



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**

**ELC SUIT NO. 200 OF 2013**

**FIROZA A. JIWAJI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**TEHZIN F. JIWAJI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**SELEIMAN MWINYI GANYUMA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE DISTRICT LAND REGISTRAR KWALE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FRANCIS NYAGA CHABARI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**ANTHONY KAMAU AMANGA T/A MANTO PROPERTIES.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

**The Application**

1. By an application dated 8<sup>th</sup> September, 2016 brought under Articles 25(c) Sections 35 (1), 40, 47 & 159 (2) (b) of the Constitution of Kenya and Section 1A, 1B and 3A of the Civil Procedure Rules, the applicant seeks the following orders:

a) Spent

b) Spent

c) The 1<sup>st</sup> Defendant be compelled to produce to the court original pleadings and the original document purporting to be vesting court order issued in Mombasa HCCC No. 110 of 2005 (OS) ON 17.7 2006 and original receipts for court fees for scrutiny for purposes of establishing whether the said document is a genuine vesting order issued by the High Court.

d) The 2<sup>nd</sup> Defendant be similarly compelled to produce to this Court the original document purporting to be a vesting court order issued in Mombasa HCCC No. 110 of 2005 (OS) on 17.7.2006 for scrutiny for purposes of establishing whether the said document is a genuine vesting order issued by the High Court.

e) Should the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fail to produce the said documents the copy of the document purporting to be a vesting order issued on 17.7.2006 and annexed to the further affidavit sworn by the 3<sup>rd</sup> Defendant together with that entire affidavit be expunged from the record.

f) The Deputy Registrar of the High Court be directed to investigate whether any court file in Mombasa High Court Civil Suit No. 110 of 2005 (OS) (Selemani Mwinyi Ganyuma –VS- Feroz J. Jiwaji & Tehzin N. Jiwaji ) exists or was ever filed and if so, whether the document purporting to be a vesting order issued by the High Court in that suit on 17.7.2006 is a genuine order originating from the high court of Kenya at Mombasa and to make a report to the Court with a copy to the parties within such time as the court may direct.

g) In the event that this court establishes that the said document purporting to be a vesting order of the high court in HCCC NO. 110 of 2005(OS) is a forgery this court be pleased to declare that the said document is a forgery and to expunge it together with the 3<sup>rd</sup> Defendant's Further Affidavit sworn on 26.2.2016 from the record.

h) In the event that the said document purporting to be a vesting order issued on 17.7.2006 in HCCC No. 110 of 2005 is found to be

a forgery the registration of the 1<sup>st</sup> Defendant as a proprietor of the premises be cancelled.

i) If it is held that the document purporting to be a vesting order issued by the High Court in the said HCC No. 110 of 2005 (OS) is a forgery this court be pleased to strike out any defence or other denial of liability by any of the Defendant's and to order and direct that the 2<sup>nd</sup> Defendant to cancel the registration of the 1<sup>st</sup> Defendant as the proprietor of the suit premises and to further order that the documents purporting to be certificates of official search showing the suit premises as belonging to the 1<sup>st</sup> Defendant and the Certificate of Lease in favor of the 1<sup>st</sup> Defendant and 3<sup>rd</sup> Defendant be cancelled and be destroyed.

j) Upon cancellation of the entry showing the Defendant as the registered proprietor of the suit premises all other subsequent entries including the purported transfer to the 3<sup>rd</sup> Defendant be cancelled and the Defendant's Defences be struck out with costs.

k) Costs of this application be paid to the Plaintiff in any event.

The application is premised on the grounds set therein on the face of the application and on the supporting affidavit of **FIROZ A. JIWAJI** sworn on 8<sup>th</sup> September, 2016 as follows: -

