



**REPUBLIC OF KENYA**

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

**AT MOMBASA**

**ELC NO. 39 OF 2021**

**ALI SAID ALI.....PLAINTIFF**

**VERSUS**

**ABDALLAH ALI SALIM.....1<sup>ST</sup> DEFENDANT**

**JAMILLA KALA.....2<sup>ND</sup> DEFENDANT**

**RULING**

*(Application for injunction and orders to have title registered in name of the late father of the plaintiff; plaintiff claiming that upon demise of his grandfather, his father's siblings agreed to transfer the property to his late father which was done; plaintiff complaining that an irregular order was made cancelling his father's title; alleged irregular order being an order made 15 years ago by the High Court in the succession cause of his father; if aggrieved, avenue was to appeal; this court not vested with jurisdiction to reverse an order of the High Court; in any event, application coming 15 years after the order and would be time barred; no mention by the applicant of the status of the succession case of his late grandfather; no prima facie case established; application dismissed)*

1. What is before me is a Notice of Motion dated 8 March 2021 filed by the plaintiff contemporaneously with the plaint. It seeks the following orders:-

- a) Spent (certification of urgency)
- b) That this Honourable Court be pleased to grant an order of temporary injunction to restrain the defendants, their agents and/or servants from collecting rent or any money whatsoever from the Tenans on Plot No. Garissa Town/Block 1/162 until this application is heard and determined.
- c) That this Honourable Court be pleased to grant an order of arrest of the 2<sup>nd</sup> defendant one Jamila Kala who is misappropriating money obtained from Plot No. Garissa Town/Block 1/162.
- d) That this honourable court be pleased to return the property by the order of this court to the rightful and legal owner who is the late Said Ali Salim.
- e) Spent (date for inter partes hearing)
- f) That the costs of this application be provided for.

2. The application is supported by the affidavit of the applicant, Ali Said Ali. He is the administrator of the estate of his late father one Said Ali Salim (deceased). In the plaint, and in the supporting affidavit, he has averred that the land parcel Plot No. Garissa Town/Block 1/162 (the suit property) initially belonged to his late grandfather Ali Salim Baadad (deceased), and that his father, Said Ali Salim, purchased it from his other siblings who received Kshs 20,000 each. He has annexed two affidavits said to be sworn by his late father's siblings, dated 2 October 1991 and 8 October 1991, in which it appears that the siblings were agreeable to having the suit land registered in the name of the late Said Ali Salim. The applicant avers further that thereafter, the suit property was then transferred by the siblings to his late father who was subsequently issued with a certificate of lease on 16 August 1994.

3. The applicant pleads that his late father developed the suit premises by building residential and commercial houses. He has pleaded that in the year 2002, two of his uncles, Hassan Ali Salim and Abdallah Ali Salim, filed an application in court. He claims that they filed the application while aware that Salim Ali Salim died in the year 1996. He states that orders to revoke the name of his late father from the title were issued on 21 July 2005. It is claimed that this was well over 3 years after the filing of the application which application did not proceed

in court until after the death of his father. He has pleaded that the 2<sup>nd</sup> defendant, Jamila Kala, and her son, are in the process of changing (title) to the suit property so that it belongs to her and her children. She states that if not stopped, it may prejudice the entire suit. He asserts that the suit property belongs to his late father and should be returned to its rightful owner. In the plaint, he asks for the following orders :-

(a) A permanent injunction restraining the defendants, their agents and/or servants from collecting rent or any money whatsoever from the tenants on Plot No. Garissa/Block 1/ 162.

(b) Court to issue an order directing the Land Registrar to revoke and issue a new title in the name of the legal and rightful owner of Plot No. Garissa Town/Block 1/162.

(c) That this Honourable Court be pleased to grant an order of arrest of the 2<sup>nd</sup> defendant one Jamila Kala who is misappropriating money obtained from Plot No. Garissa Town/Block 1/162.

(d) Costs of this suit.

(e) Interest on (a) above (sic).

(f) Any other relief the Honourable Court may deem fit and just to grant.

4. Despite being served, the defendants are yet to enter appearance and therefore no response has been filed to this application.

5. I have considered the application alongside the material supplied by the plaintiff. It will be seen that the applicant wants orders of injunction, an order of arrest of the 2<sup>nd</sup> respondent, and orders to revert the property back to the late Said Ali Salim. Although the prayer for injunction as drafted, appears only limited to the time of hearing of the application, I will take it that it is an application seeking interlocutory orders pending hearing of the suit. What one needs to demonstrate is a prima facie case with a probability of success; show that he stands to suffer irreparable loss if the order is not granted, and where the court is in doubt, it will decide the application on a balance of convenience. These principles were well elaborated in the case of *Giella vs Cassman Brown (1973) EA 358*.

6. I will straight away make an assessment of whether the applicant has demonstrated a prima facie case.

7. The applicant claims that upon demise of his grandfather, the siblings of his father agreed that his father should own the property and the property was transferred to him. He appears to raise issue over an application filed in the year 2002 that he claims was filed after his father died in 1996 and which led to orders revoking the name of his father from the title of the suit property on 21 July 2005.

8. I have looked at the documents annexed by the applicant and I see nothing of what is contended above. Firstly, what I have seen, from the Grant of Letters of Administration annexed, is that the applicant's father died on 27 June 2005 and not in the year 1996 as he has alleged. The application that he states was filed in the year 2002 appears to have been an application filed within the succession cause relating to the estate of the applicant's grandfather, the late Ali Salim Baabad, which is Succession Cause No. 1154 of 1991 filed in the High Court of Kenya at Nairobi. The order said to have been wrongfully made on 21 July 2005 is actually an order revoking the title of his father, Said Ali Salim, to the suit land, and ordering the commencing, de novo of the administration cause of the estate of the late Ali Salim Baabad. The order further goes to state that the suit land be registered in the name of the deceased Ali Salim Baabad until the process of the administration of the Estate is completed as required by law.

9. Now, this is an order of the High Court issued in the year 2005. If the applicant was aggrieved by the said order, his avenue was to file an appeal to the Court of Appeal. I cannot see how he can be allowed to challenge that order in this case. In any event, that order was issued by a court of equal status, and this court, as far as I can see, at this stage of the proceedings, has no jurisdiction to interfere with, or reverse, such an order. Even if this court had the jurisdiction to do so, this application is coming more than 15 years since the order was made and would be time barred. Further to the above, the applicant does not say what transpired in Succession Cause No 1154 of 1991 after the issuance of the order of 21 July 2005 and I am in the dark as to the current status of that case. What is critical however, is that a court of competent jurisdiction, the High Court no less, made an order revoking the title of the applicant's father to the suit property. With the revocation of that title, the applicant has nothing upon which to hinge his case, for he has no title that he can speak about which is in favour of his late father.

10. From the above, I am not persuaded that the applicant has made out any prima facie case with a probability of success so as to entitle him to the order of injunction sought here. I also see no basis upon which to issue any order of arrest of any of the respondents. The applicant has similarly failed to make out a case for the grant of an order that the title do revert back to the name of his late father, forget for a moment that it would not be prudent to grant such an order at the interlocutory stage of a case, without first hearing the suit.

11. The long and short of it is that I see absolutely no merit in this application and it is hereby dismissed. Since the respondents did not bother to respond to it, I make no orders as to costs.

12. Orders accordingly.

**DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF JUNE 2021.**

**JUSTICE MUNYAO SILA**

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

AT MOMBASA