



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC CASE NO. 222 OF 2020**

**TULIP DEVELOPMENT LIMITED..... PLAINTIFF**

**VERSUS**

**REHEMA KAZUNGU BAYA .....1<sup>ST</sup> DEFENDANT**

**KHALID OMAR AHMED .....2<sup>ND</sup> DEFENDANT**

**SALIM SALIM MWABAHLE.....3<sup>RD</sup> DEFENDANT**

**JOSEPH A. NG'ETICH .....4<sup>TH</sup> DEFENDANT**

**ABRAHAM BIRUNDU NYANGOTO.....5<sup>TH</sup> DEFENDANT**

**RULING**

*(Plaintiff seeking injunction against the defendants from interfering with the suit land, and the land register; application allowed).*

1. This suit was instituted by way of a plaint that was filed on 4 December 2020. It is the case of the plaintiff that he was, and still is, the registered leasehold proprietor of all that parcel of land known as L.R. No. MN/I/3220, grant number CR 27666 (hereinafter, 'the suit land'). The plaintiff has pleaded that at all material times he had possession of the title to the suit land, which title was free of encumbrances. The plaintiff further claims that on 8 January 2016, he made an application for an official search, but the Land Registrar declined to issue it, due to alleged conflicting claims of ownership. The plaintiff has pleaded that he later uncovered that the 2<sup>nd</sup> defendant, one Khalid Omar Ahmed, fraudulently and irregularly registered an instrument purporting to transfer the suit land to himself. The plaintiff claims that to prevent further fraudulent and illegal dealings by the 2<sup>nd</sup> defendant, or any other person, he registered a restriction against the title to the suit land.

2. He has pleaded that when the investigation on the fraudulent transfer of the suit land to the 2<sup>nd</sup> defendant was completed, and the 2<sup>nd</sup> defendant was being sought after by the police, the 1<sup>st</sup> defendant (Rehema Kazungu Baya) unlawfully entered into the suit land, quickly put up temporary structures, and filed two suits against the plaintiff, namely Mombasa ELC No. 82 of 2017 (O.S) and Mombasa ELC No. 120 of 2017 (O.S) claiming ownership through adverse possession. The plaintiff avers that the 1<sup>st</sup> defendant filed another suit, namely Mombasa ELC No. 131 of 2020 (O.S). He pleads that as he was preparing to defend this suit, he discovered that despite his registered restriction, the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants (Salim Salim Mwabahle, Joseph A. Ng'etich and Abraham Birundu Nyangoto, respectively), in November 2019, obtained and caused to be registered, on an undisclosed date as entry number 9, a court order, pursuant to a purported consent adopted in Mombasa Chief Magistrate ELC No. 155 of 2019, a suit filed by the 3<sup>rd</sup> defendant against the 4<sup>th</sup> and 5<sup>th</sup> defendants, purporting to transfer ownership of the suit land to the 3<sup>rd</sup> defendant, and the removal of the restriction earlier registered, and fraudulently procured title to the suit land. For these reasons, the plaintiff prays *inter alia*, for a declaration that he is the true and lawful owner of the suit land.

3. Together with the plaint, the plaintiff filed a notice of motion application dated 3 December 2020. It is that application which is the subject of this ruling. The application seeks orders of an interlocutory injunction, restraining the defendants jointly and severally from interfering with the suit land, and the records in the land register in any manner howsoever, pending the hearing and determination of the suit. The affidavit in support of the application is sworn by one Iqbal Valli Hussein, the director of the plaintiff. He reiterates the averments in the plaint, and further deposes that on 8 January 2016, the plaintiff discovered that without its knowledge or consent, the 2<sup>nd</sup> defendant fraudulently and irregularly registered an instrument as entry number 7 purporting to transfer the suit land to himself (2<sup>nd</sup> defendant). Mr. Iqbal deposes that the plaintiff has never advertised or offered the suit land to the 2<sup>nd</sup> defendant, or to any other person, and the plaintiff has never received any sum of money from the 2<sup>nd</sup> defendant, or from any other person, relating to the suit land. He deposes that the 2<sup>nd</sup> defendant acquired the title fraudulently, irregularly, and illegally, and the said title is void *ab initio*. He deposes that the plaintiff registered a restriction against the title to the suit land on 7 June 2016, and the same was registered as entry number 8.