1. That the court file in which the document purporting to be a vesting order given by the High Court on 17.7.2006 in HCCC No. 110 of 2005 (OS) cannot be found. It is likely that no such file exists or existed.
2. That the Applicant's advocate wrote to the Deputy Registrar of the High Court on 24.3.2016 requesting that the court file in Mombasa HCCC No. 110 of 2005 (OS) (Selemani Mwinyi Ganyuma -vs- Feroz J.Jiwaji & Tehzin N.Jiwaji) be availed for perusal but the file has not been availed and that numerous attempts to the registry have been unsuccessful.
3. That a thorough perusal of all registers of Civil Cases and Miscellaneous Suits in the High Court at Mombasa for the year 2005 shows that no such suit was registered or filed.
4. That a thorough perusal of the files Movement Control Register maintained in the archives for the period 1.6.2006 to 30.7.2006 shows no record of the court file in Mombasa HCCC No. 110 of 2005 having left the registry for the purported hearing of the Originating Summons or having returned to the registry after the hearing or having left the registry to the Deputy Registrar for the signing and sealing of the Order.
5. That to protect its own dignity and to prevent abuse of the process of the court and to prevent a judge from determining the issues on basis of suspected documents it is necessary for the investigations to be carried out.
6. That the Plaintiffs are apprehensive that if this suit proceeds before the validity of that alleged vesting order is determined they will be severely prejudiced since the alleged vesting order alleged to have been issued on 17.7.2006 does not bear the date when it was given by any Judge.
7. The Applicant avers that as the Court file in Mombasa HCCC No. 110 of 2005 (OS) cannot be found the Plaintiffs cannot make any application in that suit to set aside that order.
8. That the register of civil suits in the High Court Registry/archives Mombasa has no record of filing Mombasa HCCC No. 110 of 2005 (OS) and as such the applicants cannot apply to reconstruct it or to open a skeleton file.
9. That until the 3<sup>rd</sup> Defendant filed his further affidavit on 29.02.2016 the Plaintiff's had no knowledge of Mombasa Mombasa HCCC No. 110 of 2005 (OS) and had not been served with any pleadings or orders relating to that suit.
10. The document marked **FNC8 (5)** in the affidavit sworn by the 3<sup>rd</sup> Defendant purports to be a judgment by a chief in a dispute between the 1<sup>st</sup> Defendant and Darad Limited. The applicant pleads that if the 3<sup>rd</sup> Defendant has access to the 1<sup>st</sup> plaintiff's document dating back to 1986 he then should have access to all pleadings, Rulings and Judgments in Mombasa HCCC No. 110 of 2005 (OS).
11. The Applicant further avers that the document purporting to be a vesting order appears to have been a result of a default judgment entered by the Deputy Registrar of the High Court in 2006. That Deputy Registrars have no power or jurisdiction to hear and determine an originating summons whether opposed or not and that if the said document is a genuine order given by the Deputy Registrar then the order is a nullity for all purposes.
12. The deputy registrar deposed that HCCC No. 110 of 2005 according to the register of civil suits filed in the High Court at Mombasa in 2005 the parties are Joseph Mbatu Nziu vs Kenya Orient Insurance Co. Ltd which relates to a claim for payment of Kshs 1,500,000.00.
13. The plaintiff contends that their right to a fair and speedy trial and right to their property as guaranteed by the Constitution of Kenya is being violated by parties who seek to rely on forged Court Orders.
14. That by canvassing this application it may determine the entire suit other than with regard to mesne profits, general, punitive and aggravated damages and may therefore save time and costs.
15. That the orders sought would not cause any prejudice to the Defendants if the document purporting to be an Order in HCCC No. 110 of 2005 (OS) is found to be a genuine Court Order.

## **Response**

16. The Deputy Registrar filed an affidavit dated 3.4.2018 where she deposed that she has perused the Registers of Civil Cases and Miscellaneous Applications filed in the High Court in the year 2005 because at the time the Environment and Land Court was yet to be established.

17. The Deputy Registrar averred that after a perusal of the Registers it shows that no suit was registered as HCCC No. 110 of 2005 Selemani Mwinyi Ganyuma vs Ferozz Jiwaji & Tehzin N. Jiwaji and that even on further perusal of Files Movement Control Register maintained in the archives for the period 1.6.2006 to 30<sup>th</sup> July, 2006 shows no record of the Court file having left the registry for the hearing of this Originating Summons or having returned to the registry after the hearing or having left the Registry to the Deputy Registrar for the signing and sealing of the order.

18. The Deputy Registrar further avers that through her directions the Registry has tried to trace the file if at all it existed but to no avail as details of the same cannot be found on the Registers.

19. The Deputy Registrar deposed that as per the Register of Miscellaneous Applications filed in 2005 the parties in Miscellaneous Civil Application No. 110 of 2005 are *V. W Maina & Co. Advocates vs United Insurance Co. Ltd* which matter relates to an Advocate/Client Bill of costs.

20. The Respondent/3<sup>rd</sup> Defenant also responded to the application by way of a replying affidavit sworn by **FRANCIS NYAGA CHABARI** on 4<sup>th</sup> July, 2018 and grounds of opposition dated 5.12.2016.

21. The 3<sup>rd</sup> Defendant/Respondent deposed that the Court should not expunge his affidavit on the basis that the Court order is a forgery as the 3<sup>rd</sup> Defendant is an innocent party.

22. The 3<sup>rd</sup> Defendant further claims that the Applicant wants to conclude the suit by way of a short cut instead of allowing the suit to proceed for full hearing.

23. The 3<sup>rd</sup> Defendant/respondent pleads that the application is made to embarrass the 3<sup>rd</sup> Defendant and hence an abuse of the court process and that the same ought to be dismissed with costs.

## **Submissions**

24. The applicant relied on the application as filed together with the affidavit sworn by the Deputy Registrar. The 3<sup>rd</sup> Defendant/Respondent canvassed the application by way of filing of written submissions. The counsel for the 3<sup>rd</sup> Defendant submitted that the Plaintiff/Applicants were quite determined to have this matter concluded before it proceeds to hearing and that the prayer sought by the Applicants is to declare the order a forgery and cancel the 1<sup>st</sup> Defendants' title. The 3<sup>rd</sup> Defendant submits that this is a Land's Court and not a criminal court thus this court cannot declare a document a forgery or cancel a title without hearing the evidence of witnesses.

