



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

**AT MOMBASA**

**ELC CIVIL CASE NO. 108 OF 2015**

**ZUBEDA SALIM IDDI (Suing as personal Representative of the Estate**

**of Khadija Salim Iddi alias Khadija Khalfan – deceased)...PLAINTIFF/APPLICANT**

**-VERSUS-**

**MUSTAPHA YUSUF ALI JIWANJI.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

1. By an application dated 21<sup>ST</sup> May 2015 brought pursuant to the provisions of Order 40 of the Civil Procedure Rules and section 1A, 1B, 3 and 63 (e) of the Civil Procedure Act, the plaintiff sought for Orders ;

**1. Spent**

**2. Spent**

**3. Spent**

**4. Spent**

**5. Pending the hearing and determination of this suit, a temporary injunction do issue against the 1<sup>st</sup> Defendant restraining him by himself, his servants, agents, agents, employees, directors or otherwise howsoever from trespassing, entering, interfering in any manner with the plaintiff's/Applicant's quiet possession in respect of L.R No. MOMBASA/BLOCK/XXVIII/37.**

**6. Pending the hearing and determination of this suit, a temporary injunction do issue against the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant restraining them by themselves, their servants, agents, employees, directors or otherwise howsoever from advertising for sale, selling charging, leasing letting, subdividing, transferring or in any other manner whatsoever encumbering or alienating the title and property in respect of L.R No. MOMBASA/BLOCK/XXVIII/37.**

**7. Costs of the application be provided for.**

2. The application is supported by the grounds that the 2<sup>nd</sup> Respondent irregularly effected a transfer of one half share of the suit property to the 1<sup>st</sup> Respondent. Secondly that the power of attorney relied upon for the sale agreement is not genuine. That the purported transfers were undertaken in total disregard of the existing caveats and encumbrances.

3. The application is supported further by the applicant's affidavits sworn on 21<sup>st</sup> May 2015 and 14<sup>th</sup> March 2016. In the supporting affidavit of 21<sup>st</sup> May, the applicant annexed a copy of official search to show the land was registered in the name of Khadija Salim Iddi – deceased. She deposes that she is the administrator of her estate. The applicant also annexed copies of pleadings in previous suits between her and the 1<sup>st</sup> Respondent i.e. HCCC No 529 of 1996 which according to her was dismissed. She deposed that the power of attorney was incapable of transferring the suit property. She deposed further that the property is developed with 2 flats and 2 shops and that on 29<sup>th</sup> July 2014 she opened the shop for routine cleaning. During this process, the 1<sup>st</sup> Respondent reported the matter to the police station which resulted into her arrest and being charged. That the criminal case is pending.

4. The application is opposed by the 1<sup>st</sup> Defendant vide his 52 paragraph replying affidavit dated 17.6.2015. The affidavit is quite detailed. He deposes that prior to 18<sup>th</sup> May 1994, the suit plot was registered in the name of Khadija Salim Iddi. That on 18.5.1994 he entered into a sale agreement with the attorney of the said Khadija Iddi entitling him to a half share of the property. He deposes that Sachdeva & Co advocates could not have prepared the sale agreement if the power of attorney was not in compliance with the law.

5. That 1<sup>st</sup> Defendant deposes that he subsequently issued notices to the tenants to pay him new rents and when they failed to comply, he levied distress which resulted in filing of HCCC No 2 of 2001. The present applicant applied to be joined in this suit. He deposed that he later sold his interest to Mrs Gulzar Shakat Hussein and when he could not give her title, she sued her which suit is still pending. The 1<sup>st</sup> defendant deposes that she got possession of the suit premises when she moved the Court in 2014 after the property has been closed for over 7 years.

