



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 328 OF 2017**

**KADOGO ATHUMANI NYESI.....PLAINTIFF/APPLICANT**

**VERSUS**

**TITUS MUNYOKI.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 12<sup>th</sup> September, 2017. It is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3 and 3A and Section 63(e) 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 a temporary injunction do issue against the Defendant, his servants, agents, employees or otherwise whosoever acting on his behalf from selling, disposing, alienating, wasting or dealing in any manner with undivided portion of Plot. No 289 measuring 45 feet by 80 feet situated within Likoni Corner Mbaya 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:-
  - a) **That the Plaintiff is the owner and proprietor of the undivided portion of land Plot No. 289 measuring 45 feet by 80 feet situated within Likoni Corner Mbaya having purchased the same from her late mother Salama Sudi.**
  - b) **That the Defendant without authority of the Plaintiff has commenced construction on the Plaintiff's parcel of land without her consent and/or authority.**
  - c) **That the Defendant intends to forcefully dispossess the Plaintiff her parcel of land.**
  - d) **That the Plaintiff stands to suffer irreparable loss should the Defendant succeed in his action.**
4. The application is supported by the affidavit of Kadogo Athumani Nyese, the Plaintiff/Applicant herein sworn on the 12<sup>th</sup> September, 2017.
5. The application is opposed. There is a replying affidavit sworn by Titus Munyoki, the Defendant/Respondent sworn on the 7<sup>th</sup> November, 2017.
6. On the 15<sup>th</sup> November, 2017, it was agreed between the parties that the application be disposed by way of written submissions.
7. It is the Plaintiff's/Applicant's submissions that the undivided portion measuring 45 feet by 80 feet belonged to her late mother. That the disputed Plot is a family plot.

That the Plaintiff/Applicant has met the threshold for the grant of temporary injunction as the disputed plot belongs to her late mother, Salama Sudi.

That she bought the same in 1997. Further that she stands to suffer irreparable loss if the Defendant is allowed to proceed to fully develop the plot and dispossess the Plaintiff of the disputed plot.

8. It is the Defendant's/Respondent's submissions that the Plaintiff/Applicant has not annexed any single document to show that she purchased the plot from her late mother. The Defendant/Respondent on the other hand has annexed a sale agreement.

Further that the Plaintiff/Applicant has failed to establish a prima facie case with a probability of success. The Defendant/Respondent has put up a house which is near completion. The Plaintiff/Applicant has failed to prove that she will suffer irreparable loss if these orders are not granted.

That on the contrary it is the defendant/Respondent who will suffer irreparable loss if these orders are not granted. Further that the balance of convenience tilts in favour of the Defendant/Respondent who rightly purchased the plot.

It is the Defendant's/Respondent's final submission that the application ought to be dismissed

9. I have considered the pleadings, the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit and the annexures. I have considered the written submissions of counsel and the authorities cited. The issues for determination are;

**i) Whether the Plaintiff's/Applicant's application meets the threshold for grant of temporary injunctions.**

**ii) Who should bear costs?**

10. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications 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.

11. The principles for grant of temporary injunction were set out in the in the celebrated case of *Giella -versus- Cassman Brown and Company Limited (1973) EA 358.*

In the case of *Mrao Limited -versus-First American Bank of Kenya Limited and 2 Others (2003) KLR* the Court of Appeal in determining what amounts to a prima facie case stated;

**“A prima facie case in a civil application includes but not confined to a “genuine and arguable” case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

I am guided by the above authorities.

12. The Plaintiff/Applicant states that she bought the disputed plot from her late mother. She has annexed no sale agreement or any document to confirm this. That it is not in dispute that the plot belonged to her late mother. The Defendant/Respondent on the other hand has annexed a sale agreement confirming that he bought the plot for Kshs240,000/=.

13. I find that the Plaintiff/Applicant has failed to establish a prima facie case with a probability of success at the trial.

In the case of *Kenleb Cons Limited -versus- New Gatitu Service Station Limited and Another (1990)KLR 557.* it was held by Bosire J. (as he then was) 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 find that the Plaintiff/Applicant herein has failed to demonstrate that she deserves this kind of protection.

14. I find that the Plaintiff/Applicant has failed to demonstrate that she is likely to suffer irreparable loss and/or injury which cannot be compensated by an award of damages.

If at the end of the day the Plaintiff established her claim, the loss suffered is quantifiable and can be compensated by monetary terms.

15. I find that the balance of convenience tilts in favour of the Defendant/Respondent who purchased the plot and has put up a house which is near completion.

16. All in all I find no merit in this application and the same is dismissed. The costs of this application do abide the outcome of the main suit

**It is so ordered.**

**DATED, and SIGNED at Mombasa on the 13<sup>th</sup> day of June, 2018.**

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**L. KOMINGOI**

**JUDGE**

**DATED, SIGNED and DELIVERED at Mombasa on the 13<sup>th</sup> day of June, 2018.**

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**A. OMOLLO**

**JUDGE**