25. The counsel further submits that the Applicants are not the rightful owners of the suit property as they allege by virtue of not having occupied the property. Counsel further submitted that Article 50 of the Constitution provides that every person should be given a fair hearing and has a right to be heard and prayed for the application to be dismissed to allow the matter to proceed for full hearing and hear the evidence of the four defendants together with witnesses.

## **Determination**

26. I have considered the application as well as the response from the 3<sup>rd</sup> Defendants and his written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any response to the application. The inference the Court draws is that they have no objection to the grant of the orders sought in this application. The 3<sup>rd</sup> Respondent in his response stated that he is an innocent party.

27. It is indeed true that the 3<sup>rd</sup> Respondent was not a party to the proceedings in HCCC No 110 of 2005. However he is the one who introduced the order obtained in that suit to these proceedings vide his affidavit dated 26<sup>th</sup> February 2016 as annexure "**FNC 8 (a)**". This makes him have a duty to explain to this Court how he obtained the said Order. He did not depose in his affidavit of 26<sup>th</sup> February 2016 which annexed the order nor in his replying affidavit in opposing the current application how he obtained the impugned Order. He can only benefit from the doctrine of "*innocent purchaser for value without notice*" if he has explained the source of the copy of the Order and which he has failed to do. Therefore his remedy in the event any adverse orders are given in light of the facts deposed to by the deputy registrar does lie as against the 1<sup>st</sup> defendant.

28. Now on the merits of the application, the applicant has stated that the affidavit sworn by the Deputy Registrar of this Court sums it all. From the record, on 6<sup>th</sup> December 2016 when the application came up for hearing inter partes, all the parties were present except the 4<sup>th</sup> defendant. The Court gave the 1<sup>st</sup> defendant who was then present in person 30 days to file his response to the application. As stated in paragraph 26 above, that has not been done to date. The Court also directed the Deputy Registrar to investigate and make an affidavit on the existence or otherwise of case No Mombasa HCCC No 110 of 2005. Pursuant to this order, the Deputy Registrar after undertaking the exercise swore the affidavit dated 3<sup>rd</sup> April 2018 where she deposed that after perusing all the High Court registers she found that no suit was registered in 2005 as HCCC 110 of 2005 between Selemani Mwinyi Ganyuma vs Feroz Jiwaji & Tehzin N. Jiwaji. She also confirmed that there is no record of such a file leaving the registry for hearing before a Judge or signing and sealing of an order by the Deputy Registrar.

29. If there was no suit registered under the 1<sup>st</sup> defendant's name in HCCC 110 of 2005 then no order could issue which the 1<sup>st</sup> defendant then used to transfer the suit title into his name. The facts deposed by the applicant as regards the non-existence of this order and or file is corroborated by the Deputy Registrar of the Court and no contrary facts having been presented by the 1<sup>st</sup> defendant infers that having the plaintiff's suit proceed to full hearing would merely be an academic exercise whose outcome is already known before the plaintiff takes the witness stand. The averment by the 3<sup>rd</sup> defendant that the plaintiff wants to conclude the suit by short cut would only be justified if he demonstrated that the facts presented by the Deputy Registrar are not true. The 3<sup>rd</sup> Respondent did not even apply to have the Deputy Registrar cross – examined.

30. The 3<sup>rd</sup> Respondent has submitted that this Court cannot declare an order a forgery or cancel a title without hearing witnesses. That is a wrong presumption of law since this Court is bequeathed with wide powers under Section 1A, 1B, 3 and 3A to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In this regard, which witnesses would be called to prove the existence or otherwise of the impugned order and/or suit where the 1<sup>st</sup> defendant in spite of being given time to file a response chose not to do so. Further in view of the facts deposed to by the Deputy Registrar who is a judicial officer what contrary conclusion can this Court draw in light of the facts presented by the deputy registrar and not controverted by the 1<sup>st</sup> Defendant?

31. In light of the obtaining facts, I find the present application has merit. I do allow it in the following terms:

- a) The copy of the document annexed as *FNC 8 (a)* titled as vesting order issued on 17/7/2006 be and is hereby expunged from the further affidavit of the 3<sup>rd</sup> defendant dated 26.2.2016 as being a forgery.**
- b) The document having been deemed to be a forgery, the registration of the 1<sup>st</sup> defendant as proprietor of the suit premises based on the non-existence order and the subsequent registration of the 3<sup>rd</sup> Defendant be and is hereby cancelled.**
- c) The defences filed by the defendants is hereby ordered struck out and judgment entered for the plaintiff in terms of prayers (a) – (f) and (J) (K) of the plaint.**
- d) The suit to proceed to formal proof as regards prayer (g), (m) & (n).**
- e) The costs of the application awarded to the plaintiff payable by the 1<sup>st</sup> defendant.**

**Dated, Signed & Delivered in Mombasa this 6<sup>th</sup> December 2018**

**A OMOLLO**

**JUDGE**