



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELCA CASE NO. 40 OF 2021**

**PRISCILLA WANJIKU MBATIA.....APPELLANT**

**VERSES**

**HELMUT HEINZ MULLER.....RESPONDENT**

**RULING**

The application is dated 17<sup>th</sup> September 2021 and is brought under Section 68 of the Land Registration Act, 2012, Section 1A, IB, 3A of the Civil Procedure Act & Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified as urgent and the same be heard ex-parte in the first instance for purposes of prayer 2 and 3 below;
2. THAT pending the hearing and determination of this application, this Honourable Court, be pleased to issue an order of inhibition stopping further dealings and the registration of further transactions over the parcel of land known as CR. 24956 Subdivision number MN/III/2312 (Original Number 1878/10) situated in North of Mombasa Municipality within Mtwapa in Mombasa County pending the hearing and determination of the Appeal.
3. THAT after the inter partes hearing of this application, this Honourable Court be pleased to issue an order of inhibition stopping further dealings and the registration of further transactions over the parcel of land known as CR. 24956 Subdivision number MN/III/2312 (Original number 1878/10) situated in North of Mombasa Municipality within Mtwapa in Mombasa County pending the hearing and determination of the Appeal.
4. THAT this Honourable Court be pleased to issue further Orders and/or Directions as the Honourable Court may deem fit and just to grant;
5. THAT the costs of and incidental to this application be provided for

It is based on the grounds that the Appellant/Applicant herein was the Defendant in Mombasa CM Environment and Land Court Case No. 33 of 2019, Helmut Heinz Muller -V- Priscilla Wanjiku Mbatia, from which this Appeal arises. That the subject matter of the Lower Court land case and this Appeal is the parcel of land known as CR. 24956 Subdivision number MN/III/2312 (Original number 1878/10) measuring approximately 0.0709 hectares or thereabouts situated in North of Mombasa Municipality which was previously jointly registered in the Applicant's and Respondent's names in shares of 25% and 75%, respectively. That the suit property was acquired by the parties sometimes in February, 2011 during the parties cohabitation. That on 21<sup>st</sup> December, 2011, during the cohabitation, the Respondent registered 25% (1/4) ownership of the suit property in the Applicant's name, and she thereby became the absolute registered owner thereof. That the Appellant and the Respondent lived together at Mombasa in the suit property for 8 years from 2009 to 2019 when they had an acrimonious disagreement and separated. That sometimes in March, 2019, the Respondent sued the Applicant in the suit from which the Appeal arises seeking to have the Applicant's 25% ownership of the suit property to be transferred back to him. The suit was defended. that the suit was heard, and a Judgement was delivered therein on 9<sup>th</sup> July, 2021 in favour of the Respondent as prayed in the plaint. That the effect of the lower Court's Judgement is to divest the Applicant of her 25% share of the suit property which was registered in her name since the year 2011 because the said Judgement has given the Respondent 100% ownership of the suit property. That the said Judgement was delivered in the absence of the Applicant's advocates and without any notice to them after the delivery of the same was postponed from 31<sup>st</sup> March, 2021. The Court record does not show that any notice of the delivery of the said Judgement was issued to the said advocates on record and or how the Respondent's advocates learnt about the Judgement date. That the Applicant has discovered that her 25% share of the suit property was transferred to the Respondent on 9<sup>th</sup> July, 2021, the same day the Judgement was delivered and that the Respondent obtained the Decree dated 9<sup>th</sup> July, 2021 on the same date the Judgement was delivered, without having the same approved by the Applicant's advocates. That the Respondent further used the said Decree dated 9<sup>th</sup> July, 2021 to remove the caution the Applicant had registered on the suit property and to transfer her 25% share and ownership of the suit property in his favour. That the Applicant has an arguable appeal as shown by the Memorandum of Appeal filed herein. That the Respondent is a German national who is now ordinarily resident in Germany and being the sole registered owner of the suit property without any other interests or obligations in Kenya, he may dispose of the suit property which may render the Applicant's appeal herein nugatory and a mere academic exercise. That the Applicant will suffer irreparable loss if the Respondent disposes of the suit property before the appeal is heard and determined and fails to come to Kenya since he is a foreigner.

The Respondent submitted that this instant Application is an abuse of the Court processes and time as a similar Application was filed in the Lower Court and it is still pending where the Applicant is enjoying stay orders and even status quo hence her filing this Application is tantamount to a fishing expedition in Courts for a favourable order. That the Applicant herein has been delaying the Lower Court Application as she has never filed submissions to her Application for stay only for her to file a different Application in this Court seeking the same orders. That he has never been married to the Applicant at any one time and that she was just a friend whom they used to co-habit and stay with when he was visiting the Country and after a full trial in the Lower Court the Court agreed with that position. That he has never acquired the suit property with the Appellant/Applicant but rather she found him with the property and she never contributed even a penny to

its acquisition. That he allegation that she got a transfer of 25% of the property to her name on account of her love and affection ended when she got legally married to another man in Germany when they were still together as lovers hence that currency so to say ended and she voluntarily relinquished and voluntarily surrendered the share back to him. That the allegation now that the Trial Court had no Jurisdiction to determine the matter is mischievous as she never raised any objection to the jurisdiction of the Trial Court. That the judgement was delivered before both counsels where Ms Gakuo Advocate appeared for the Applicant/Defendant.

This court has considered the application and the submissions therein. That *Section 3A of the Civil Procedure Act* gives the court inherent power to make such orders as may be necessary for the ends of justice to be met, while *Order 51 Rule 1 of the Civil Procedure Rules* gives a person claiming to be entitled to any property attached in execution of a decree at any time prior to payment out of the proceeds may give a notice of objection. In the instant case the applicant seeks an inhibition order. The court's discretionary power in doing so should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. The applicant submitted that on 21<sup>st</sup> December, 2011, during her cohabitation with the Respondent, he registered 25% (1/4) ownership of the suit property in the Applicant's name, and she thereby became the absolute registered owner thereof. That judgement was issued in the lower court against her and the respondent has transferred the entire property to himself and she has appealed against that decision hence this application. I find that the applicant has not given sufficient reasons for me to grant the orders sought. The respondent submitted that this instant Application is an abuse of the Court processes and time as a similar Application was filed in the Lower Court and it is still pending where the Applicant is enjoying stay orders and even status quo. I find this application has no merit and is dismissed. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7<sup>TH</sup> DECEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**