



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 63 OF 2017**

**1. BERNADETTE NJERI KAMANI MARTIN IGECHA.....PLAINTIFF**

**VERSUS**

**1. FREDRICK KIBIRA NDATHO**

**2. MOMBASA COUNTY GOVERNMENT.....DEFENDANTS**

**RULING**

1. The application for determination is the Notice of Motion dated 28<sup>th</sup> February 2017 brought under Article 159 and 40 of the Constitution, Section 3A of the Civil Procedure Act and Order 40 Rules 1(a), 2, 4(1) of the Civil Procedure Rules. The application seeks a temporary injunction restraining the 1<sup>st</sup> defendant/Respondent by himself, their servants or agents and/or anybody working under their direction from entering into, constructing and/or otherwise interfering with administrators of the estate of Dominic Kamami Igecha (deceased) quiet possession and enjoyment of the suit property herein referred to as **PLOT NO.274 MIRITINI SITE & SERVICE SCHEME** pending the hearing and determination of this application and the suit.

2. The application is based on the grounds on the face of the motion and supported by the affidavit of Martin Igecha, the 2<sup>nd</sup> Plaintiff sworn on 28<sup>th</sup> February, 2018 and further affidavit sworn on 28<sup>th</sup> April 2017. The applicants who are mother and son are the administrators of the estate of Dominic Kamami Igecha (deceased). It is the applicants case that on or about 1<sup>st</sup> March 1989 the deceased purchased the suit property from one Hamisi M. Kidanga who was the principal allottee who wrote a letter to the director, Housing Development Department, Mombasa Municipal Council directing him to transfer the ownership of the **PLOT NO.274/V/MN – MIRITINI** to the deceased. The agreement is annexed to the affidavit and marked “M 12”. That on 8<sup>th</sup> November 1993, the deceased paid the sum of Kshs.51,590/= being the final payment. The receipt is marked “M 13”. On 6<sup>th</sup> September 1995 the deceased was issued with a clearance certificate indicating that he had completed paying Kshs.64,790/= being the market sale price for the suit plot (annexures “M 14”).

3. The deceased passed on in or about 1993 and the Applicants obtained letters of administration, (annexures “M 11”). The applicants aver that in the year 2004, they received a letter dated 29<sup>th</sup> October, 2003 (annexure “M 16”) reminding the deceased that the title deeds were ready for processing. In or about January, 2017, the Applicants wanted to sell the plot and carried out a search at the offices of the County Government of Mombasa to establish the status of the plot but were surprised to find that the suit plot was registered in the name of Fredrick Kibira Ndatho, the 1<sup>st</sup> Defendant herein, (annexure “M 17”). It is the applicants contention that the suit plot was fraudulently transferred to the 1<sup>st</sup> Defendant who has began some constructions thereon, hence this application.

4. The Application is opposed by the defendants. The 1<sup>st</sup> Defendant filed a replying affidavit sworn by himself on 12<sup>th</sup> April, 2017 in which he depones that he bought the plot from one Kombo Jumaa Mzee on 21<sup>st</sup> October, 2015 after conducting a search at the County Government of Mombasa and has annexed the Sale Agreement (marked “A”) and a copy of the certificate of lease for Title No. Mombasa/MN/Block 2/144. The 1<sup>st</sup> Defendant admits that he has commenced construction of a commercial building on the plot. It is the 1<sup>st</sup> Defendants contention that the Applicants have no legal capacity in respect of the title since the same is not among the assets of the deceased as shown in the confirmed grant. The 1<sup>st</sup> Defendant avers that the plot in dispute legally belongs to him and any adverse orders will affect him adversely as he has invested a lot of resources in its development. The 1<sup>st</sup> Defendant also filed Notice of Preliminary Objection dated 9<sup>th</sup> March, 2017 in which has avers that the Plaintiffs lack the legal capacity to sue in respect of **PLOT NO.274 MIRITINI** Site and Service Scheme which is not part of the assets of the estate of the deceased contained in the confirmed grant.

