REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

ELCLC NO. E043 OF 2025

KHALID SALIM NAAMAN ..... 1ST PLAINTIFF

SAID SALIM NAAMAN..... 2ND PLAINTIFF

VERSUS

ALI SALIM MOHAMED .....DEFENDANT

RULING

[NOTICE OF MOTION DATED 2ND APRIL 2025 AND NOTICE OF PRELIMINARY OBJECTION DATED 3RD JULY 2025]

1. The plaintiff filed the notice of motion dated 2nd April 2025 seeking for the following orders:

   i. *"Spent.*

   ii. *Spent.*

   iii. *THAT an injunctive order be issued restraining the Defendant, his agents and or servants from selling, mortgaging, transferring or in whatever manner interfere with the property known as Plot NO. 4940 (Original NO. 539/182) Section III/MN CR NO. 59091 and Plot NO.4941 (Original NO. 539/183) Section III/MN CR. No. 59092*

pending the interpartes hearing and determination of the main suit herein.

iv. *Costs of this Application."*

v. *Any other relief deemed just and fair to grant.*

The application is based on the twelve grounds on its face marked (1) to (12) respectively, and supported by the affidavit of Khalid Salim Naaman and Said Salim Naaman, the plaintiffs, sworn on 2nd April 2025, in which they deposed inter alia that they are the administrators of the estate of Moza Toban, who died on 13th August 2005, and a certificate of confirmation of grant dated 16th April 2015 was issued in HCSC NO. 197 "B" of 2009; that the plot No. 539/III/MN, original suit property, was one of the properties distributed under the above certificate of confirmation; that according to the deed plan dated 3rd June 2010, the defendant his servant/agent unlawfully surveyed and subdivided Plot 539/III/MN before confirmation of grant; that upon conducting a search, they discovered that title deeds were issued to the defendant on 21st February 2013 for the subdivisions Plot numbers 4940/III/MN CR 59091 and 4941/III/MN CR 59092, hereafter the suit properties; that as the grant was confirmed in 2015, it was impossible for the defendant to have

legally and procedurally bought and transferred the original plot 539/III/MN; that the defendant is determined to sell the suit property to a third party, and their claim shall be rendered nugatory if the injunction is not issued.

2. The application is opposed by the defendant through the replying affidavit which he swore on 3rd July 2025 and notice of preliminary objection dated 3rd July 2025. The preliminary objection raises four grounds summarized as follows:

    i. That the application is frivolous, vexatious, incurably defective, is guilty of laches and an abuse of court process.

    ii. That application contravenes section 7 of the Limitation of Actions Act and the court is without jurisdiction to entertain the suit.

In the replying affidavit, the defendant deposed inter alia that the application offends section 7 of the Limitations of Actions Act; that the applicant are guilty of laches, and the court has no jurisdiction to entertain the application and the suit; that he acquired the suit properties in 2010, in good faith from one Aisha Mohamed Abdalla, who was the registered proprietor; that the suit properties are distinct from the properties in the said

confirmation of grant; that there is no evidence to prove that the suit properties belonged to the deceased; that the application was filed in bad faith and undue delay; that if the application is allowed, the defendant will suffer irreparable harm; that the suit properties are his by virtue of adverse possession.

3. On 7th July 2025, the court directed that both the application and the preliminary objection be canvassed together through written submissions. The learned counsel for the plaintiffs and defendant filed their submissions dated 23rd July 2025 and 30th July 2025 respectively, which the court has considered.

4. The following are the issues for the court's determinations:

   i. Whether the court has jurisdiction to hear and determine the application and suit herein.

   ii. Whether the plaintiffs' application contravenes the provision of section 7 of the Limitations of Actions Act.

   iii. Who bears the costs in the application and preliminary objection?

5. The court has carefully considered the grounds on the application, affidavit evidence, grounds on the preliminary

objection, submissions by the learned counsel, the pleadings and come to the following determinations:

i. The court is as is the usual practice, obligated to make a determination on the preliminary objection first. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. At page 700 Law JA stated:

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

At page 701 Sir Charles Newbold, P added:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."

I have perused the plaint dated 2nd April 2025, and it is clear the plaintiffs avers that plot No. 539 section 111/MN CR NO. 9087 belonged to Moza Toban, the deceased to which estate they are administrators, and their grant was confirmed on 16th April 2015 in HCSC NO. 197'A' of 2009. They further averred that they later discovered the said land had been subdivided into plot numbers 4940 CR 59091 and 4941 CR 59092 respectively, and registered with the defendant on 21st February 2013 fraudulently. They therefore seek for inter alia permanent injunction, order for defendant to vacate, cancellation of defendant's titles and costs among others. The defendant is yet to file his statement of defence but from his depositions in the replying affidavit, he has apparently disputed the facts presented by the plaintiffs by claiming that the suit properties were not part of the estate of the said deceased, and that he had attained title by adverse possession.

