

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 222 OF 2017

LENNY MWAKIMA.....PLAINTIFF/APPLICANT

VERSUS

HUSSEIN ABDALLA KAI..... 1ST DEFENDANT/RESPONDENT

FATHIYA ABDALLA ALI.....2ND DEFENDANT/RESPONDENT

RULING

This application is dated 17th June 2021 and is brought under Sections 1A, 1B, and 3A Civil Procedure Act, Order 51 Rule 1, Section 107, Land Registration Act (Act No. 2, 2021) Section Judicature Act (Cap 8 Laws for Kenya) seeking the following orders;

1. That the Honourable Court be pleased to certify this matter urgent and service in the first instance be dispensed with;
2. That pending the hearing and determination of the plaintiffs application inter partes an order of temporary injunction do issue against the defendants restraining them whether by themselves, their servants and/or agents from entering, developing, building, selling, disposing of and/or interfering in any way whatsoever with the suit property known as PLOT NO. 372 VIKWATANI ESTATE.
3. That the costs of this application be provided for.

It is based on the ground that the applicant is the beneficial and legal proprietor of the suit property. That the applicant has filed this suit seeking among other reliefs a declaration that he is the legal and/or beneficial owner of all that property known as PLOT NO 372 VIKWATANI ESTATE within Mombasa County. That the respondents have strenuously opposed the applicant's claim and the matter is pending determination by the Honourable Court. That the respective parties' right and/or interest in the suit property is in contention. That the respondents are actively developing the suit property and reasserting property interests that are in contention which acts and/conduct on the part of the respondents will radically change and alter the status quo to the applicant's disadvantage. That it is fair and just in the circumstance that for the issues in contention to be determined there is need to preserve the subject matter of the suit in accordance with the doctrine of lis pendens.

The 1st respondent submitted that he obtained this plot in 1988 from an old man called Nyae, a member of land group called Concordia Development Group whose children and grandchildren are still staying in the main plot. That as a member of Concordia Development Group he was allocated this PLOT NO.372 VIKWATANI estate which the surveyor was asked to survey and give each person his name of the plot and that was the genesis of his ownership of PLOT NO. 372. That he has been in possession since then and have cultivated crops and vegetables. That he has during the course of the year aimed about to finish a double storey building on the same plot. That the applicant says that he obtained ownership by sale from one Christopher Mwache Mbogoh. That the above does not indicate ownership as the PLOT NO. 372 VIKWATANI is one that was surveyed by Concordia and he was allocated the same. That the application has not disclosed the filing of the similar application dated 20th June 2017 for injunction which lacked merit and was dismissed (HAT – and 2 are the said copies of the ruling dated 20th June 2018 and the order dated 13th July 2021). He also raised a preliminary objection that the application is res judicata.

This court has carefully considered the application and the submissions therein. The issue to be determined first is whether or not the application is res judicata. I have perused the court file and find that on the 20th June 2017 the applicant filed a similar application for injunctive orders and the said application was dismissed for lack of merit on the 22nd May 2018. I find the parties are the same and so is the application. This application is re judicata and an abuse of the court process. I therefore strike it out with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH OCTOBER, 2021

N.A. MATHEKA

JUDGE