoud*) and a niece (*Swafia Salim Muhashamy*) as executors. Following the death of the testator, the executors petitioned the High Court at Nairobi for grant of probate of the will; and the same was gazetted on 29<sup>th</sup> October, 1999. The High Court later issued grant of probate on 30<sup>th</sup> November, 1999; and on 14<sup>th</sup> July, 2000 a certificate of confirmation of grant was issued: this gave effect to the will and the distribution of the estate, as determined by the testator.

It was deponed that the executors, in discharge of their statutory duties, caused Land Title C.R No. 12243, plot No. 969 Malindi (the suit plot) to be transferred to the 1<sup>st</sup> – 4<sup>th</sup> defendants in terms of the will and as ordered by the court. It is deposed that, to date, neither the will nor the orders of the High Court has been challenged. It is further averred that the plaintiff, even though he was aware of the death of the testator, and equally aware of the will; the succession proceedings; the court order and the change of ownership; never lodged any claim for Kshs.2,000,000/= in respect of developments which he claims to have made on the suit property.

The deponent denies that her late husband had ever offered to sell the suit property to the plaintiff. She avers that for the 17 years that the plaintiff had been a tenant on the suit premises, he had paid a *flat rent*; and this was because any minor repairs the plaintiff did effect, had been factored in the rent claimed. The deponent avers that when, in 1988 the plaintiff had proposed to effect certain renovations, the testator had made it clear that such renovations must be on his express authority, and there would be no refund for any renovation. She averred too that the testator had clarified to the plaintiff that he, the proprietor, had no interest in selling the suit property. The deponent deposed that she was not aware of any verbal contract between the plaintiff and the testator, obligating the testator to sell the suit property to the plaintiff. The deponent has been advised by her advocates, whom she believes, that even if the testator may have expressed his willingness to give a first priority in case of purchase to the plaintiff, the testator made this wholly *conditional*, using language of this tenor: “were he to sell the property during his life time”. The testator ended up *not selling the suit property in his lifetime*, and he instead “**decided to bequeath it to his son and daughters**”.

The plaintiff filed a further affidavit on 4<sup>th</sup> July, 2005 in which he avers that the 5<sup>th</sup> defendant had, by her letter of 30<sup>th</sup> July, 1999 asked him to continue paying rent in the name of her late husband. The plaintiff averred that the late *Masoud Mohamed Muhashamy* had committed himself both verbally and by letter dated 29<sup>th</sup> July, 1988 when he made offers on the terms of tenancy. One paragraph of the said letter of 29<sup>th</sup> July 1988 however reads:

*“You also requested to know if I would consider selling the entire property to you to develop a small hotel with rooms upstairs. This, I regrettably tell you ..... I have no intention to sell at the moment, but you can rest assured that you shall be given the first option at the existing market price should this arise in future and at which time the cost of development and maintenance will be considered for refund”.*

The plaintiff, in his depositions, denies that the costs of renovations which he effected, had ever featured in the rent paid at any time. He avers that the testator had authorized him to develop the suit property, for

consideration in the future; and that the fact that he continued to meet his obligations to the suit property's beneficiaries through the 5<sup>th</sup> defendant and her agents, did indicate his stake in that property. The plaintiff averred that he was not claiming ownership, but only what he and the original landlord had agreed.

In response to the plaintiff's further affidavit, the 4<sup>th</sup> defendant filed a further affidavit on 15<sup>th</sup> July, 2005. The material elements in her averment are: that the proprietors of the suit property had earlier entered into a *sale agreement* and had sold off the same to one *Marco Vancini* on 18<sup>th</sup> March, 2005 for the consideration of Kshs.10,000,000, a substantial part of which has been paid, in accordance with the terms of the sale contract. It is further averred that to date, the estate of the late *Masoud Mohamed Muhashamy* had *not received any claim* from the plaintiff herein.

On the occasion of hearing the instant application, on 19<sup>th</sup> July, 2005 learned counsel *Mr. Ritho* and *Mr. Eboso* appeared for the plaintiff/applicant and the defendants/respondents respectively. *Mr. Ritho* stated that his client was seeking a temporary injunction against transfer of title to the suit land to a third party by the defendants.

*Mr. Riitho* submitted that the testator had committed himself that the plaintiff would have first option to purchase the suit premises before anyone else. He contested the 5<sup>th</sup> defendant's communication of 22<sup>nd</sup> April, 2005 which was to the effect that a first offer to purchase the suit property had been given to the plaintiff but the plaintiff did not take it up. Counsel contended that the commitment of the testator to grant the plaintiff a first - purchase option, in 1988, had been attended by *part – performance*, and so the defendants were bound by that commitment. The part-performance, it was submitted, took the form of the plaintiff renovating the premises and constructing extensions, with the testator's consent. Counsel stated that the plaintiff had written to the 5<sup>th</sup> defendant asking to be given the first option to purchase – but there was no response. Counsel submitted that so long as there was part performance, it was not necessary that there should be a written agreement under which the testator bound himself to give a first - purchase option to the plaintiff.

