



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 411 OF 2016**

**THOMAS SCHIERING.....PLAINTIFF**

**VERSUS**

**NEREAH MICHEAL SAID.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 22<sup>nd</sup> December, 2016. It is brought under Section 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya, Section 68, 80 of the Land Registration Act, Order 40, Rule 1 and 2, Order 51. Rule 1 of the Civil Procedure Rules and under any other relevant provisions of the law.

2. It seeks orders;

**1. Spent.**

**2. Spent.**

**3. That this Honourable Court be pleased to issue orders restraining the Respondent herein by herself, through her servants and/or agents and/or employees from sub-dividing, selling, disposing, transferring, constructing, evicting, threatening and/or interfering in any other manner with the property known as Kwale/Galu/Kinondo/2458 and Kwale/Galu/Kinondo/2459 and the Applicant herein, his family and/or occupants residing on the suit property pending the hearing and determination of this suit.**

**4. That the Honourable Court do hereby declare the interest of the Defendant herein in property known as Plot Numbers Kwale/Galu/Kinondo/2458 and Kwale/Galu/Kinondo/2459 be and is hereby extinguished and do hereby order and/or direct the Land Registrar Kwale to cancel all entries on the green card (s) of property known as plot numbers Kwale/Galu/Kinondo/2458 and Kwale/Galu/Kinondo/2459 indicating the Respondent as the owner and in place and/or register the Applicant herein as the owner of the property known as plot numbers Kwale/ Galu/Kinondo/2458 and Kwale/Galu/Kinondo/2459.**

**5. That this Honourable Court be pleased to issue any other orders it deems fit in the circumstances.**

**6. Spent.**

**7. That costs of this application be proved for.**

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

4. The application is supported by the affidavit sworn by Thomas Schering, the Plaintiff/Applicant herein sworn on the 22<sup>nd</sup> December, 2016 and a further affidavit sworn on the 16<sup>th</sup> May, 2017.

5. The application is opposed. There is a replying affidavit sworn by Nereah Micheal Said, the Defendant/Respondent herein sworn on the 25<sup>th</sup> January, 2017.

6. On the 27<sup>th</sup> September, 2017, it was agreed between the parties that the application be disposed of by way of written submissions.

7. It is the Plaintiff's/Applicant's case that he is the legal, registered and beneficial owner of the property previously known as Kwale/Galu/Kinondo/755 having obtained the same as a lease from the government of Kenya together with his ex-wife. That he registered a company with the Defendant known as Rising Eagle Limited where both parties were shareholders and directors and transferred the property to the company.

8. That the property was further transferred to the Defendant to hold in trust and sell the property. The Defendant /Respondent was entitled to 12% of the purchase price in any sale.

The Defendant/Respondent sold land parcel number Kwale/Galu/Kinondo/2460 and failed to remit the purchase price. She also registered land parcel numbers Kwale/Galu/Kinondo/2458 and 2459 in her names and has threatened to evict the Plaintiff/Applicant.

9. It is the Defendant/Respondent's case that she purchased land parcel Kwale/Galu/Kinondo/755 for valuable consideration. That she then sub-divided it into three plots 2458, 2459 and 2460. She sold the plot number 2460 and retained the other two. She prays that the application be dismissed with costs.

10. I have considered the pleadings, the Notice of Motion, the affidavits in support and the annexures. I have also considered the replying affidavit and the annexures. I have considered the written submissions of both counsels and the authorities cited. The issues for determination are;

**i) Whether there was an agreement by the Defendant/Respondent to hold land in favour of the Plaintiff/Applicant.**

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

**iii) Who should bear costs?**

11. It is the Plaintiff's/Applicant's case that he transferred the property to the Defendant/Respondent in good faith and in the belief that she would hold in trust for him. He has annexed a certificate of lease and as "Ts-3a" and an agreement between him and the Defendant Annexure "Ts-4".

12. On the other hand, the Defendant/Respondent claims to have purchased the property for valuable consideration. She has not annexed a copy of sale agreement. There is no proof of sale.

In paragraph 4 of the replying affidavit, she only annexed at transfer of lease. There is no sale agreement between herself and the Plaintiff/Applicant annexed. I find the Plaintiff/Applicant's explanation that she was holding the title in trust for him to be more plausible I believe the Plaintiff/Applicant.

13. 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 –vs- Cassman Brown And Company Limited (1973) EA 358. In the case of Mrao Limited –vs- First American Bank Limited And 2 Others (2003) eKLR the Court of Appeal gave a definition of what amounts to a prima facie case.

14. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? The Plaintiff/Applicant states that he is the legal, and beneficial owner of the suit properties.

He has demonstrated to the court what led to the transfer in the Defendant/Respondent's favour.

It is in good faith. Annexure "Ts-4" explains it all.

15. The Defendant/Respondent has failed to demonstrate that she purchased the property for valuable consideration I am of the opinion that she did not tell the court the truth as she had no proof of sale and/or purchase.

I find that the Plaintiff/Applicant has demonstrated that he has a prima facie case with a probability of success at the trial.

16. The Defendant/Respondent upon transfer sub-divided the plot into three portions and sold one, Kwale/Galu/Kinondo/2460. She retained numbers 2458 and 2459 and has threatened to evict the Plaintiff/Applicant.

I find that the Plaintiff/Applicant has demonstrated that he will suffer irreparable injury which cannot be adequately compensated by an award of damages. If these orders are not granted.

17. The Defendant/Respondent sold number 2460 without remitting the purchase price to the Plaintiff. There is need to preserve the remaining two plots.

18. I find merit in this application. I am however resistant in granting prayer (4) of the application at this juncture as this would amount to disposal of the main suit.

In essence thereby allow the application in terms of prayer (3) namely;

**i) That orders are hereby issued restraining the Defendant/Respondent herein by herself, through her servants and/or agents**

and employees from sub-diving, selling, disposing, transferring, constructing, evicting, threatening and/or interfering in any other manner with the property known as Kwale/ Galu/Kinondo/2458 and Kwale/Galu/Kinondo/2459 and the Applicant herein, his family and/or occupants residing on the suit property pending the hearing and determination of this suit.

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

It is ordered.

Dated, Signed and Delivered at *Mombasa* on the *13<sup>th</sup>* day of *March 2018*.

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L. KOMINGOI

JUDGE

13/3/2018