ii. The defendant relies on *section 7* of the Limitation of Actions Act, and the doctrine of laches. Simply put, *section 7* provides that recovery of land may not occur after 12 years from the date the right accrued. The plaintiff has also

accused the plaintiffs of being guilty of laches as they had the grant by the time he got issued with the titles on 21st February 2013, and should have filed their claim earlier. Indeed I have confirmed from the attacked grant that it was issued on 14th May 2010, while the certificate of confirmation was issued on 16th April 2015. I have noted from paragraph 5 of the plaint that the plaintiffs got to know about the subdivision and registration of the suit properties with the defendant *"on or about February 2025"*. As it is evident that the parties are disputing on the relevant facts, the court cannot at this interlocutory stage purport to determine whether the defendant had attained title to the suit properties under adverse possession, without according the parties the opportunity to present their evidence before rendering the court's determination.

iii. That while the ground on whether or not the application and suit contravenes *section 7* of the Limitation of Actions Act, would fit the definition of a pure point of law, the parties herein are not in agreement on the facts surrounding the cause of action. The ground on whether or not the application and suit are statute time barred cannot

in this suit, be determined without considering evidence, and as the ground in preliminary objection herein was not raised through an application, the same is rejected. I have noted the defendant has not pursued the grounds of the application being frivolous, vexatious, defective and abuse of the court process through their submissions and I will take it that they were abandoned, The court therefore has jurisdiction in both the suit and the application herein.

iv. Had the court upheld that ground of limitation, then inevitably, the court would have downed its tools in accordance to the dictates in the case of Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd [1989] KLR 1, the court rendered itself as follows on jurisdiction:

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is*
>
> *without jurisdiction."*

v. The plaintiff's application is a prayer for temporary injunction which are provided under *Order 40 (1)* Civil Procedure Rules while the ingredients are elaborated in the famous case of Giella versus Cassman Brown & Co. Ltd (1973) EA 358 and reiterated in the case of Nguruman Limited versus Jan Bunde Nelson & 2 Others (2014) eKLR. The said ingredients are as follows:

a) The applicant must prove a prima facie case with a likelihood of success.

b) The applicant must demonstrate that there will be irreparable harm or loss suffered if the application is not allowed.

c) The applicant must show that the balance of convenience should be exercised in their favour.

vi. The plaintiffs has alleged that Plot 539/III/MN was subdivided by the defendant sometime in 2013 to create the suit properties. That the original parcel was part of estate of the deceased, and also among the properties distributed in the certificate of confirmation of grant dated 16th April 2015. In their joint affidavit, there are certificates of title issued on 21st February 2013 indicating that both

suit properties came from plot 539/III/MN, while the same plot is listed in the grant issued in the above-mentioned grant. The plaintiffs have through the above facts established a prima facie case with a probability of success.

vii. On the question of irreparable loss, it was defined as follows in the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] KEELC 2424 (KLR):

> *"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."*

Counsel for the plaintiffs submitted that the defendant has threatened to dispose of the suit properties to third parties. That if the injunction prayer is not granted, and the suit properties are disposed, the recovery of the same will result to other expenses being incurred costs in filing of other recovery suits.

viii. The third element of balance of inconvenience was also discussed in the Pius Kipchirchir Kogo [supra] where the court held that:

> *"The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding*

the injunction will be greater than which is likely to arise from granting it."

The inconvenience that will be caused to the plaintiffs should the application not be granted, and they later succeed in the suit will be greater than any inconvenience to be caused to the defendant. The court has noted that the defendant did not offer or tender any submissions on the plaintiffs' notice of motion as his counsel only concentrated on their preliminary objection, despite the clear orders of the court that the application and preliminary objection were to be canvassed together. That from the foregoing conclusions, the court therefore finds that the plaintiff's application has merit.

ix. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where the court orders otherwise on good reasons. The plaintiffs are entitled to costs as they have succeeded in their application while the defendant has failed in his preliminary objection.

6. From the foregoing conclusions on both the defendant's preliminary objection and the plaintiffs' application, I find and order as follows:

    a. *The defendant's Preliminary Objection dated 3rd July 2025 is without merit and is hereby rejected with costs.*

    b. *That the plaintiffs' notice of motion dated 2nd April 2025 has merit and is allowed in the following terms:*

        i. *That prayer (3) is granted and an injunction order hereby issued restraining the Defendant, his agents and or servants from selling, mortgaging, transferring or in whatever manner interfere with the property known as Plot NO. 4940 (Original NO. 539/182) Section III/MN CR NO. 59091 and Plot NO.4941 (Original NO. 539/183) Section III/MN CR. No. 59092, pending the inter parties hearing and determination of the main suit herein.*

        ii. *The defendant to bear the plaintiffs' costs.*

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF NOVEMBER 2025.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFFS : M/s Mohamed

DEFENDANT : M/s Matoke

NECHESAH-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.