Noting that the suit premises was registered under the Registration of Titles Act (Cap. 281), and therefore it was administered under the Transfer of Property Act (Rev. 1962), counsel invoked S.520 of the Transfer of Property act which carries the *lis pendens* principle:

**“During the active prosecution in any court.... of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose”.**

*Mr. Riitho* urged that the plaintiff had a good case, with a probability of success; and on this account he should be allowed to remain on the premises until the suit is heard and determined.

Learned counsel for the defendants, *Mr. Eboso*, remarked that the plaintiff's case was predicated on an alleged oral agreement between him and the previous owner. He submitted that the defendants were not parties to the alleged oral agreement, and so it is not binding on them. He submitted that the defendants were strangers to the oral agreement; and that if there ever was such agreement it was conditional on *whether in his lifetime the proprietor would have been minded to sell the property*. He submitted that only once, by his letter of 29<sup>th</sup> July, 1988, did the testator ever refer to the possibility that he might sell the suit land; and he did so not by deliberate initiative, but only by way of *responding to an inquiry by the plaintiff*. The proprietor did not, in the event, change his mind or decide to sell; instead he decided to *bequeath* by will. If an oral arrangement ever existed between the proprietor and the plaintiff, learned counsel submitted, it lapsed upon him writing his will and upon his death; and the present proprietors became proprietors pursuant to orders of court. Counsel noted that the plaintiff had not pursued the estate and tried to enforce the content of the said oral agreement against persons who knew not about such agreement. Had there been an enforceable contractual claim, counsel submitted, it would have been canvassed *at the time of succession*, but this was not done. Hence the titles of the 1<sup>st</sup> – 4<sup>th</sup> defendants

were granted by court not subject to any claim by the plaintiff.

Learned counsel also disputed the submission that the suit property, C.R. No. 12243, Plot No.969 Malindi was registered under the *Registration of Titles Act* (Cap. 281); it was instead registered under the Land Titles Act (Cap. 282); and the effect was that under S.8 of the Transfer of Property act, unless a different intention appears, then *title passes upon transfer*.

*Mr. Eboso* submitted that the plaintiff had made no attempt to show that he stands to suffer irreparable damage. Counsel submitted that the statement that the plaintiff had spent more than Kshs.2,000,000/= in renovations on the suit property was a bare claim without supporting evidence; and that even if the claim were true, it was for compensation only in *damages* in a proper case. And even were damages to be the suitable remedy, counsel submitted, the proper party, namely the *estate*, would have to be enjoined. The estate, in this regard, would mean the *executors of the will*; and they do exist. Such a claim, counsel submitted, would have to be loaded on to the *succession cause*.

Learned counsel submitted that it was not conceivable that any tenant could spend a large amount, such as Kshs.2,000,000/=, without a *formal contract* with the landlord.

*Mr. Eboso* submitted that the balance of convenience did not lie in favour of the plaintiff, and in particular as the persons against whom injunctive relief was now sought were not parties to the oral agreement. The *innocent purchaser* stands to be inconvenienced, yet he is *not a party* to the suit.

Learned counsel submitted that the plaintiff who is a *protected tenant* remains a protected tenant, and has nothing to lose, in contrast to the beneficiaries who have everything to lose. He urged that the caveat lodged by the plaintiff should be ordered to be removed.

In his rejoinder, *Mr. Ritho* submitted that the plaintiff had no reason to proceed under the succession process: “He had no business under the succession cause; his concern was only that he would be given the *first purchase – option*; and the prayer is for that option”.

Learned counsel submitted that the plaintiff had made extensions to the suit property in which he had constructed “**a first-class restaurant, and a first-class butchery**”. These extensions, it was urged, “cannot be replaced by money”. It was urged that in 1988, before any expenditure was incurred, *hope* was given by the proprietor. Counsel urged that “the children inherited whatever was there in the condition in which it was”; “the children of the late proprietor received the property when the plaintiff was in occupation”. He maintained that the property in question was registered under the Registration of Titles Act (Cap. 281), and as of now, *transfer had not yet taken place*. Indeed the search record document shows that statute, rather than the Land Titles Act (Cap. 282), as stated by counsel for the defendants.

