



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC 192 OF 2017**

**ALI KITSAO KATANA.....PLAINTIFF**

**-VS-**

**1. KASSIM MOHAMED OMAR**

**2. MUHSIN MOHAMED OMAR**

**3. NOOR SAYER BAKAR NOOR**

**4. JEYLAN MUNYE KOLATANI**

**5. LAND REGISTRAR MOMBASA**

**6. THE ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> June, 2017 the Plaintiff seeks an order of temporary injunction to restrain the 3<sup>rd</sup> and 4<sup>th</sup> Defendants by themselves, their servants, employees, assignees or agents from constructing on, disposing of, transferring, trespassing, onto, advertising for sale or interfering in any way with the suit property pending hearing and determination of this suit.

2. The application is supported by the affidavit of the Plaintiff sworn on 5<sup>th</sup> June 2017 and the grounds set out in the Motion, being principally:

**i. THAT the Plaintiff is the registered proprietor of the Suit Property having bought the same in 2005 and has since 2013 started construction of a three-storey building thereat.**

**ii. THAT the Plaintiff has been gainfully employed in the Republic of South Africa and during his absence left the care of the original documents in regard of the Suit Property with the 1<sup>st</sup> Defendant who is his first cousin.**

**iii. THAT the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in collusion with the officers of the 5<sup>th</sup> and 6<sup>th</sup> Defendants purported to transfer the Suit Property to the 2<sup>nd</sup> Defendant, also a cousin to the Plaintiff, and subsequently to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who by dint of this action are claiming ownership of the Suit Property and will dispossess the Plaintiff thereof.**

**iv. THAT it is necessary to restrain the 3<sup>rd</sup> and 4<sup>th</sup> Defendants from transferring the Suit Property further to third parties and to prevent the eviction of the Plaintiff who is still in occupation.**

**v. THAT without such orders the Court would have acted in vain and the Plaintiff will be extremely prejudiced as the Suit Property can be transferred and the Plaintiff lose all his investments herein.**

**vi. THAT it is in the interest of justice that the Application is allowed to preserve the subject matter of the Suit pending trial.**

3. In his said affidavit the Plaintiff has deponed that he bought **plot No. MN/1/13135** in 2005 from one Muhammed Abdala Muhammed and had the Title transferred in his name. The Plaintiff deponed that he was and is still employed in the Republic of South Africa where he

spends large stints of his time and thus left the Original Title and other documents with the 1<sup>st</sup> Defendant who is his cousin. The Plaintiff avers that in 2013 he returned to Kenya and started construction of a three-floor permanent building at the Suit Property and left it under the supervision of the 1<sup>st</sup> Defendant. That he sent the 1<sup>st</sup> Defendant monies from South Africa to continue with the construction but in or around 2014 he had lost faith in the 1<sup>st</sup> Defendant's management of the funds as he was advised that construction had halted. The Plaintiff avers that on or around 15<sup>th</sup> May 2017 he received a call from his caretaker on site, one Mvuko Buso Ndune who informed him that several strangers had approached him at the property and asked him to leave to enable them go on with the construction of the building.

4. The Plaintiff further avers that he travelled back and after making numerous inquiries at the lands Registry and County Offices he discovered transfers to the 2<sup>nd</sup> Defendant who is a brother to the 1<sup>st</sup> Defendant. He states that he does not know the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and that he never consented to a sale to them and believes all the transfers were fraudulent to cheat him of his property and therefore reported the matter to the police. The Plaintiff depones that he is still in occupation of the Suit Property but is apprehensive that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants will transfer to a third party or seek his vacation from it. Relying on advice, the Plaintiff believes the Court can issue the orders sought to prevent his eviction and preserve the Suit Property. It is the Plaintiff's contention that if the orders are not granted he stands to suffer irreparable harm in terms of his property and the considerable investments and therefore prays that the status quo be maintained pending hearing of the case. Annexed to the said Affidavit are copies of the Certificate of Title, the Plaintiff's passport, letter from Assistant Chief, Maweni Sub-location and approved building plans.

5. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 1<sup>st</sup> Defendant filed a Replying Affidavit sworn by himself on 17<sup>th</sup> January 2018 in which he deposes that when the Plaintiff bought the suit property in 2005, he entrusted him with providing the caretakers of the house and was to pay him Kshs.10,000 per month for disbursement to the caretakers but never sent any payment. That the Plaintiff had also promised to pay him Kshs.400,000 upon completion and sale of the house. He states that the Plaintiff never completed the house but sold it to the 2<sup>nd</sup> Defendant while in South Africa. The 1<sup>st</sup> Defendant avers that the Plaintiff was in Kenya in 2013 and gave the 2<sup>nd</sup> Defendant the Original Title, his Identity Card and PIN and that the plaintiff informed him that he had sold the house to the 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant's brother. The 1<sup>st</sup> Defendant denies the allegations of fraud and maintains that the Plaintiff sold the Suit Property to the 2<sup>nd</sup> Defendant. He states that he has the original Nema Certificate and copy of the development plan approved by the County Government of Mombasa and has attached copies of the same.

6. The 2<sup>nd</sup> Defendant filed a Replying Affidavit sworn by himself on 17<sup>th</sup> January 2018 in which he deposes that the plaintiff is his maternal cousin while the 1<sup>st</sup> Defendant is his elder brother and that they have always lived together in Kongowea Maweni. He states that before and on 13<sup>th</sup> November 2015, at a place called Springs Gauteng, Johannesburg he entered into a sale transaction with the Plaintiff to purchase the half built house in Maweni Kongowea at a price of South Africa Rand 950,000 which when converted at the prevailing rate of Kshs.7.00 per Rand brings the purchase price to Kshs.6,550,000. The 2<sup>nd</sup> Defendant avers that his wife Denise Khan was his witness while the Plaintiff's witness was one Richmond Onyedekede Onyekachi. He states that the Plaintiff gave him the Original Title and deed plan for the one storeyed building and he travelled back to Kenya on 29<sup>th</sup> December 2015.

7. The 2<sup>nd</sup> Defendant states that in 2014 after intervention from members of their extended family, the Plaintiff paid him 7000 Rand out of 30,000 Rand which he owed him for the sale of a Motor vehicle and the Plaintiff still owes him 23,000 Rand which he has refused to pay. It is the 1<sup>st</sup> Defendant's contention that the house is still in the same condition to date. The 2<sup>nd</sup> defendant avers that in February, 2017 he sold the house to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who paid him a deposit of Kshs.1 million and later the balance of kshs.8 million. He denies owing the Plaintiff anything having paid the purchase price of 950,000 Rand (Kshs.6,550,000) in full. He said one Aziz Masoud who was entrusted with sending the transfers to South Africa brought it back after it had been endorsed. He complains that the said Aziz Masoud has been harassing him demanding Kshs.200,000 which he declined to give and reported the matter to Mtwapa Police Station in August 2017.

8. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Replying Affidavit sworn by the 3<sup>rd</sup> defendant on 10<sup>th</sup> July 2017 in which they deny the Plaintiff's averments and in particular deny that the Plaintiff is in occupation of the Suit Property and aver that their guard is stationed there. They aver that they are purchasers for value without notice having purchased the Suit Property from the 2<sup>nd</sup> Defendant after conducting due diligence.

9. The parties filed written submissions which I have read and need not reproduce their contents herein.

10. I have carefully considered the Application, the Affidavits in support and against. I have also considered the submissions filed. This being an Application for Interlocutory Injunction, the Plaintiff must satisfy the conditions laid down in case of the **Giella -v- Cassman Brown & Co. Ltd (1973) EA 358**. The Plaintiff must show that he has a *prima facie* case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

11. The dispute is over the ownership of **Plot No.MN/1/13135**. The Suit Property was originally registered in the Plaintiff's name but it was transferred into the name of the 2<sup>nd</sup> Defendant before it was eventually transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiff alleges that because he is based in the Republic of South Africa where he works, he left the original title documents with the 1<sup>st</sup> Defendant who is his cousin and who was supervising some construction on the Suit Property. It is the Plaintiff's case that when his relationship with the 1<sup>st</sup> defendant grew icy, he returned to Kenya and upon making inquiries he discovered that the property had been transferred to the 2<sup>nd</sup> Defendant who is a brother to the 1<sup>st</sup> Defendant and therefore the Plaintiff's cousin too. He states that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are not known to him and denies selling the Suit Property to the 2<sup>nd</sup> Defendant. The Plaintiff maintains that he is still in occupation of the Suit Property but his apprehension is that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants may transfer the property to a third party.

12. On his part, the 2<sup>nd</sup> Defendant avers that he purchased the Suit Property from the Plaintiff before selling it to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. His position is supported by the 1<sup>st</sup> Defendant. The Plaintiff has denied this and alleges that the Defendants actions are fraudulent.

13. The crucial issue for determination is whether the Plaintiff should be granted the order of injunction sought given the circumstances of

this case. In the case of Mrao Ltd- v – First American Bank of Kenya Ltd (2003) eKLR, the Court of Appeal stated that:

**“... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evident must show an infringement of a right and the probability of the Applicant’s case upon trial...It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for all explanation from the latter..... ”**

14. In this case, the Plaintiff has denied that he sold the Suit Property to the 2<sup>nd</sup> Defendant who in turn sold and transferred it to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The main dispute is whether or not the Plaintiff sold the Suit Property to the 2<sup>nd</sup> Defendant. This is an issue that can only be ascertained at the trial. Until that fact is established, it is only fair that the status quo prevailing be maintained. To my mind, the Injunction sought by the Plaintiff is for purposes of maintaining the status quo prevailing until the case is heard and determined.

15. Courts have now accepted that in dealing with an Application for an Interlocutory Injunction, the Court is not necessarily bound by the three principles set out in the Giella –v- Cassman Brown case. The Court may look at the circumstances of the case generally and the overriding objective of the law. In the case of Suleiman –v- Amboseli Resort Ltd (2004) KLR 589, Ojwang, Ag. J (as he then was) stated, *inter alia*

**“Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella –v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 AA EL 772 at page 780-781: “A fundamental principle of..... that the court should take whichever course appears to carry the lower risk of injunction if it should turn out to have been ‘wrong’... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown, the Court has had to consider the following questions before granting injunctive relief:**

- i) Is there a prima facie case**
- ii) Does the applicant stand to suffer irreparable harm....**
- iii) On which side does the balance of convenience lie....**

**Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice...if granting the Applicant’s prayers will support the motion towards full hearing, then should grant those prayers.**

**I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a larger risk of injustice if I found in favour of the defendant that if I determined this Application in favour of the Applicant.”**

16. In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the *status quo* for a greater justice than to let the *status quo* be disrupted by not granting an Interlocutory Injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interest must be put on scales. In my view, it is only fair to make orders that safeguard and maintain the *status quo* until the Suit is heard and determined.

If the 3<sup>rd</sup> and 4<sup>th</sup> Defendants went ahead and transferred the suit Property to a third party, the Plaintiff would be liable in every case to be defeated by the 3<sup>rd</sup> and 4<sup>th</sup> Defendant’s alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings. As was stated by Madan J in Mawji –v- International University & Another (1976-80)KLR 229. **“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by fresh suit if the property in dispute is transferred to a third party. The Court must therefore protect the status quo.”**

17. I am thus satisfied that the facts presented in this case demonstrate that the Applicant has a *prima facie* case and the balance of convenience tilts in favour for the prevailing circumstances to be maintained. The Plaintiff has reason to seek orders to preserve the Suit Property from changing hands so that the case is not rendered an academic exercise.

18. Accordingly, I find merit in the application and grant the order for Temporary Injunction in terms of prayer 3 of the Notice of Motion dated 5<sup>th</sup> June, 2017. Costs in the cause.

**Ruling dated, signed and delivered at Mombasa this 2<sup>nd</sup> day of July 2018.**

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C. YANO

**JUDGE**