



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

COUNTY COURT NAME: MOMBASA ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCLC/E018/2026

KHALID MOHAMED AHMED VS MUHIYADIN OSMAN ALI

### RULING

Khalid Mohamed Ahmad hereinafter referred to as the applicant has come to this court seeking orders against Muhiyadin Osman Ali that a temporary injunction be issued restraining the respondent, his agents and or servants and or assigns from proceeding with any further construction, excavation or modification on property known as Mombasa/Block XV/728 pending the hearing and determination of the suit. The application is based on grounds that the Applicant and Respondent are the registered co-owners of the Suit Property and the Applicant has a clear, unmistakable right to be consulted on any developments.

The Respondent cannot deal with or alter Suit Property through construction without written consent of the Applicant. The Respondent has unilaterally commenced construction of unauthorized works on the joint property without prior knowledge, consent or approval of the Applicant.

The ongoing construction is being carried out without the necessary statutory approvals from the relevant County Government planning authorities and the National Construction Authority (NCA) before commencing works. The ongoing unauthorized construction is ILLEGAL and constitute a building code violation and subject to demolition. The unauthorized construction is altering the nature and character of the Suit Property which may lead to its permanent waste, damage or alienation. Structures built without permits pose acute danger to the public and are subject to forced demolition by authorities which would cause waste and financial loss to the joint estate.

The applicant contends that the illegal structures can diminish the market value and going value of the registered land. If the construction continues, the Applicant will suffer prejudice and financial loss that cannot be adequately compensated by an award of damages, as it may result in the ouster of the Applicant's rights or lead to a multiplicity of suits. The Applicant is apprehensive that the completed works might be used to dispose of or transfer portions of the Property to third parties, further complicated the legal title.

According to the applicant, the balance of convenience favors the preservation of the status quo pending the hearing and determination of the main suit to prevent further interference with the property. The Halting construction at this stage causes less hardship than allowing the completion of



an illegal structure that may eventually require mandatory demolition at the parties' expense, It is in the best interest of the minor that orders sought in the application be granted. The application is made in the best interest of justice and fairness. The supporting affidavit reiterates the grounds of the application.

Mr. Muhiyadin Osman Ali filed a replying affidavit whose gist is that upto 20th November, 2017, the Suit Property was exclusively owned by his Late Mother Fatuma Said Abanur, when her 1/2 Share was illegally and unlawfully transferred to the name of the Plaintiff.

According to the plaintiff, the purported transfer above is a forgery because as per his mother's passport which on the alleged date of signing the transfer of 20th February, 2016 she was not in Kenya, she was in the United Kingdom. She only came to Kenya on 21st May, 2016 having left Kenya on 03rd June, 2015 and therefore the Plaintiff does not at all have any good Title Deed to the Suit Property to enable him file the Suit herein.

When his Mother was bed-ridden in the United Kingdom, barely a month to her demise, the Plaintiff was busy transacting using his Mother's signature. He contends that they each have known shares on the Suit Land and therefore he does need to seek the Plaintiffs permission to make repairs and or developments on his part of the contested Title Deed. His contractors working on his side of the Property have the requisite permission to do the works.

That indeed the Plaintiff does not at all have right, lawful and or legal proprietary rights which can be legally threatened and hence his entire Application and Suit should be dismissed with costs. That he has never received any request and or demand to stop the works from the Plaintiff. Indeed the said works are being carried out legally and lawfully.

The defendant contends that there is absolutely no evidence produced by the Applicant that his ongoing works are being done illegally without any approvals and hence his allegations are based on mere allegations. There is absolutely no danger to the public otherwise my Contractor would have been stopped by the relevant authorities, hence it is not foreseeable that demolition will be carried out leading to waste and financial loss as alleged.

Moreover, that there is no evidence produced by the Plaintiff to support all his wild, irrelevant and mere allegations and hence the Court should disregard the same as mere allegations from a person whose part of the Title Deed is a suspect to have been obtained by fraud and forgery. He believes that no prejudice, irreparable loss and or injury will be caused against the Plaintiff and hence the Orders sought of Injunction should not be granted. There is absolutely no evidence that he will transfer any of his Portions to Third Parties hence the averments by the Plaintiff are far-fetched. Both parties have filed submissions. I have carefully considered their respective submissions and do find that the plaintiff and defendant are tenants in common with equal shares. It is evident that the defendant is constructing on the suit property without the consent of the plaintiff. There is no evidence that the defendant has complied with the physical planning Act by obtaining the relevant approvals from the county government of Mombasa.

It is clear that the parties hold the property as tenants in common, where it highly recommended and often legally required to obtain the consent of all other co-owners before making substantial improvements to the property. While tenants in common have distinct shares, they hold an undivided interest in the whole property, meaning one owner cannot make changes that affect the whole property without collective agreement. This court has the power to grant injunction preventing a co-owner from dealing with the property in a way that would prejudice the other co-owners, and to set aside transactions that were effected without the required consent. Section 91 of the registration of land Act provides as follows:-

Meaning and incidents of co-tenancies



(1)In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.(2)Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.(3)An instrument made in favour of two or more persons and the registration giving effect to it shall show—(a)whether those persons are joint tenants or tenants in common; and(b)the share of each tenant, if they are tenants in common.(4)If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—(a)dispositions may be made only by all the joint tenants;(b)on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; and(c)each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.(5)If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate.(6)No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

I do find that the plaintiff has established a prima facie case with a probability of success as his consent was not obtained before the construction was commenced. Moreover, I do find that the plaintiff to suffer irreparable loss if a temporary injunction is not granted as the construction will be irreversible.

The balance of convenience tilts towards granting injunction because the plaintiff will be highly inconvenienced if the injunction is not granted and he succeeds in the case because the building would have been completed and demolition would be expensive. The defendant will suffer less inconvenience if the injunction is granted and yet he succeeds because he can complete the structure and be compensated. Application is allowed thus I do grant a temporary injunction restraining the respondent, his agents and or servants and or assigns from proceeding with any further construction, excavation or modification on property known as Mombasa/Block XV/728 pending the hearing and determination of the suit. Costs in the cause. Mention on the 6th May 2026 for directions.

SIGNED BY/FOR:  
HON. JUSTICE ANTONY O. OMBWAYO