4. Mr. Iqbal deposes that as a result of the fraud and irregularities abovementioned, the plaintiff risked losing the right to the suit land, and is unable to develop it, and has consequently suffered and continues to suffer loss and damage due to the defendants' unlawful actions. He deposes that the defendants' actions are not only unlawful, but also patently criminal in nature, and criminal investigations have been finalized, and confirmed that the signatures on the transfer instrument in favor of the 2<sup>nd</sup> defendant were forged, and further that the passport size photographs annexed to the transfer were not of the plaintiff's directors. He deposes that the defendants' unlawful actions are part of a stealthily calculated plan to grab the plaintiff's land, and unjustly enrich themselves from the plaintiff's commercially viable prime property, which is situated in Nyali, to the plaintiff's detriment and loss.

5. He further deposes that the honorable Magistrate lacked jurisdiction to hear and determine Mombasa Chief Magistrate ELC No. 155 of 2019 as the value of the suit land was more than Kshs. 40,000,000/=. Mr. Iqbal deposes that unless restrained by this court, the defendants will continue to interfere with the land register relating to the suit land, and unlawfully enter and construct illegal structures thereon, thus, depriving the plaintiff of ownership and possession of the suit land. He deposes that the plaintiff has suffered and continues to suffer irreparable loss and damage that cannot be atoned by an award of damages.

6. The application is opposed by the 1<sup>st</sup> defendant who filed a replying affidavit. She has deposed that the application constitutes of hearsay, falsehood and mere innuendos, and the same offends Section 139 of the Evidence Act. She deposes that the plaintiff had deposed on matters he could not substantiate and/or be cross-examined on, since he was not the author and/or maker of those documents attached therein. The 1<sup>st</sup> defendant further deposes that the application, and the entire suit is *res sub judice*, since Mombasa ELC No. 131 of 2019 (OS) is pending hearing and determination where she has sued the plaintiff for adverse possession. She further deposes that she is the beneficial owner of the suit land having lived on the land since the year 1994. She adds that she has never worked in cahoots with the other defendants as alleged in the application, which was why in ELC No. 82 of 2016 and ELC No. 131 of 2020, she sued the plaintiff in relation to the suit land and acknowledged that the plaintiff was the registered owner, and she the beneficial owner.

7. She contends that the plaintiff is malicious, because though he alleges that he had lodged a restriction on the suit land, he has failed to enjoin the Land Registrar in the proceedings. She has further deposed that she has never been charged with any criminal offence related to forgery of documents as alleged by the plaintiff. She deposes that the plaintiff is abusing the court process which amounts to harassment. She adds that the plaintiff on several occasions has dragged her to Nyali police station over the same issues being raised herein, where she was charged in Shanzu criminal court. She finally deposed that she has a right of protection by this court from constant threat and intimidation by the plaintiff as there is nothing criminal in seeking orders for adverse possession.

8. The 1<sup>st</sup> defendant also filed a preliminary objection. It is claimed that the plaintiff's application and suit are incompetent, malicious, misconceived, lack merit, and an abuse of the court process. She argues that the application offends Section 139 of the Evidence Act, as the plaintiff has deposed on matters he could not substantiate and/or be cross examined on, since he was not the author and/or maker of those documents attached to the supporting affidavit. It is further claimed that the suit is *res sub judice* because ELC No. 131 of 2021 (OS) is pending hearing and determination. It is also contended that the application is incompetent for failure to enjoin the Land Registrar to this proceedings.

9. I directed that both the application and the preliminary objection be canvassed together, and counsel agreed to file written submissions.

10. Counsel on record for the plaintiff, Mr. Mwakireti, first referred me to the case of Nzele David Dzumo vs. Moses Namayi Anyangu & Another (2009) eKLR, where the court quoted with approval, the case of Mukhisa Biscuit Manufacturing Co. Ltd vs. West End distributors. With these cases, counsel put emphasis on his claim that the preliminary objection is misconceived as the 1<sup>st</sup> defendant has disputed the facts pleaded by the plaintiff, and the same require further investigation by this Honorable Court.

