



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 296 OF 2017**

**SAID SULEIMAN SAID.....PLAINTIFF**

**VERSUS**

**FRANCIS WANJOHI NGANG.....1<sup>ST</sup> DEFENDANT**

**THEOPISTY OBURA AMIMO.....2<sup>ND</sup> DEFENDANT**

**JANE WANJIKU WANJOHI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is the Amended Notice of Motion dated 17<sup>th</sup> August, 2017 and Amended on 15<sup>th</sup> December, 2017. It is brought under 40 Rule 1(a), 3 and 9 of the Civil Procedure Rules 2010, and Section 3A, 1A, 1B of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders;

**1) Spent.**

**2) Spent.**

**3) That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining the Defendant/Respondents either by themselves or their agents, assigns, employees, and/or representatives from further constructing, erecting, building, interfering and/or otherwise tampering with the Plaintiff's parcel of land known as Sub-division No. 572/2 Section III Mainland North CR. No. 57684 and Land Reference No. 5737 Section III Mainland North CR. No. 52171.**

**4) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of mandatory injunction compelling and requiring the Defendants, their agents, servants and/or assigns to immediately demolish, pull down and/or remove the premises and/or structures being constructed and/or constructed on Land Reference No. Sub-division No. 572/2 Section III/Mainland North CR. No. 57684 and/or Land Reference No. 5737 Section III/Mainland North CR, No. 52171.**

**5) That costs of this application be provided for.**

3. The grounds are on the face of the application and are listed as in paragraph 1-11. I do not need to reproduce them.

4. The application is supported by the affidavit of Said Suleiman Said, the Plaintiff/Applicant herein sworn on the 15<sup>th</sup> September, 2017.

5. The application is opposed. There is a replying affidavit by Francis Wanjohi Nganga, the 1<sup>st</sup> Defendant/Respondent sworn on the 1<sup>st</sup> November, 2017 and further affidavit sworn on the 8<sup>th</sup> February, 2018. There is also an affidavit sworn by Jane Wanjiku Wanjohi, the 3<sup>rd</sup> defendant/Respondent sworn on the 2<sup>nd</sup> November, 2017 and further affidavit sworn on 8<sup>th</sup> February, 2018. There is a Preliminary Objection dated 17<sup>th</sup> October, 2017 to the Application herein.

6. On the 9<sup>th</sup> November, 2017, it was agreed amongst the parties that the Preliminary Objection and the Notice of Motion be disposed of by

way of written submissions. A date for highlighting was given.

#### 7. **THE PLAINTIFF'S/APPLICANT'S SUBMISSIONS.**

The Plaintiff/Applicant is the registered owner of Land Reference No. Sub-division No. 572/2 Section III/Mainland North CR. No. 57684 having purchased the same from Sammy Musembi Munyao and a transfer was duly registered on 15<sup>th</sup> July, 2016. Sometimes in July 2017, the 1<sup>st</sup> Defendant/Respondent without any colour of right unlawfully gained access into the Plaintiff's property and illegally commenced construction therein.

The Plaintiff/Applicant has established a prima facie case with a probability of success as he is the registered owner of the suit property. The Plaintiff/Applicant certificate of title was issued first in time then that of the 1<sup>st</sup> Defendant's.

They have relied on the case of **Giella –versus- Cassman Brown And Co. Ltd (1973) EA 358, Mrao Limited –versus- First American Bank of Kenya Ltd and 2 Others (2003) KLR 125.**

8. Further that the Plaintiff/Applicant stands to suffer irreparable injury or loss if the orders are not granted. The Defendants will proceed to illegally and unlawfully construct on the suit property. Damages in this instance is not adequate remedy.

He has relied on the case of **Mara North Holdings Ltd –versus- Sanaeot Ole Masek & 4 Others (2015) eKLR.**

9. The balance of convenience tilts in favour of the Plaintiff/Applicant the registered owner of the suit property. The subject matter ought to be preserved pending the hearing and determination of the suit.

They have put forward the case of **Flex Construction Solutions Ltd –versus- Verandel Court Ltd (2012) eKLR. Suleiman –versus- Amboseli Resort Ltd (2004) 2KLR 589.**

#### 10. **THE DEFENDANT'S/RESPONDENT'S SUBMISSIONS.**

The 1<sup>st</sup> Defendant/Respondent was allotted the suit property on 27<sup>th</sup> March, 1997. He took physical possession and later sold it to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents.

The Plaintiff/Applicant has not shown how title CR. 57684 was obtained. The Plaintiff/Applicant has not provided any report from a survey of on the suit property. His case is weak and has no chances of success.

