



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC NO 397 OF 2017**

SAMWEL OSEBE KINANGA.....PLAINTIFF

VERSUS

ISAAC TARUS TOROITICH.....1<sup>ST</sup> DEFENDANT

SIMEON MWENDWA.....2<sup>ND</sup> DEFENDANT

**RULING**

1. This is the Notice of Motion dated 3<sup>rd</sup> November, 2017. It is brought under Order 40 Rule 1, 2 & 3 of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders;

**1. Spent.**

**2. Spent.**

**3. That the Honourable Court be pleased to issue a temporary injunction to restrain the Defendants/Respondents by themselves, their servants and/or agents from constructing , pouring materials or doing anything on Plot No. 10866/Section II/MN in Mombasa County pending the hearing and determination of this suit.**

**4. That costs of this application be provided for.**

3. The grounds are on the face of the application and are listed as in paragraph a-h I do not need to reproduce them here.

4. The application is supported by the affidavit of Samwel Osebe Kinanga, the Plaintiff/Applicant herein sworn on the 3<sup>rd</sup> November, 2017 and a further affidavit sworn on the 14<sup>th</sup> December, 2017.

5. The application is opposed. There is a replying affidavit sworn by Isaac Tarus Toroitich, the 1<sup>st</sup> Defendant/Respondent sworn on the 4<sup>th</sup> December, 2017. The 2<sup>nd</sup> Defendant/Respondent has also sworn a replying affidavit dated 15<sup>th</sup> September, 2017.

6. It is the Plaintiff/Applicant's case that he bought the suit property from Mr. Obutu Zachary Atei Mathew Osoro. He annexed the sale agreement to his further affidavit as annexure "SOK 1". He told the court that thereafter he gave the documents to the 1<sup>st</sup> Defendant, whom he knew well to effect transfer in his favour.

7. The 1<sup>st</sup> Defendant instead fraudulently and illegally effected transfer to his own names and sold the suit property to the 2<sup>nd</sup> Defendant.

8. The 1<sup>st</sup> Defendant/Respondent on his part said that the Plaintiff/Applicant owed him money. That since he was holding the Plaintiff's documents, the Plaintiff advised him to effect transfer on his favour. That thereafter he sold the land to one Nabhan at Kshs500,000/=.

9. It is the 2<sup>nd</sup> Defendants/Respondent's case that he is now registered owner of the suit property. He said he bought it from the 1<sup>st</sup> Defendant. That he is an innocent purchaser for value without notice of any fraud or impropriety.

10. I have considered the Notice of Motion and the affidavits in support together with the annexures. I have considered the replying affidavits and the annexures. I have considered the submissions of both counsels and the authorities cited.

The issues for determination are;

**i) Whether the Plaintiff/Applicant's case has met the threshold for grant of temporary injunctions.**

**ii) Who should bear costs?**

11. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of *Giella –versus- Cassman And Company Limited (1973) EA 358.*

12. In the case of *Mrao Limited –versus- First American Bank of Kenya Limited And 2 Others (2003) KLR 125,* the Court of Appeal gave a definition of what amounts to a prima facie case. It stated,

**“So what is a prima facie case? I would say that in civil cases; it is a case in 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 on or rebuttal from the latter.”**

13. It is the Plaintiff/Applicant's case that he gave the 1<sup>st</sup> Defendant/Respondent documents to effect transfer on his behalf. He and the 1<sup>st</sup> Defendant had known each other for a long time. He was surprised when he learnt that someone was putting up a construction on the suit property.

14. The Plaintiff has annexed a sale agreement between himself and Zachary Obutu, the owner of the plot. He has also annexed an affidavit by Obutu Zachary Atei Mathew Osoro confirming that he never sold the suit property to the 1<sup>st</sup> Defendant.

15. The 1<sup>st</sup> Defendant/Respondent in his replying affidavit confirms that he was holding documents given to him by the Plaintiff. That when the Plaintiff/Applicant could not pay his debt he (Plaintiff) advised him to effect transfer in his 1<sup>st</sup> Defendant's favour.

16. I find that this is an afterthought. The 1<sup>st</sup> Defendant is merely trying to explain what he did. This is wrong. The 1<sup>st</sup> Defendant said he sold the suit property to one Nabhan for Kshs500,000/=. He never said he sold the suit property to the 2<sup>nd</sup> Defendant.

17. In paragraph 6 of his replying affidavit, the 2<sup>nd</sup> Defendant claims to have bought the plot from the 1<sup>st</sup> Defendant. One wonders who is telling the truth.

All in all, I find the 1<sup>st</sup> Defendant/Respondent in breach of trust had the suit property transferred to himself instead of the Plaintiff.

18. I find that the Plaintiff/Applicant has demonstrated that he has a prima facie case with a probability of success at the trial. I find that the 1<sup>st</sup> Defendant/Respondent fraudulently had the plot registered in his names instead of the Plaintiff/Applicant.

19. I also find that the Plaintiff/Applicant has demonstrated that he is likely to suffer irreparable loss if these orders are not granted. He paid the purchase price.

20. I find merit in this application and I grant the orders sought namely;

**a) That a temporary injunction be and is hereby issued restraining the Defendants/Respondents by themselves, their servants and/or agents from constructing, pouring materials or doing anything on Plot No. 10866/Section II/MN in Mombasa County pending the hearing and determination of this suit.**

**b) The costs of the application do abide the outcome of the main suit.**

**It is ordered.**

**Dated, Signed and Delivered at Mombasa on the 21<sup>st</sup> day of March 2018.**

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**L. KOMINGOI**

**JUDGE**

**21/3/2018**