5. The 2<sup>nd</sup> Defendant filed grounds of opposition dated 30<sup>th</sup> May, 2017 in which they oppose the application on the grounds, inter alia, that the same is misconceived, is frivolous, bad in law and an abuse of the process of the court, and that it is fatally defective. That the application has not demonstrated any loss or damage suffered by the applicants that cannot be compensated by way of damages.

6. All the parties filed written submissions which I have read and I need not reproduce their contents herein. I have considered the Application, the affidavits in support and against, the preliminary objection and the grounds of opposition and the rival submissions made. The principle to be applied when considering an application for injunction such as this are well settled. In the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA, 358**, the Plaintiff must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt it will decide the matter on the balance of convenience.

7. In the case of **Mrao Ltd – v – First American Bank of Kenya (2003) KLR 125**, a prima facie case was said to be one in which on the material presented to the court or 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 or rebuttal from the opposite party.

8. In the instant case, the dispute is over **PLOT NO. 274 MIRITINI** Settlement Scheme. The plaintiff's main contention is that the deceased purchased the same and it was transferred to him. On the other hand, the 1<sup>st</sup> defendant contends that he is the registered owner having purchased it from one Kombo Juma Mzee who transferred it to him. The 1<sup>st</sup> Defendant has exhibited the sale agreement for **PLOT NO.274 MIRITINI** Site & Service Scheme and a **CERTIFICATE OF TITLE NO. MOMBASA/MN/BLOCK 2/144**. The plaintiffs have also exhibited an agreement/transfer and receipts in the name of the deceased for **PLOT NO.274/V/MN MIRITINI OR PLOT NO.MSA/MN BLOCK 2/144 - MIRITINI**.

9. It is apparent that in this case, both the plaintiffs and the 1<sup>st</sup> defendant are claiming the suit property. The main dispute is who between the deceased and the 1<sup>st</sup> defendant is the true owner of the suit property. The plaintiffs claim that the deceased purchased the suit plot from one Hamisi M. Kidanga, the alleged original allottee and have exhibited documents in support of their contention. On his part, the 1<sup>st</sup> defendant claims that he bought the plot from one Kombo Juma Mzee on 21<sup>st</sup> October 2015 and has annexed a copy of the sale agreement. The issue as to who between Hamisi M. Kidanga and Kombo Juma Mzee, or the deceased and the 1<sup>st</sup> defendant is the rightful owner is an issue that can only be ascertained at the trial. Until that fact is established, it is only fair that the status quo prevailing be maintained. The courts have accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella –vs- Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In **Suliman –vs- Amboseli Resort Ltd (2004) eKLR 589** Ojwang, Ag. J (as he then was) at page 607 delivered himself 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 as 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 770 – 781: A fundamental principle of ... that the court should take which ever course appears to carry the lower risk of injustice if it should turnout 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.*

*iv) is there a prima facie case...*

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

*vi) 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 for the lower rather than the higher risk of injustice.... ”*

10. 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 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. Both the plaintiffs and the 1<sup>st</sup> Defendant are claiming ownership of the suit property. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

11. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of the court that the plaintiffs have established a prima facie case with a probability of success against the defendants. In my view, it is clear that the plaintiffs have shown their right over the suit property. As regards irreparable damage, I take the view that should the suit land be developed to conclusion, it will have changed totally and the plaintiffs will have suffered loss which may not be quantified in damages. The balance of convenience would tilt in favour of the plaintiffs in order to safeguard the current status of the subject matter pending hearing and determination.

12. Arising from all the above reasons, I find merit in the application. Accordingly, I grant the order for temporary injunction in terms of prayer 3 of the notice of motion dated 28<sup>th</sup> February, 2017. Considering the circumstances of this case, I order that the costs of the application shall be in the cause. It is so ordered.

**DATED, DELIVERED and SIGNED at MOMBASA this 9<sup>TH</sup> day of October, 2018**

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**C. YANO**

**JUDGE**