



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 129 OF 2019**

**MWANAJUMA NIGATEMBO alias MWANAJUMA**

**MBWANA NOOR GAKWELI.....PLAINTIFF/APPLICANT**

**VERSUS**

**1. MWAROGA NASSORO NASSORO**

**2. MOHAMED JUGE DALENO**

**3. ISMAEL WARE GODANA**

**4. MOHAMED WARE GODANA**

**5. LANDS REGISTRAR KWALE**

**6. THE ATTORNEY GENERAL..... DEFENDANTS**

**RULING**

1. The application before this court for determination is the Notice of Motion dated 8<sup>th</sup> July, 2019 brought by the Plaintiff/Applicant seeking an order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents whether by themselves, their agents and/or servants from further trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the properties being PLOT NUMBERS KWALE/WAA/2101, KWALE/WAA/2102 AND KWALE/WAA/2103 pending the hearing and determination of this suit. The application is premised on the grounds on the face of the motion and supported by the affidavit of Mwanajuma Nigatembo alias Mwanajuma Mbwana Noor Gakweli sworn on 8<sup>th</sup> July, 2019 in which she averred inter alia, that by the process of land adjudication carried out around the year 1975 in Waa adjudication Section within Kwale County, PLOT NUMBER KWALE/WAA/115 (hereinafter referred to as “the suit property”) was recorded in the names of Suleiman Omari Mwabweta, Nironga Omari Mwabweta and the applicant, who are all related to each other and were to hold it in common in equal undivided share of a third (1/3) each. That title deed to the suit property was issued on 6<sup>th</sup> April, 1981. The applicant avers that the first registration was done using her maiden name, Mwanajuma Nigatembo. That when she got married, she relinquished her old generation identity card and was issued with a new identity card bearing her husband’s name, Mbwana Noor Gakweli. The applicant has exhibited copies of the adjudication record dated 18<sup>th</sup>, July 1975 and letter dated 4<sup>th</sup> July 2019 from the chief, Ng’ombeni Location and affidavit for confirmation of names.

2. The applicant further avers that Suleiman Omari Mwabweta died on 2<sup>nd</sup> December, 2016 and was survived by two children; Swaleh Suleiman Mwaronga and Omar Suleiman Mwabweta, while Nironga Omari Mwabweta died on 1<sup>st</sup> July 1992 leaving the applicant as the only remaining original owner of the suit property. Copies of death certificate and application of late registration of death and application for a death certificate have been annexed. The applicant avers that to her knowledge, the title deed in respect of the suit property had always remained in the custody of the said Suleiman Omari Mwabweta (deceased) but the applicant and the rest of the family continued to reside in the suit property and remained in quiet and peaceful possession thereof.

3. The applicant states that sometime in June, 2019, certain individuals entered the suit property and started constructing a residential house in a Section of the suit property, allegedly on instructions from the 1<sup>st</sup> respondent herein who claimed to be the proprietor of the area under construction. That the 1<sup>st</sup> respondent further claimed that the suit property did not exist and that the construction was being undertaken on his property, Kwale/Waa/2103 wherein he was the proprietor in common with the applicant’s great uncle, Suleiman Omari Mwabweta (deceased). The applicant avers that upon inquiries at the Lands Registry, Kwale, she found that the green card of the suit property had been altered and new entries numbers 2 and 3 made on 24<sup>th</sup> July, 2012 wherein Suleiman Omari Mwabweta and the 1<sup>st</sup> respondent were shown as

proprietors and title deed issued to them on the same date, then cancelled. That Entry No. 4 on the same date was in the names of Suleiman Omar Mwaronga, the 1<sup>st</sup> defendant and the applicant as proprietors and a title deed issued in their names (Entry No. 5). That Entry No. 6 made on 10<sup>th</sup> February, 2017 in the names of Suleiman Omar Mwaronga (deceased) and the 1<sup>st</sup> respondent as registered proprietors pursuant to an order made in Cause No. 199 of 2011 at the Kadhi's Court in Kwale (Entry No. 7), and a title deed issued (Entry No.8). That entry No. 9 made on 30<sup>th</sup> July 2018 indicated that title deed of the suit property was closed on sub-division and new files for subdivisions Nos. 2101 to 2103 opened in the names of the 1<sup>st</sup> respondent and Suleiman Omari Mwaronga (deceased) as proprietors. The applicant avers that the last entry in PLOT NUMBER KWALE/WAA/2101 indicates that on 15<sup>th</sup> November, 2018, the 3<sup>rd</sup> and 4<sup>th</sup> defendants were registered as the proprietors and title deed issued in their names, while the last entry in PLOT NUMBER KWALE/WAA/2102 indicated the 2<sup>nd</sup> respondent was registered as the proprietor and a title deed issued in his name. That the Green Card of that plot number still indicates that the 1<sup>st</sup> respondent and Suleiman Omari Mwaronga (deceased) are the proprietors of the plot. Copies of the title deeds and green cards have been annexed.