11. Further to this, counsel submitted that the suit was not *res sub judice* as ELC No. 131 of 2021(OS) is between the plaintiff and the 1<sup>st</sup> defendant only. He submitted that the suit herein also involves the 2<sup>nd</sup>-5<sup>th</sup> defendants, who are not parties in ELC No. 131 of 2021(OS). Counsel submitted that there is no suit pending between the parties herein. Mr. Mwakireti, further relied on the case of Peter Ndukuthyo & 3 others vs. Lydia Wang'ondy & another (2013) eKLR to buttress his point that the suit herein is not *res sub judice*. On the injunction, Counsel relied on Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 on the principles for grant of an order of injunction. On whether the plaintiff had established a prima facie case with probability of success, Mr. Mwakireti submitted that the plaintiff is the legal and registered owner of the suit land, and that was confirmed by the 1<sup>st</sup> defendant in her replying affidavit. He submitted that the 2<sup>nd</sup> defendant fraudulently and irregularly registered an instrument purporting to transfer the suit property to himself. Counsel reiterated that the plaintiff had never advertised, offered or sold the suit land to the 2<sup>nd</sup> defendant or any other person. He submitted that criminal investigations were done and found the 2<sup>nd</sup> defendant had forged the signature and passport size photographs of the directors of the plaintiff on the transfer document. Mr. Mwakireti submitted that three suits had been filed against the plaintiff for adverse possession, therefore, this shows that the 1<sup>st</sup> defendant is a nuisance litigant with a baseless claim and in violation of section 6 of the Civil Procedure Act. On whether the plaintiff will suffer irreparable loss that cannot be atoned by an award of damages, counsel submitted that the plaintiff was at risk of losing the rights to the suit land. He further submitted that the plaintiff had been unable to develop the suit land, which is a commercially viable land located in Nyali, and consequently, the plaintiff continues to suffer loss and damages as a result of the defendants' actions. Counsel submitted that it is imperative that this court grants the order of injunction sought to preserve the suit property which will prevent a situation where third parties may be sucked in the dispute, and prolonging the determination of the suit. On the condition of balance of probability, Mr. Mwakireti submitted that dismissing the application will have a higher risk of injustice as the defendants herein had engaged in fraudulent activities with the view of dispossessing the plaintiff of the suit property. He submitted that the plaintiff would suffer more harm if the injunction would be declined, more than the defendants would suffer if the order of injunction was not granted.

12. In opposition, counsel on record for the 1<sup>st</sup> defendant, Ms. Kedeki, submitted that the 1<sup>st</sup> defendant filed Mombasa ELC No. 82 of 2017 against the plaintiff for adverse possession on the suit land. She claimed however, that counsel on record for the applicant therein (the 1<sup>st</sup> defendant) withdrew the case without notifying the 1<sup>st</sup> defendant. Counsel submitted that the 1<sup>st</sup> defendant subsequently filed Mombasa ELC No. 131 of 2020 which suit is currently pending. Ms. Kedeki thus argued that the application and suit herein are *res sub judice*. She submitted that the main dispute in all the filed suits was the suit land herein. Counsel referred me to the decision in Republic vs. Paul Kihara

Kariuki, Attorney General & 2 others ex parte Law Society of Kenya (2020) eKLR to support her claim that the suit is *res sub judice*.

13. Ms. Kedeki further submitted that the application offends Section 139 of the Evidence Act. Counsel submitted that the plaintiff relied on documents produced by the office of the director of criminal investigation with a view of bolstering her claims. She submitted that the same could not stand the test of strict proof, as the plaintiff was not the author and/or privy to the report, and cannot be cross examined to shed light on it, and the same constitutes hearsay and innuendos. Counsel referred me to the decision of RG Patel vs. Lalji Makanji (1957) EA 314 to put emphasis on her claim that the allegation of fraud must be strictly proved. Counsel submitted that the plaintiff was trying to abuse the court process to gain possession of the land, which was meant to frustrate the hearing and determination of Mombasa ELC No. 131 of 2020. She submitted that the plaintiff through this application was trying to use the back door to gain possession of the suit land albeit illegally, whereas she is aware that the 1<sup>st</sup> defendant has possession, and had moved this honorable court for remedy.

14. Ms. Kedeki submitted that the plaintiff's suit is incompetent as the applicant lacks locus to unequivocally declare that the 2<sup>nd</sup> – 5<sup>th</sup> defendants are fraudsters without the help of the Land Registrar who is the holder of all land records. In support of this argument, Ms. Kedeki referred me to the court of appeal decision in Charles Karaithe Kiarie & 2 others vs. Administrators of the estate of John Mallace Muthare (deceased) & 5 others (2013) eKLR. Counsel finally submitted that the plaintiff's suit and application are malicious, scandalous, incompetent, *res sub judice*, and a multiplicity and therefore, should be dismissed with costs.

