



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 663 OF 2009**

**IBRAHIM ATHMAN SAID. ....PLAINTIFF/APPLICANT**

**(suing in his capacity as administrator Ad Litem of the Estate of Hussna**

**Binti Said also known as Hussna Said Ali)**

**VERSUS**

**IBRAHIM ABDILLE ABDULLAH.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUKTAR SAMAN OLOW .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff's Notice of Motion application dated 20<sup>th</sup> February 2015 is the subject of this ruling. The application seeks an order of temporary injunction to restrain the defendants/Respondents by themselves, or through their agents, employees, nominees and/or servants from constructing on, alienating, wasting, charging, selling, transferring or in any other adverse manner deal with the parcel of land known as **L.R.NO.36/111/1045** Nairobi pending the hearing and determination of this suit.

The plaintiff's application is grounded on the grounds set out on the face of the application and on the supporting affidavit sworn by **Ibrahim Athman Said** on 20<sup>th</sup> February 2015. The applicant states that he is the Administrator ad Litem of the estate of the late **Hussna Binti alias Hussna Said Ali** who was the registered owner of **L.R.NO.36/111/1045** Nairobi "**the suit property**" which the applicant alleges was on or about 14<sup>th</sup> November 2008 fraudulently transferred by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. The applicant avers that the 2<sup>nd</sup> Defendant has fenced off the suit property and has commenced construction work thereon and the plaintiff is apprehensive that the 2<sup>nd</sup> Defendant may alienate the suit property to third parties which will render the instant suit superfluous and hence the necessity for an order of restraint.

The applicant states that the late **Hussna Binti said** who it is alleged sold the suit property and transferred the same to the 1<sup>st</sup> defendant vide the conveyance dated 25<sup>th</sup> September, 1992 died on 29<sup>th</sup> December 1986 as per the death certificate annexed and marked "**1AS-6**". The Applicant further states that the family of the late **Hussna Said** still holds the original title to the suit property and contends the purported conveyance dated 25<sup>th</sup> September, 1992 was factitious and fraudulent and could not pass any interest in

the suit property to the 1<sup>st</sup> defendant or anybody and that the 1<sup>st</sup> Defendant equally could not pass any interest in the suit property to the 2<sup>nd</sup> defendant or any other person as he purported to do pursuant to the conveyance dated 14<sup>th</sup> November 2008.

The 2<sup>nd</sup> Defendant opposes the plaintiff's application and has sworn a replying affidavit (undated) but filed in court on 6<sup>th</sup> March 2015. The 2<sup>nd</sup> Defendant states that he is the registered owner of the suit property and he is in possession thereof and on that account he is entitled to quiet and uninterrupted possession and enjoyment of his property. The 2<sup>nd</sup> Defendant avers that the suit property was repossessed by the City Council following the demise of the deceased owner for non payment of rates and was allocated to **Ibrahim Abdille Abdullah** the 1<sup>st</sup> defendant who in turn lawfully transferred the same to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant further avers that the applicant has no proprietary interest in the suit property and cannot therefore be entitled to an order of injunction.

In the plaint filed against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the plaintiff inter alia seeks:-

- a. A declaration that the purported transfer of the suit property by way of gift from **Hussna Binti Said** (deceased) to the 1<sup>st</sup> defendant was null and void ab initio.
- b. A declaration that the transfer of the suit property from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant was fraudulent and null and void.
- c. An order for the surrender of the title by the 2<sup>nd</sup> defendant and rectification of the same by the Chief Land Registrar.

The parties filed written submissions where they each reiterate the facts of the case. Upon review of the pleadings, the application and the affidavits and annexures thereto and the submissions by the parties the issue for determination at this interlocutory stage is whether the applicant has satisfied the conditions for grant of a temporary injunction as established in the case of **GIELLA -VS- CASSMAN BROWN & CO. LTD (1973) EA 358** to warrant the court to grant the injunction as sought.

From a review of all the material placed before the court there is no doubt that one **Hussna Binti Said** was pursuant to the indenture dated 24<sup>th</sup> April 1952 registered as the owner of **L.R.NO.36/111/1045**, the suit property herein under the registration particulars contained in Volume **N12 Folio 481/11 file 5016 on 9<sup>th</sup> May 1952**. It is also not in dispute that the said **Hussna Binti Said** passed away on 29<sup>th</sup> December 1986 as per the annexed death certificate.