The Plaintiff/Applicant can be compensated by an award of damages showed he succeed in the end. The balance of convenience tilts in favour of the Defendants who are in possession. They pray that the application be dismissed with costs.

They have also relied on the case of **Richard Birir Bwogo –versus- Phibian Chepkoech Mibei & Another Kisu HC, Civil Case No. 51 of 2010.**

11. Finally, that the suit property is situated within Mtwapa in Kilifi County hence this court has no territorial jurisdiction to deal with this matter as the proper court would be Environment and Land Court in Malindi. The 1<sup>st</sup> Defendant/Respondent has already transferred the suit property on 22<sup>nd</sup> May, 2012 hence he has been wrongly sued.

12. I have considered the Pleadings, the Notice of Motion, the affidavits in support and the annexures. I have considered the Preliminary Objection, the replying affidavit and the annexures. I have considered the written submissions, the oral highlights and the authorities cited.

The issues for determination are;

- i) Whether or not the Plaintiff/Applicant's application meets the threshold for the grant of temporary injunctions.**
- ii) What orders should the court make?**
- iii) Who should bear costs?**

13. At this juncture, it is necessary for this court to briefly examine the legal principles governing the application of this nature. In an application for an interlocutory injunction the onus is on the Applicant to satisfy the court that it should grant an injunction. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

The conditions for grant of temporary injunctions were laid down in the celebrated case of **Giella –versus- Cassman Brown And Company Ltd (1973) EA 358.**

14. The Court of Appeal determined what amounts to a prima facie case in the case of **Mrao Limited –versus- First American Bank of Kenya Limited and 2 Others (2003) KLR 125.** I am guided by the above authorities.

15. In their Preliminary Objection dated 17<sup>th</sup> October, 2017 the Defendants have raised the issues of jurisdiction. That the suit property is

situated within Mtwapa which is in Kilifi County hence the suit ought to have been filed in Environment and Land Court, Malindi.

It is true that under Section 12(d) of the Civil Procedure Act the suit ought to be instituted in the court within the local limits of whose jurisdiction the property is situated. It is not in dispute that Mtwapa is on the border of Kilifi and Mombasa Counties.

The court takes judicial notice that it is closer to Mombasa than Malindi. I am guided by Article 159(d) of the Constitution. Which urges the courts to administer justice without undue regard to procedural technicalities. The Defendants have not demonstrated what prejudice they will suffer if this matter is heard in Mombasa.

I find that this ground of the objection fails. Another ground is that the 1<sup>st</sup> Defendant has been wrongly sued as he has already transferred the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

I find that this objection was watered down when the Plaintiff was allowed to amend the plaint and the Notice of Motion respectively. In any event the 1<sup>st</sup> Defendant states that he was allocated the Plot by the government of Kenya. I find that he is a necessary party in these proceedings.

I find that the Preliminary Objection herein lacks merit and the same is dismissed.

16. A casual look at the pleadings show that the plaintiff/Applicant and the Defendant/Respondent are laying claim to the same parcel of land. The question of how each acquired the title will come out during the hearing where evidence will be tendered and witnesses cross examined.

17. It is the Plaintiff's/Applicant's case that he acquired the property for valuable consideration. I find that he has established a prima facie case with a probability of success at the trial.

18. I am persuaded by the facts presented by the Plaintiff/Applicant that he deserves the orders sought. In the case of *Kenleb Cons Limited -versus- New Gatitu Service Station And Another (1990) KLR 557*, Bosire J. (as he then was) held that;

**“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”**

I am satisfied that the Plaintiff/Applicant deserves this kind of protection.

19. I also find that the Plaintiff/Applicant stands to suffer irreparable injury or loss which cannot be compensated by an award of damages if the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are allowed to continue with construction.

20. Finally, I am satisfied that the interest of justice will be better served by preserving the suit property.

21. As I stated earlier, the Plaintiff/Applicant and the Defendants/Respondents are claiming the title each holds is genuine. It would not be in the interest of justice to order the demolition and/or pulling down of the structure at this point. I therefore decline to grant prayer (4) of the Application.

22. 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 either by themselves or their agents, assigns, employees and/or representatives from further constructing,erecting,building,interfering and/or otherwise tampering with the Plaintiff's/Applicant's Sub-division No. 572/2/Section III/Mainland North CR. NO. 57684 and Land Reference NO. 5737/Section III/Mainland North CR. NO. 52171.**

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

**It is so ordered.**

**DATED, and SIGNED at MOMBASA on the 22<sup>nd</sup> day of May 2018.**

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**L. KOMINGOI**

**JUDGE**

**DATED, SIGNED and DELIVERED at MOMBASA on the 14<sup>th</sup> day of June 2018.**

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**A. OMOLLO**

**JUDGE**