4. It is the applicant's contention that the process in which the 1<sup>st</sup> respondent and Suleiman Omari Mwaronga (deceased) acquired the suit property and the subsequent sub-divisions were fraudulent and illegal and whose particulars have been given. The applicant avers that as a result of the 1<sup>st</sup> respondent's actions, the applicant and her family have suffered irreparable damage as they have been dispossessed part of the suit property and risk eviction.

5. In opposing the application, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a replying affidavit sworn by Mohamed Juge Daleno, the 2<sup>nd</sup> respondent on 23<sup>rd</sup> October, 2019 in which he averred inter alia, that they purchased the suit property from the 1<sup>st</sup> respondent whom they found pursuant to a search, was one of the proprietors of the property and who had obtained title by way of transmission through Succession Cause No. 119 of 2011. That the order stated that the shares of the suit property originally belonging to Omar Mwabweta Nironga (Mwaronga) (deceased) was vested upon Mwaronga Nassoro Nassoro, the 1<sup>st</sup> respondent herein. It is their contention that they acquired titles of the suit property in good faith after complying with all the legal requirements, and that they are bona fide purchasers for value. Copies of authority to appear, title deeds, certificate of official search, court order dated 6<sup>th</sup> June, 2011 in Succession Cause No. 119 of 2011, Sale Agreements, Letter of consent from the Land Control Board, Mutation forms and transfer forms have been exhibited. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents aver that they acquired the suit property lawfully and deny being involved in any fraud.

6. Both the applicant and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed written submissions upon being invited by the court to do so and which I have taken into account in this ruling. The issue for determination is whether the injunction orders should issue in favour of the applicant.

7. The conditions for the grant of temporary injunction were laid in the case of **Giella –v- Cassman Brown & Company Limited (1973) EA 358** as follows:

**“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

8. Has the applicant made out a prima facie case with probability of success? In the case of **Mrao- v- First American Bank of Kenya Limited & 2 Others (2003) KLR, 125**, a prima facie case was described as follows:

***“ A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

9. In this case, there is no dispute that the suit property was originally registered in the joint names of the applicant and two others. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have stated that they acquired the property from the 1<sup>st</sup> defendant who allegedly got registered by transmissions pursuant to orders issued in Kadhi's Cause Succession No. 119 of 2011. The applicant's case is that the change in ownership was fraudulently and illegally carried out by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has not rebutted the applicant's contention that the 1<sup>st</sup> defendant fraudulently acquired, subdivided and disposed of the suit land without the applicant's knowledge. Issues of fraud are weighty and can only be determined at the trial.

10. From the material on record however, I find that the applicant has established a prima facie case with a probability of success. In my view, it is clear that the applicant has shown her right over the suit property. As regards irreparable damage, I take the view that should the suit property be further alienated, disposed of, constructed on or wasted, the applicant will suffer irreparable loss which may not be quantified in damages. Even if I was to consider the balance of convenience, no doubt the same tilts towards maintaining the status quo until this suit is heard and determined.

11. Arising from all the above reasons, I find merit in the application. Accordingly, I allow the notice of motion dated 8<sup>th</sup> July 2019 as prayed. I do specifically order as follows: -

**i. That an injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents whether by themselves, their agents and/or servants from trespassing on, wasting, further constructing on, alienating or otherwise interfering or dealing with the properties being plot numbers KWALE/WAA/2101, KWALE/WAA/2102 and KWALE/WAA/2103 pending the hearing and determination of this suit.**

**ii. That the Officer Commanding Station (OCS) Kwale Police Station to ensure compliance with the above order.**

**iii. That the plaintiff shall have the costs of this application.**

12. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 15<sup>TH</sup> day of July 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**