



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 284 OF 2017**

**SALIM MWALIMU SHEE..... PLAINTIFF**

**-VS-**

**1. MACHARIA KAMAU**

**2. MARTIN MONGWANJA**

**3. PAULINE MONGWANJA....DEFENDANTS**

**RULING**

1. The application for determination is the Notice of Motion dated 31<sup>st</sup> July 2017 in which the plaintiff/applicant is seeking orders of temporary injunction to restrain the defendants/respondents by themselves, agents, servants, workers, employees or any person acting on their behalf from entering, remaining, constructing, selling, transferring, mortgaging and/or in any manner dealing with the plaintiff's PLOT NO. KWALE/KINONDO/720 pending the hearing and determination of the suit. In the alternative, the applicant wants the respondents ordered to demolish the structure on the suit property and to remove the debris therefrom. The application is supported by the affidavits of Salim Mwalimu Shee sworn on 31<sup>st</sup> July 2017, 9<sup>th</sup> April, 2018 and 9<sup>th</sup> July 2018.

2. The applicant's case as elaborated in the plaint and supporting affidavits is that he is the absolute registered owner of PLOT NO. KWALE/GALU KINONDO/720. That the respondents have without any colour of right entered into the said plot and built a structure thereon without the consent and express authority of the applicant. The applicant avers that the suit plot is a subdivision from various subdivisions from the original LAND PARCEL NO. GALU/KINONDO/677. The applicant has annexed a copy of title deed for title deed for TITLE NO. KWALE/GALU KINONDO/720 in his name, a copy of an order in Mombasa HC Misc. Civil Application No.131 of 1991, letter dated 11.11.13, a copy of probate of written will issued on 11<sup>th</sup> June, 2001 in Mombasa HC Succession Cause No. 90 of 1999 – in the matter of the estate of Amir Ali Boi and a copy of originating summons in ELC Case No. 30 of 2017.

3. The respondents have opposed the application for injunction through the replying affidavit of Peter Migiri Karingu filed on 19<sup>th</sup> January, 2018 and a further replying affidavit dated 1<sup>st</sup> November, 2019. He has deposed that he holds a General Power of Attorney executed by the 1<sup>st</sup> defendant who is a registered proprietor of half share of the suit property and that he has authority from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are jointly registered proprietors of half share of the suit property. He annexed copies of General Power of Attorney and letters of authority. He deposed that he handled the defendants purchase of the suit property and that the defendants lawfully purchased the suit property from one Joseph Gilbert Kibe for a consideration of Kshs.6,000,000.00 vide a sale agreement dated 6<sup>th</sup> February, 2001, a copy of which has also been annexed. That on 19<sup>th</sup> February, 2001 a title deed was issued to the defendants. A copy of the said title deed and certificate of search have been annexed. He has deposed that the defendants proceeded to build a beach cottage on the property. Copies of pleadings and orders in previous litigation have also been annexed. The respondents contend that they are the duly registered proprietors of the suit property and that the plaintiff has no right over the same, and urged the court to dismiss the application with costs.

4. The application was canvassed by way of written submissions which were duly filed by the counsel for the parties.

5. I have considered the application, the affidavits in support and against and the rival submissions. In this case, both the plaintiff and the defendants are claiming the suit property. Each of them have exhibited title deeds in their favour. I have looked at the copy of the title held by the applicant which bears his name. I have also looked at the title held by the defendants which bears their names. It is therefore apparent that there are two titles over the suit property. At this interlocutory stage, the court may not be in a position to tell which of the titles is genuine and which one is not. This is so because it is not possible for one property to have two titles.

6. The principles to be applied when considering an application for temporary injunction are well settled. In the famous case of **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; that he

stands to suffer irreparable damage not compensable by damages; and if the court is in doubt, it will decide the matter on a balance of convenience. In this case, since both parties are claiming the suit property with each holding title in their names, it is my view that the balance of convenience tilts towards maintaining the status quo ante until the suit is heard and determined.

7. Given the above discourse, I do allow the application for injunction and specifically order as follows:

**a. That pending the hearing and determination of this suit, there is hereby issued an order of injunction restraining the defendants, their agents, servants, workers, employees and/or any person acting on their behalf from constructing, selling, transferring, or mortgaging PLOT NO. KWALE/GALU KINONDO/720.**

**b. The costs of this application shall be in the cause.**

8. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 22<sup>nd</sup> day of July 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**