15. I have taken note of what counsel submitted alongside their pleadings.

16. I opt to start with the issue of whether this suit should be struck out as being *res sub judice*. The defendants have cited Section 6 of the Civil Procedure Act, CAP 21, Laws of Kenya, which provides as follows :-

“6. *Stay of Suit*

*No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

*Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”*

17. The defendant has pointed out to this court that there exists the suit Mombasa ELC No. 131 of 2020 (OS), and I have seen the pleadings annexed. I have seen that the said suit is one where the 1<sup>st</sup> defendant seeks ownership of the suit land through adverse possession. The Originating Summons was filed on 21 September 2020. The respondent is the plaintiff herein. The issue in this case is clearly distinct from the issues in the case of Mombasa ELC No. 131 of 2020 (OS). It is apparent to me, that the plaintiff and the 1<sup>st</sup> defendant, are on one page on the issue of ownership of the land, and acknowledge that ownership of the suit land is with the plaintiff. The issue in this suit is on the conflict of ownership between the plaintiff and the 2<sup>nd</sup> – 5<sup>th</sup> defendants. I have seen title that shows that the suit land is owned by the plaintiff. There is apparently another title which shows that the suit land is owned by the 2<sup>nd</sup> defendant. There is also the issue of a consent entered in Mombasa CMCC No. 155 of 2019, where the parties therein agreed to transfer title to one Salim Salim Mwabahle. The principal issue in this case is who is entitled to ownership of the suit land. It is not the same issue in Mombasa ELC No. 131 of 2020 (OS) which is a case of adverse possession.

18. The 1<sup>st</sup> defendant has also raised two other issues in her preliminary objection. On the issue of enjoining of the Land Registrar, or lack thereof, Order 1 Rule 9 of the Civil Procedure Rules (CPR) is very clear that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

19. On the last claim in the preliminary objection, that is whether or not the plaintiff has breached Section 139 of the Evidence Act, I see no issue, simply because what the plaintiff is trying to demonstrate is prima facie evidence, as he is required to do, to support his application. Nothing arises from this issue. There is no substance in the preliminary objection and it is dismissed with costs.

20. Turning now to the issue of whether or not an injunction should be granted, it is required that the applicants should demonstrate a prima facie case with a probability of success; demonstrate irreparable loss; and where the court is in doubt, it will decide the matter on a balance of convenience. It is the case of the plaintiff that she is the legal and registered owner of the suit land. It is further the case of the plaintiff that the 2<sup>nd</sup> defendant has obtained a fraudulent title and that there is attempt by the 2<sup>nd</sup> – 5<sup>th</sup> defendants to also procure registration of their names in the title through the consent recorded in the Magistrate's Court. These parties have not filed anything to oppose the plaintiff's motion despite being duly served. They have not therefore raised any contest, so far, to the plaintiff's title to the suit land. The only party to oppose this application is the 1<sup>st</sup> defendant. However, the 1<sup>st</sup> defendant does not claim to be the registered owner, but only asserts that she is entitled to the land by way of adverse possession, which assertion she had made first in the suit Mombasa ELC No. 82 of 2017, and secondly in the suit Mombasa ELC No. 131 of 2020 (OS). In the suit *Mombasa ELC No. 82 of 2017, Rehema Kazungu Baya vs Tulip Development Limited*, she filed an application seeking orders of injunction against the respondent in that suit (plaintiff herein), to restrain the respondent from evicting her, or demolishing her structures pending hearing of the said suit. That application was heard and dismissed by Yano J, on 18 September 2017. It basically means that no orders of injunction were issued against the plaintiff in this case and the plaintiff was thus allowed the leeway to deal with the suit land as it wished. Having failed in obtaining an injunction against the plaintiff in the suit Mombasa ELC No. 82 of 2017, I do not see how the 1<sup>st</sup> defendant can now resist an application for injunction against her in this suit.

21. The plaintiff has demonstrated evidence of title and has a report showing that the title of the 2<sup>nd</sup> defendant may have been obtained fraudulently. I have already mentioned that the 2<sup>nd</sup> defendant and also the 3<sup>rd</sup> – 5<sup>th</sup> defendants have filed nothing to oppose this motion. I

have pointed out the futility of the 1<sup>st</sup> defendant opposing this application having failed to stop the plaintiff in the suit Mombasa ELC No. 82 of 2017. Given the foregoing, I am persuaded that the plaintiff has demonstrated a prima facie case with a probability of success. On irreparable loss, it is clear that if the Land Register is tampered with any further, or the defendants jointly or severally interfere with the land, then the plaintiff stands to lose his land and may suffer loss that may not be compensable by an award of damages. Even if I was to consider the balance of convenience, it tilts towards preserving the property, in the possession of the plaintiff, and stopping any dealings in the register of the suit property, until this case is heard and determined.

22. I am thus persuaded to allow this application. I order as follows :-

*(i) That pending the hearing and determination of this suit, there be no registration of any disposition in any of the titles relating to the land parcel LR No. MN/I/3220.*

*(ii) That in so far as possession of the land is concerned, possession remain with the plaintiff , until this case is heard and determined.*

*(iii) That the plaintiff shall have the costs of this application.*

23. Orders accordingly.

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF MAY 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**