



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.149 OF 2018**

**HAJILA BAJILA GUYO.....PLAINTIFF/APPLICANT**

**VERSUS**

**MAISHA BORA LIMITED.....1<sup>ST</sup> DEFENDANTS/RESPONDENT**

**WESTERN SUNSHINE COMPANY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, KILIFI COUNTY.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**MICHAEL K. KATANA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By this Notice of Motion application dated 13<sup>th</sup> July 2018, Hajila Bajila Guyo (the Plaintiff/Applicant) prays for an order of injunction to issue restraining the 1<sup>st</sup> Defendant from selling, alienating, trespassing, encroaching, sub-dividing, transferring or otherwise dealing with two parcels of land known as Chembe/Kibabamshe/397 and Chembe/Kibabamshe/440 pending the hearing and determination of this suit.
2. In addition, the Plaintiff prays for an order that all further registrations or change of registration in the ownership, lease, allotment, user, occupation or possession of any kind of right or interest in the two properties be prohibited until further orders of this Court.
3. The application is supported by an Affidavit sworn by the Plaintiff herself and is premised on the grounds that she was duly allocated the two parcels of land by the Government through the Settlement Scheme Program and that the 2<sup>nd</sup> Defendant irregularly sold the two parcels of land to the 1<sup>st</sup> Defendant knowing very well that its title deeds were fraudulently obtained.
4. In a Replying Affidavit sworn by its Managing Director Mehboob Hasham Ahmed and filed herein on 26<sup>th</sup> October 2018, Maisha Bora Limited (the 1<sup>st</sup> Defendant/Respondent) avers that it is the registered owner of Plot No. Chembe/Kibabamshe/397 having acquired the same from Western Sunshine Company (the 2<sup>nd</sup> Defendant/Respondent) for a valuable consideration. The 1<sup>st</sup> Defendant further avers that the Plaintiff's application and the entire suit is incompetent and fatally defective and urge the Court to dismiss the same.
5. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents did not file any response to the application.
6. On his part, Michael Kaingu Katana (the 5<sup>th</sup> Defendant/Respondent) avers in a Replying Affidavit filed herein on 17<sup>th</sup> August 2018 that he was the Assistant Chief Jimba Sub-Location before becoming the Chief Watamu Location between 1996 and the year 2016 and that he has known the Plaintiff's family since the year 1990.
7. The 5<sup>th</sup> Defendant asserts that the Plaintiff's family approached him as the Senior Chief Watamu to intervene in resolving a dispute between themselves and the 1<sup>st</sup> Defendant in regard to the two suit properties. In that capacity the 5<sup>th</sup> Defendant received Kshs 6,700,000/- from the 1<sup>st</sup> Defendant to pass to the Plaintiffs family.
8. The 5<sup>th</sup> Defendant avers that according to the Agreement by the parties, he went ahead to pay a sum of Kshs 4,000,000/- to the family of the Plaintiff while the sum of Kshs 2,700,000/- was paid to a nephew of the Plaintiff also known as Hajila Bajila Guyo. The 5<sup>th</sup> Defendant further avers that those who received the payments acknowledged receipt and there was no basis for any suit against him as he was only

acting on the request of the parties to intercede on their behalf.

9. I have considered the application and the response thereto. I have also considered the written submissions filed before me as well as the authorities to which I was referred by the Learned Advocates for the parties.

10. The conditions for the grant of an interlocutory injunction application were settled in the oft-cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** where the Court stated thus: -

*“First, an applicant must demonstrate a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”*

11. In the matter before me, the Plaintiff asserts that she was offered the suit properties by the Government through the Land Adjudication and Settlement Department. She has annexed to her application a letter dated 14<sup>th</sup> August 1998 as evidence of the allocation. It is her case that the offer was valid for 90 days and that on 6<sup>th</sup> November 1998 and 20<sup>th</sup> November 1998, she paid the requisite charges in evidence of her acceptance of the offer. Later on 24<sup>th</sup> January 2001, the Settlement Fund Trustees discharged the properties and executed a transfer in her favour.

12. The Plaintiff accuses the 2<sup>nd</sup> Defendant of later on encroaching upon the suit properties and proceeding to unprocedurally and fraudulently sell and transfer the properties to the 1<sup>st</sup> Defendant.

13. The 2<sup>nd</sup> Defendant has not filed any response to the Plaintiff’s application. On its part, the 1<sup>st</sup> Defendant avers in a Replying Affidavit filed by its Managing Director Mehboob Hasham Ahmed that they are registered owners of Plot Number Chembe/Kibabamshe/397 “having acquired the interest from the 2<sup>nd</sup> Defendant for a valuable consideration.”

14. It is noteworthy that the 1<sup>st</sup> Defendant only purports to have bought Plot No. 397 from the 2<sup>nd</sup> Defendant. While they do not deny occupying the second Plot No. 440, the 1<sup>st</sup> Defendant makes no mention of the same in their response to the application. As it were, the 1<sup>st</sup> Defendant has neither attached their alleged title nor Sale Agreement between themselves and the 2<sup>nd</sup> Defendant in regard to the said Plot No. 397.

15. From the evidence placed before me at this stage, it was not clear to me how the 2<sup>nd</sup> Defendant acquired interest in the said Plot No. 397 capable of being sold to the 1<sup>st</sup> Defendant. In a situation like this where there is a dispute as to ownership, I did not think that it was sufficient for the 1<sup>st</sup> Defendant merely to assert that he bought the property in dispute from the seller thereof, more so when the said seller has not appeared despite service to disclose how he acquired the property in dispute.

16. Indeed while the 5<sup>th</sup> Defendant, a former Chief of Watamu Location confirms that he received various sums of money to settle the Plaintiffs claim against the 1<sup>st</sup> Defendant, it was worthy of note that the 1<sup>st</sup> Defendant itself does not claim to have bought those properties from the Plaintiff. A perusal of the so-called Agreements attached to the 5<sup>th</sup> Defendant’s Affidavit in reply reveals that neither the 1<sup>st</sup> Defendant nor its representative executed the same.

17. In the circumstances herein, it is evident that the Plaintiff and/or her family has been in occupation of the suit properties which were apparently allocated to her vide letters dated 14<sup>th</sup> August 1998. The Settlement Fund Trustees later on in January 2001 discharged the properties and executed a transfer in her favour. There was on the contrary no evidence adduced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, how they acquired interest on the same.

18. Accordingly, I find merit in the application before me. The same is allowed in terms of Prayers 2 and 3 thereof with costs.

**Dated, signed and delivered at Malindi this 20<sup>th</sup> day of September, 2019.**

**J.O. OLOLA**

**JUDGE**