



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NUMBER 103 OF 2009

**SHARIFF ALI SALIM (*Suing as holder of Power of Attorney donated by*
MARIAM BINTI ALI SALIM).....PLAINTIFF**

=VERSUS=

JAMES NZARO B.KALAMA.....DEFENDANT

RULING

By a Chamber Summons application dated 19th November 2009 made under order XXXIX Rule 1 and 2 Civil Procedure Rule and section 3 and 3A, the applicant seeks for order of injunction restraining the Defendant, his agents and/or servants from constructing, subdividing or continuing with construction works, at present or in future of any type on Plot Number 332 Group 6377 situated at Kijiwetanga Malindi until the hearing and determination of this suit.

It is premised on grounds that;-

(a) The subject matter of the suit plot is owned and registered under the names of MARIAM BINTI ALI SALIM.

(b) The Defendant/Respondent's agents and/or servants have resorted to trespassing, encroaching, disposing of parts of the property where construction is currently going on even as they are aware of the existence of a dispute over ownership.

(c) Numerous proceedings instituted by the Plaintiff to have the Defendant vacate the land have not borne fruit due to legal technicalities, as the suit abated when the then Defendant, NGUMBAO CHAI, died, and there was no substitution.

In the supporting affidavit sworn by Shariff Ali Salim(*who is suing as the holder of Power of Attorney donated by Mariam Binti Ali Salim*) he depones that Mariam is his mother and was issued with a copy of Title and a search certificate verifying ownership and marked SAS1. He filed HCCC Number 44 of 2003 which stated after the then Defendant NGUMBAO CHAI trespassed on the entire parcel of land, along with his family and started cultivating crops and trees in 1997. After his demise, the present Defendant, his heirs and/or assignees have continued, resorted to encroachment, erection of buildings and disposal of parts of the property in issue where construction is on-going recent photos of the constructions are annexed as SAS-3.

The application is opposed on grounds that the Plaintiff's suit as presented is bad in law, incompetent and a complete abuse of the court process. Further that the Plaintiff's suit is brought in contravention of mandatory provisions of the law and the Plaintiff's suit be stayed under the provisions of section 6 of the Civil Procedure Act in view of the pending HCCC 44 of 2006(O.S).

At the hearing of the application Mr Muranje held brief for Miss Momanyi for the applicant whilst Mr Mwadilo appeared for the Respondent. No real arguments were presented, Mr Muranje simply referred to the contents of the application, supporting affidavit and annexures whilst Mr Mwadilo simply urged the court to consider the grounds of opposition filed.

Applicant has justified his status in this matter on the strength of the power of attorney donated to him by his mother, which is annexed showing transfer of the suit property to the named MARIAM BINTI SALIM. This is confirmed by a copy of certificate of postal search showing that MARIAM BINTI SALIM but there is a Caveat lodged by AHMED FUAD AMIN who claims a purchaser's interest.

The Respondent does not deny that he is currently carrying out construction as supported by the annexed photographs. It is not disputed that these photos represent the true status of the property currently. There is no other explanation given as to how Defendants came to occupy the land other than the one stated by the applicant - which again, is not contested. The applicant has stated that HCCC Number 41 of 2005 abated after the initial defendant died, which death is not denied, so it is pretentious of Respondent to then seek to invoke provision of section 6 of the Civil Procedure Act to oppose the application – since that suit has abated then there is no reason to stay this suit. I think applicant has demonstrated that it is desirable and proper for the suit property to be preserved and be stopped from further division and alienation or face changing activities until the application is heard. In so demonstrating, a prima facie case with probability of success has been established.

The applicant has not however shown that it would suffer irreparable (or which cannot be adequately compensated by way of damages – which then compels me to look at the third principle enunciated in the celebrated case of **Giella V Cassman Brown**, to the effect that – where does the balance of convenience tilt. It is instructive that at this stage, applicant is not seeking removal or restraining of access by the Respondent – his concern is the activities of construction and subdivision – certainly if this is allowed to go on, then the property may change hands several times, and even change its landscape through the construction works and my view is that it is more convenient to preserve the property in its present form. To that extent then, the applicant has satisfied the conditions set out in **Giella V Cassman Brown Case 1958 EA at page 372** to warrant granting the orders sought. Consequently the orders sought are granted in the following terms.

The Defendant, his agents and/or servants are restrained from constructing, subdividing or continuing with the construction works of any type on Plot Number 332 group 6377 situated at Kijiwetanga Malindi until the suit is heard and determined.

Costs of this application be borne by the Respondent.

Delivered and dated this 1st day of March 2011

H A OMONDI
JUDGE

Mr. Otara holding brief for Momanyi for plaintiff
No appearance for respondent at 9.15am.