The applicant has contested the validity of the conveyance dated 25<sup>th</sup> September 1992 purporting to transfer the suit property from **Hussna Binti Said** to the 1<sup>st</sup> Defendant, **Ibrahim Abdille Abdillahi** on the basis that **Hussna Binti Said** was deceased as at the time it is alleged she executed the conveyance. The plaintiff contends the alleged conveyance was illegal and fraudulent and argues that the 1<sup>st</sup> Defendant could not pass any title to the 2<sup>nd</sup> Defendant if he himself did not have a good title. There is further contradiction in the 2<sup>nd</sup> Defendant's account as to how the 1<sup>st</sup> Defendant came to be registered as owner of the suit property so as to transfer the same to the 2<sup>nd</sup> Defendant. Under paragraph 7 of the replying affidavit the 2<sup>nd</sup> Defendant avers that the suit property was allocated to the 1<sup>st</sup> Defendant by the Nairobi City Council following repossession by the Council for non payment of rates. No evidence has been furnished of any repossession by the Nairobi City Council and the consequent allocation to the 1<sup>st</sup> Defendant of the suit property. The Rating Act, Cap 267 of the Laws of Kenya sets out an elaborate procedure for recovery of any outstanding rates under section 16 and there is no evidence that such procedure was adhered to or followed so that the suit property could be repossessed from the deceased.

If indeed the suit property was repossessed by the Nairobi City Council for the non payment of land rates, the suit property would under the provisions of Section 16, 17 and 18 of the Rating Act, Cap 267 of the Laws of Kenya have been the subject of proceedings for the recovery of the rates before a court supervised over by a magistrate before a transfer could be effected to the person who purchased the property through payment of the rates. Such transfer or vesting the property in the name of the purchaser

would also have required to be sanctioned by the High Court. Thus in case the property was repossessed and sold for the non payment of rates the purported conveyance dated 25<sup>th</sup> September 1992 between **Hussna Binti said** and the 1<sup>st</sup> Defendant would not have been feasible since the property would have been sold for non payment of rates and effectively transferred by order of the court.

A scrutiny of the annexed conveyance dated 25<sup>th</sup> September 1992 shows in the preamble at paragraph (a) that the same recites a conveyance dated 9<sup>th</sup> July 1992 registered in Volume N 12 Folio 480 Number 5016 yet the conveyance to **Hussna Binti Said** is dated 24<sup>th</sup> April 1952 and is registered in **Volume N12 Folio 481/11 File Number 5016**. Were there two distinct conveyances to the deceased? The conveyance stated to have been dated 9<sup>th</sup> July 1952 has not been exhibited. Interestingly the alleged conveyance dated 14<sup>th</sup> November 2008 which conveyed the property to the 2<sup>nd</sup> Defendant in the preamble part (a) recites the same conveyance dated 9<sup>th</sup> July 1952 to **Hussna Binti said** (the deceased) and does not as expected cite the conveyance dated 25<sup>th</sup> September 1992 to the 1<sup>st</sup> Defendant yet it is the latter conveyance which would have given the 1<sup>st</sup> Defendant, the right and authority to deal with the suit property including the right to sell and convey to the 2<sup>nd</sup> Defendant.

As this is an interlocutory application I am not required to make any definite findings on the contested issue of whether or not there was fraud that would vitiate the title held by the 2<sup>nd</sup> Defendant. However, I am required to determine whether the applicant has on the basis of the material and evidence presented before the court established a prima facie case with a probability of success. The test to be applied to determine whether a prima facie case exists is as was held by the court of Appeal in the case of **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where their Lordships in considering what constitutes a prima facie case stated thus:-

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

In the present case I am satisfied the applicant has placed material before the court which raises credible concerns as to how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants got to be registered as the owners of the suit property. The instruments of conveyance exhibited raises issues that would need to be explained at the trial. As what is in issue is the ownership of the suit property, that determination cannot be made at this stage without hearing the parties and they and their witnesses being subjected to cross examination. In the circumstances of this case it is necessary for the court to preserve the suit property until the issue of ownership is finally determined at the trial, so that at the conclusion of the trial the successful party finds the property intact. If the property is not preserved it could be alienated to other parties who are not parties to the suit which would invite other proceedings to reach the property.

Where as in the present case a title is being challenged on the basis of alleged fraud, damages would ordinarily not be an adequate compensation particularly where the evidence is that the applicant did not participate in the dealings that resulted in vesting the title in the name of the respondent. If the applicant was to be successful at the trial such a title would be held to have been acquired illegally and therefore void ab initio and in those circumstances damages would not be appropriate and/or adequate compensation.

In the result I find and hold the applicant’s Notice of Motion dated 20<sup>th</sup> February 2015 has merit and I allow the same in terms of prayer (3) of the Notice of Motion. The costs of the application shall in the cause.

Orders accordingly.

Ruling dated, signed and delivered this 17<sup>TH</sup> day of JULY 2015.

**J. M. MUTUNGI**

**JUDGE**

In presence of:

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent