



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO 107 OF 2017

PATRICIA MUSUNGU SHAABAN.....PLAINTIFF

-VS-

1. MOHAMED SHAABAN

2. DAMIAN NTHAMBI

3. DESINGH SWERD

4. DESMOND PATRICK MA

5. PAWAN KUMAR.....DEFENDANTS

RULING

1. By a Notice of Motion dated 28th March 2017 brought under Order 51 Rule 1 and Order 40 of the Civil Procedures Rules, Sections 1A and 3A of the Civil Procedure Act, Section 28(a) of the Land Registration Act and Section 52 of the Transfer of Property Act, 1882 the Plaintiff/Applicant is seeking an order of injunction restraining the 2nd, 3rd, 4th and 5th Defendants from reselling, transferring, sub-leasing, alienating, mortgaging, charging, interfering or in any manner whatsoever dealing or handling the Suit Plot known as **TITLE NO. KWALE/DIANI BEACH BLOCK/172** or any subdivisions thereto namely plot **Nos.1359, 1360,1361 and 1362** pending hearing and determination of this suit. The Application is based on the grounds on the face of the motion and supported by the Affidavit of Patricia Musungu Shaaban, the Plaintiff sworn on 28th March 2017.

2. The Plaintiff's case is that she commenced suit against the 1st Defendant through **Mombasa HCCC No.1088 of 2006** which was consolidated with **HCCC No.163 of 2012 (formerly SRMCC No.159 of 2006)** between the same parties and which was renamed **HCCC NO.3 of 2014** in which the Plaintiff claimed the portion of her share in matrimonial properties more specifically plot known as **TITLE NO.KWALE/DIANI BEACH BLOCK/172**. That the consolidated case was heard and determined and in its judgment that Court declared the plot known as **NO. KWALE/DIANI BEACH BLOCK/172** as matrimonial property owned by the 1st Defendant and the Plaintiff in equal shares and the same was therefore to be shared by both of them. The Plaintiff avers that when she wanted to execute the decree by registering it at the Kwale Land Registry the Land Registrar declined to register the decree because on or about 21st June 2011 the Suit Plot had been sub-divided into four parcels namely **Plot Nos.1359, 1360, 1361 and 1362** and transferred by the 1st Defendant to the 2nd, 3rd, 4th and 5th Defendants. It is the Plaintiff's contention that the said sub-lease, sub-division and/or transfer of the Suit Property was done by the 1st Defendant during the pendency of **HCCC No.3 of 2014 (OS)** and without consent and that the 1st Defendant failed to disclose the material facts to the Court during the hearing of that suit. The Plaintiff contends that where a party purchases property which is the subject of Court proceedings he or she would be bound by the judgment and decree of the Court and therefore the 2nd, 3rd, 4th and 5th Defendants are bound by the decree in **HCCC No.3 of 2014 (OS)** and that the transfer in their favour or anyone else amounts to an illegality hence should be declared null and void. The Plaintiff further contends that the 1st Defendant had no legal capacity to transfer matrimonial property without spousal consent from the Plaintiff. The Plaintiff avers that unless the orders sought are granted she will suffer irreparable loss and damage and her right to protection of property will be infringed.

3. The Application is opposed by the Defendants with the 1st Defendant filing a Replying Affidavit sworn by himself on 19th June 2017 in which he deposes that he bought the property single handedly sometime in 2001 and the Suit Property known as **TITLE NO.KWALE/DIANI BEACH BLOCK/172** was subsequently transferred to him and certificate of lease issued in his name on 7th December 2001. That in or about 2002, he sub-divided the plot into four (4) parcels known as **KWALE/DIANI BEACH BLOCK/1359, 1360, 1361 and 1362** and that he subsequently granted sub-leases of the said plots to the 2nd, 3rd, 4th and 5th Defendants legally and procedurally and without any resistance from the Plaintiff. The 1st Defendant contends that as at the year 2006 when the Plaintiff

commenced and filed **HCCC No.1088 of 2006, PLOT NO.KWALE/DIANI BEACH BLOCK/172** did not exist as the same had been sub-divided and subsequent sub-divisions sold to the 2nd to the 5th defendants. The 1st Defendant denies the Plaintiff's averments in the Application and Supporting Affidavit that **PLOT NO.KWALE/DIANI BEACH BLOCK/172** was sub-divided and/or transferred to the 2nd to 5th Defendants during the pendency of the **Suit, HCCC No.1088 of 2006 (OS)**. The 1st Defendant avers that the Plaintiff's claim that the Suit Property was matrimonial and was transferred without her consent lacks substance and is a deliberate attempt by the Plaintiff to mislead the Court and to injure his reputation since the Land Registration Act, 2012 came into effect long after the 1st Defendant had granted the subleases to the 2nd, 3rd, 4th and 5th Defendants. He further avers that there was no pending Court proceedings in respect of the property in which he had granted sub-leases to the 2nd to 5th Defendants. He reiterates that **TITLE NO. KWALE/DIANI BEACH BLOCK/172** was solely registered in his name and that the subsequent subdivisions and subleases were done above board and within the law and without infringement of the Plaintiff's rights.

4. The 2nd and 3rd Defendants who are husband and wife filed a joint replying Affidavit sworn on 7th August 2017. It is their case that on 6th January 2012 they bought **LAND REFERENCE NO. KWALE/DIANI BEACH/1359** from Mohamed Shaaban the 1st Defendant for Kshs.4,500,000.00 and that before purchasing it they did a search of the property at the Kwale Lands Registry and confirmed that the same was registered in the name of the 1st Defendant and there was no encumbrances, caution or restrictions on the property. That they paid the full purchase price and were later issued with Certificate of Lease dated 30th April 2012. They aver that they have been in physical occupation and or possession of the land since the year 2014 and have been paying land rates for it from 2013 to date. It is their contention that the decree dated 19th February 2016 in **Civil Suit No.3 of 2014 (OS), Patricia Musungu Shaaban –vs- Mohamed Shaaban** has been overtaken by events since it was issued long after **KWALE/DIANI BEACH/1359** was registered in their favour, and that suit was also filed after the registration of the Suit Land in their names on 30th April 2012. They further contend that at the time the certificate of lease was being registered in their names, there was no court order barring the Registrar of Lands at Kwale from proceeding with the registration and therefore the entire process was done legally. The 2nd and 3rd defendants aver that the doctrine of *lis pendens* cannot apply in the current case and that the application is an abuse of the court process and should be dismissed with costs.

5. The 5th Defendant in his Replying Affidavit sworn on 5th May 2017 and filed in Court on 23rd May 2017 depones that he is the registered owner of **LAND REFERENCE NUMBER KWALE/DIANI BEACH BLOCK/1362** which he bought from the 1st Defendant on 4th July 2013. He avers that as at the time he purchased the said land the same was only registered in the name of the 1st Defendant and not jointly and that the judgment and decree in **Civil Suit No.3 of 2014** has been overtaken by events and therefore incapable of enforcement.

6. The parties filed Written Submissions which I have read and need not reproduce their contents herein.

7. I have considered the Application, the Affidavits in support and against and the rival submissions made as well as the authorities cited. The principles upon which an Interlocutory Injunction may be granted are well settled. One has to establish a *prima facie* case with a probability of success, 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, and if in doubt, the Court will decide the matter on a balance of convenience.

8. It is not in dispute that **TITLE NUMBER KWALE/DIANI BEACH BLOCK/172** was registered in the name of Mohamed Shaaban, the 1st Defendant vide a Certificate of Lease dated 7th December 2001. It is also not in dispute that **TITLE NUMBER KWALE/DIANI BEACH BLOCK/172** was sub-divided into four (4) parcels known as **KWALE/DIANI BEACH BLOCK/1359,1360,1361 and 1362** and transferred and or sub-leased to and registered in the names of the 2nd, 3rd, 4th and 5th Defendants.

9. It is also not in dispute that the **TITLE NUMBER KWALE/DIANI BEACH BLOCK/172** was the subject of **Mombasa HCCC No.1088 of 2006** which was subsequently consolidated with **HCCC No.163 of 2012 (formerly SRMCC No.159 of 2012)** whereupon it was allocated a new case number, **Mombasa HCCC No.3 of 2014(OS)** between the Plaintiff and the 1st Defendant herein. In its judgment and decree dated 8th February 2016, the Court in **Mombasa HCCC No.3 of 2014 (OS) inter alia** declared the property known as **TITLE NO.KWALE/DIANI BEACH BLOCK/172** to be matrimonial property and ordered and decreed the same to be divided equally between the Plaintiff and the 1st Defendant herein. The Plaintiff could not register the decree extracted as at the time the judgment was made, the property had been sub-divided and transferred as already stated. Whereas it is the Plaintiff's contention that the said sub-division and transfers happened during the pendency of the aforementioned suit, the 1st Defendant contends that as at the year 2006 when the Plaintiff filed **Mombasa HCCC No.1088 of 2006, TITLE NO.KWALE/DIANI BEACH BLOCK/172** had already been sub-divided and the subsequent sub-divisions sold to the 2nd to 5th Defendants.

10. In the Application for registration dated 25th February 2016 marked as "PMS -3" in the Applicant's Supporting Affidavit, the remarks made are; "unable to register the decree because the parcel was sub-divided, see new **NOS.1361, 1362, 1359 AND 1360, 21/6/11.**" The Agreement for sale between the 1st Defendant and the 2nd and 3rd Defendants over **TITLES NOS.KWALE/DIANI BEACH BLOCK/1359** was made on 6th January 2012 while the 5th Defendant avers that he bought the **TITLE NO. KWALE/DIANI BEACH BLOCK/1362** from the 1st Defendant vide a Sale Agreement dated 4th July 2013. It is apparent that the two agreements were entered into during the pendency of **Mombasa HCCC No.1088 of 2006**. Of course the 1st Defendant has denied these allegations and maintains that the sub-division and transfers were done prior to the commencement of **Mombasa HCCC No.1088 of 2006**. Whereas it should be noted that it is difficult at this stage for the Court to ascertain the correct position from the disputed affidavits, it is my belief that that does not preclude the Court from making a determination on the Application before Court.

11. The crucial issue for determination is whether the Plaintiff should be granted the order of injunction sought given the circumstances of this case. To my mind, the injunction sought is for purposes of maintaining the respective parties' positions in the suit properties until the dispute is determined. Courts have now accepted that in dealing with an application for an interlocutory injunction, the Court is not necessarily bound by the three principles set out in the **Giella-v- Cassman Brown Case**. The Court may look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman –v- Amboseli Resort LTd (2004) eKLR 589**, Ojwang Ag. J (as he then

was) stated thus:

“Counsel for the Defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella –v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English Case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 780 – 781: -

“A fundamental principle of that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’...” Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown, the Court has had to consider the following questions before granting injunctive relief.

i) *Is there a prima facie case....*

ii) *Does the applicant stand to suffer irreparable harm....*

iii) *On which side does the balance of convenience lie... Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... If granting the Applicant’s prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the Applicant.”*

12. In that case, the Court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing of the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. The Plaintiff has a decree in her favour. On the other hand, the Defendants are the registered proprietors of the Suit Properties. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined. The common law doctrine of *lis pendens* is also applicable in this case as its purpose is to preserve the suit property until the suit is finally determined. In the case of Mawji –v- International University & Another (1976-80) KLR 229, Madan, J, while addressing the purpose of the principle of *lis pendens* adopted the finding in Bellamy – v – Sabine (1857) Ide J 566, 585 where Turner L J held as follows:

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants’ alienating before the judgment or decree, and would be driven to commence his proceeding de novo, subject again to be defeated by the same course of proceedings.”

Madan J, went on and stated thus:

“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The court must therefore protect the status quo”

13. I am thus satisfied that the facts as presented in this case demonstrate that the Applicant has a prima facie case and the balance of convenience tilts in her favour for the prevailing circumstances to be maintained. The Applicant has reason to seek orders to preserve the suit properties from changing hands so that this case is not rendered an academic exercise. Accordingly, I do grant the application in terms of prayer 3 with an order that each party bear their respective costs of the application.

Delivered, signed and dated at Mombasa this 8th March, 2018.

C. YANO

JUDGE