



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 151 OF 2018**

**HAWA MOHAMED ABDALLA** (*Suing as the administrator of the Estate of*

**MOHAMED HUSSEIN ABSURA (DECEASED)**...**PLAINTIFF/APPLICANT**

**VERSUS**

**UNITED CARE LIMITED**.....**1<sup>ST</sup> RESPONDENT/DEFENDANT**

**AMIR FAUD AHMED** .....**2<sup>ND</sup> RESPONDENT/DEFENDANT**

**ASHA ABDULKADIR**.....**3<sup>RD</sup> RESPONDENT/DEFENDANT**

**RULING**

1. In the Application dated 30<sup>th</sup> July, 2018, the Plaintiff is seeking for the following orders:

**a. That pending the hearing and determination of the main suit, the Honourable Court be pleased to grant an interim injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by themselves, their agents, servants, employees or any person claiming under them from, alienating, selling, or in any manner whatsoever interfering with all that parcel of land known as L.R. No. 12715/690.**

**b. That the Honourable Court be pleased to order and direct that the orders granted be enforced with the assistance of the Officer Commanding Police Station (OCS) Mlolongo Police Station.**

**c. Costs of the Application be borne by the Respondents.**

2. In the Affidavit sworn by the Plaintiff, it has been deponed by the Plaintiff that she is the widow and administrator of the Estate of the late Hussein Absura (*deceased*); that the late Absura is the registered proprietor of land known as L.R. No. 12715/690 situate in Athi River (*the suit property*) and that the 1<sup>st</sup> Respondent is in the process of selling the said land.

3. According to the Plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have been encroaching on the suit land by putting up structures and that the Application for injunction should be allowed.

4. In reply, the 1<sup>st</sup> Defendant' Director deponed that after the 1<sup>st</sup> Defendant conducted due diligence in respect of the suit land, it entered into an Agreement of Sale with one Ahmed Faud Amir; that the suit property was transferred by the Plaintiff's late husband to one Ahmed Faud Amir and that the 1<sup>st</sup> Defendant was provided with the duly executed and stamped transfer of the suit property from the said Mohamed Absura to Ahmed Faud Amir and a blank transfer from Mr. Faud to the 1<sup>st</sup> Defendant.

5. In the Further Affidavit, the Plaintiff deponed that her late husband died on 4<sup>th</sup> December, 2015; that her late husband could not have executed the Transfer after his death and that the 1<sup>st</sup> Defendant, in collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, have severally attempted to unlawfully transfer the suit land.

6. The Plaintiff's advocate submitted that the 1<sup>st</sup> Defendant has annexed a Transfer document purportedly signed by the Plaintiff's husband on 15<sup>th</sup> July, 2016 way after the Plaintiff's husband had died; that the Respondent fraudulently obtained the Transfer document and that Section 45(1) of the Law of Succession Act forbids a person from dealing with the Estate of a deceased person without the authority of the court.

7. The Defendants' advocate submitted that the Plaintiff has failed to demonstrate an upto date search of the records of the Lands Registry

relating to the suit property; that the Plaintiff's late husband lawfully disposed of the suit property and that the Plaintiff has failed to meet the threshold for a prima facie case.

8. The Defendants' advocate further submitted that the Plaintiff has failed to demonstrate the irreparable injury she will suffer if the orders are not granted and that the remedy of a temporary injunction is issued solely to prevent grave and irreparable injury.

9. The Plaintiff is seeking for an injunction restraining the Defendants from trespassing, alienating, selling or interfering in any manner with L.R. No. 12715/690 pending the hearing of the suit.

10. A prima facie case in civil cases 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 (*Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125*).

11. The Plaintiff has deponed that she is the legal administratrix of the Estate of the late Mohamed Hussein Absura (*the deceased*). Other than the Grant of Letters of Administration issued to the Plaintiff on 5<sup>th</sup> October, 2017 by the court, the Plaintiff also exhibited on her Affidavit the Certificate of Confirmation of Grant dated 28<sup>th</sup> February, 2018. One of the properties indicated in the Certificate of Confirmation of Grant is the suit property.

12. The 1<sup>st</sup> Defendant has averred that it purchased the suit land from the 2<sup>nd</sup> Defendant; that the 2<sup>nd</sup> Defendant purchased the land from the Plaintiff's late husband and that he was given the duly signed and stamped Transfer document between the Plaintiff's late husband and the 2<sup>nd</sup> Defendant.

13. The 1<sup>st</sup> Defendant annexed on its Director's Affidavit the copy of the Agreement dated 12<sup>th</sup> August, 2016 between it and the 2<sup>nd</sup> Defendant. In the said Agreement, the 2<sup>nd</sup> Defendant was described as the registered proprietor of L.R. No. 12715/690, which is not the position.

14. I say so because the copy of the Grant for L.R. No. 12715/690 exhibited by the 1<sup>st</sup> Defendant shows that the suit land was transferred from the late Mohamed Hussein Absura to the 2<sup>nd</sup> Defendant on 30<sup>th</sup> August, 2016. This means that as at 12<sup>th</sup> August, 2016, the 2<sup>nd</sup> Defendant was not the registered proprietor of the suit land as alleged in the Agreement of 12<sup>th</sup> August, 2016.

15. The 1<sup>st</sup> Defendant has claimed that the Plaintiff's late husband transferred the suit land to the 2<sup>nd</sup> Defendant by way of a Transfer purportedly signed by both the Plaintiff's late husband and the 2<sup>nd</sup> Defendant on 15<sup>th</sup> July, 2016, and that the same was registered on 30<sup>th</sup> August, 2016. However, the Defendants did respond to the issue of how the Plaintiff's husband could have signed the Transfer document on 15<sup>th</sup> July, 2016 and yet, according to the copy of the Death Certificate, he died on 4<sup>th</sup> December, 2015.

16. Indeed, neither the 2<sup>nd</sup> Defendant, nor the advocate who purportedly witnessed the Plaintiff's late husband sign the Transfer document swore an Affidavit to explain the circumstances under which a deceased person could have signed a document.

17. The documents annexed on the 1<sup>st</sup> Defendant's Director's Affidavit, read together with the Plaintiff's Affidavit and annexures shows, prima facie, that the Estate of the late Mohamed Hussein Absura has been intermeddled with. Indeed, the evidence before this court shows that the Plaintiff has a prima facie case with chances of success.

18. The fact that the suit and is currently registered in favour of the 2<sup>nd</sup> Defendant shows that the land may be transferred or charged to a third party, thus further putting it out of reach of the Plaintiff. The Plaintiff is therefore likely to suffer irreparable injury that cannot be compensated by an award of damages. For those reasons, an order of injunction should issue pending the hearing and determination of the suit.

19. The Application by the Plaintiff dated 30<sup>th</sup> July, 2018 is therefore allowed in the following terms:

**a. That pending the hearing and determination of the main suit, the Honourable Court be pleased to grant an interim injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by themselves, their agents, servants, employees or any person claiming under them from, alienating, selling, or in any manner whatsoever interfering with all that parcel of land known as L.R. No. 12715/690.**

**b. Costs of the Application to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF APRIL, 2019.**

**O.A. ANGOTE**

**JUDGE**