6. That 1<sup>st</sup> Defendant moved to advertise the shop for purposes of letting the premises. The applicant was unhappy with this step taken hence the present suit. The 1<sup>st</sup> Respondent also deposed that the matter was reported to the police and the applicant was charged in Court. The 1<sup>st</sup> Respondent denies she acquired this property fraudulently. Further that the applicant has no right of stopping him from using the plot. She asked the Court to dismiss the pending application. The applicant filed a supplementary affidavit to counter the allegations put forth by the 1<sup>st</sup> Defendant.

7. The responsibility of this Court at this stage is to determine whether the applicant has set out and proved any of the principles for granting temporary injunctions. From the pleadings and documents annexed, it is clear that the applicant and the 1<sup>st</sup> defendant have litigated over the disputed property previously. The first suit was case No 529 of 1996 between Mustafa Jiwaji (1<sup>st</sup> Defendant and Zubeda Salim Iddi (Applicant) and Nadra Salim Iddi.

8. The applicant deposed that this suit was dismissed. She annexed a copy of the decree extracted therein as "ZSI – 5". The decree indeed show the plaintiff's (1<sup>st</sup> defendant) suit was dismissed. The 1<sup>st</sup> defendant on his part said this suit was dismissed by consent after he learnt that Khadija and Nadran had died. The 1<sup>st</sup> defendant wondered why the plaintiff herein did not file suit as the surviving administrator of Khadija who was of unsound mind.

9. The second suit whose pleadings are annexed is No HCCC 2 of 2001 where the 1<sup>st</sup> defendant deposed that the applicant applied to be joined as an interested party but did not file any pleadings to provide her claim. It seems this case is still active as it is within it that the 1<sup>st</sup> defendant moved the Court and obtained break in in orders. The application for the break – in order was filed on 4<sup>th</sup> February 2011 and orders given exparte (annex MYJ - 5) the same day.

10. In HCC No 2/2001, the plaintiff was European General Agency who was a tenant in the suit premises. The 1<sup>st</sup> defendant deposes that this party moved out of the country leaving the premises locked for over 10 years (paragraph 22 of the Replying Affidavit). It's therefore not clear whether the 1<sup>st</sup> Respondent has ever been in possession of the suit premises from the time he secured registration of the ½ share of the property into his name in the year 2000.

11. The despositions of both parties herein reveal the property has been Vacant. The applicant in paragraph 10 of the affidavit in support deposes that on 29<sup>th</sup> July 2014 he instructed the agent to open the shop for routing cleaning and maintenance. The 1<sup>st</sup> defendant had earlier moved the Court for a break – in order after the tenant had moved out of the country. In spite of the break – in order issued on 4<sup>th</sup> February 2011 he seemed not to have executed the order forthwith. In the circumstances of this case I am satisfied that a prima facie case is established as there is evidence of a dispute over ownership of the suit property.

12. On irreparable loss, the applicant has not shown the Court that there is any loss which she is likely to suffer. Her pleadings did not make any reference to any such other than stating that her prosecution is intended to dispossess her of the property. Instead it is the 1<sup>st</sup> defendant who alluded to loss. He deposed that he spent money in painting the shop. Since he is currently the registered proprietor of the half share of the suit premises, I direct the applicant to file an undertaking to compensate the 1<sup>st</sup> defendant in the event her suit fails. The said undertaking to be filed within 21 days of the delivery of this ruling.

13. In conclusion therefore although the applicant has established a prima facie case, it is imperative to preserve the suit property given that the disputed property and given that the disputed property is being claimed by both of them. The orders commendable to be issued in the circumstance should thus secure the interest of both the applicant and the 1<sup>st</sup> defendant. Consequently I do grant prayer 5 of the motion to apply to both the 1<sup>st</sup> defendant and the applicant. Neither of them should interfere with the half share of the property comprised in the shop and flat pending the hearing and determination of the suit. I.e. the same should remain vacant pending determination of this suit unless the Court shall direct otherwise. Costs of the application is ordered in the cause.

**Ruling dated and delivered at Mombasa this 15<sup>th</sup> day of September 2016.**

**A. OMOLLO**

**JUDGE**