*Mr. Riitho* expresses concern about the clause in the agreement between the defendants and the third party, which provides for vacant possession to the third party. This apprehension would not, I think, be justified, since the *plaintiff’s rights will be protected under the Business Premises (Shops, Hotels and Catering Establishment) Act (Cap. 301)*.

Learned counsel had several authorities which he urged to be in support of the contention that the testator’s verbal undertaking towards the plaintiff would be binding on the testator’s heirs. He cited the following: **Halsbury’s Laws of England**, 3<sup>rd</sup> ed., Vol. 15, pp. 196 – 97 (on “parties estopped by judgment interpartes”); **Dundas v Waddell** (1888) H.L. (Sc) 249; **Weeks v. Birch** (1893) L.T.R. 759. I would not say, with respect, that there was a sharp focus in the mode of canvassing these authorities. In my judgment, not quite as much will turn on them as on the immediately apparent legal issues, as well as the compelling facts in the instant matter. But one clear point made by *Mr. Riitho* was that the privies are bound by *orders* made against vendors; and that on that principle, present registered owners of the suit property are bound by what would have bound their late father.

The plaintiff’s case for interlocutory relief rests on a *promise* which the original proprietor once made to him, apparently both orally and in writing. The promise made in writing, however, is conditional : it

would apply *if the owner were to be minded to sell the property*; and if he were so minded, in *his lifetime*. Now the decision to sell is coming *after* his lifetime, by new owners, and in the context of the purchase-rights of an *innocent third party* who knew nothing about the verbal promise. I have to state, in these circumstances, that it would in law be untenable that the interests of such an innocent third party would be defeated. Besides, the original proprietor did not take the decision to sell, whether directly while he lived, nor indirectly by sanctioning sale in his will. All he did was to *bequeath his property by will to his children*. On these facts I would hold that the condition – if condition it was – for granting a first-purchase option to the plaintiff had *failed*.

Such a position is in addition buttressed by the fact, as emerges from the evidence, that the defendants were not parties to the testator's promises of first-purchase offer, made to the plaintiff; indeed they were not at all in the know when the promise was being made.

I must observe, in these circumstances, that if a valid first-option-to-purchase offer had been made to the plaintiff, the supervening circumstances have nullified such a promise and it cannot be enforced against the beneficiaries, the defendants. The said circumstances – *the defendants being alien to the testator's promise; the conditionalities attached to the promise; the succession process that took place and the orders issued therein; the emergence of innocent third-party rights* – nullified the possible emergence of privity-obligations surviving the testator and accruing to the beneficiaries. I would hold, therefore, that there is no obligation resting on the defendants, in relation to the testator's promise to the plaintiff, by dint of the same having rested on the testator himself.

In my judgment, the fact that the 5<sup>th</sup> defendant continued to collect rent from the plaintiff as tenant following the death of the testator, does not lessen the force of the legal reasoning elaborated hereinabove. Such continued collection of rent was no more than a practical recourse, transitional to the resolution of the vital legal questions which I have considered above.

I am, besides, in agreement with counsel for the defendants that, were the plaintiff to have a valid claim founded on such promise as may have been made to him by the testator, the same *would have been lodged and proved against the estate itself*. This has never been done; and it demonstrates that the claim now being made against the beneficiaries is misdirected, in law.

I am further in agreement with counsel for the defendants that this is *not a fit case for equitable interlocutory relief*. Equity follows the law; and as I have already stated, the law in this matter stands squarely in favour of the defendants. Besides, the plaintiff has shown no *irreparable harm* which he stands to suffer. His interests are very easily calculable in *monetary figures*, and then claimed against the correct party, after suitable joinder has been made. And, for good measure, counsel for the defendants has readily conceded that the plaintiff is a *protected tenant*. This was not disputed by counsel for the plaintiff, and I assume it to be true. Therefore the plaintiff's protection is settled reality, available within the framework of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301). A party so protected is not to be heard praying for an equitable interlocutory injunction as a substitute to the guaranteed protection of statute. I will make the following orders:

- 1. The plaintiff's prayer that a temporary injunction be issued restraining the defendants, their servants and/or agents from dealing and interfering with the plaintiff's quiet occupation of L.R. No.969 Malindi pending hearing and final determination of this suit, is refused.**
- 2. The plaintiff shall bear the defendants' costs in this application, in any event.**

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of September 2005.**

**J.B OJWANG**

**JUDGE**

**Coram : Ojwang, J**

**Court Clerk : Mwangi**

**For the Plaintiff/applicant : Mr. Riitho, instructed by M/s S.K Riitho & Co. Advocates**

**For the defendants/respondents : Mr. Eboso, instructed by M/s Eboso & Wandago Advocates**