



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 125 OF 2016**

**ESTHER WANJIKU NDIRITU.....PLAINTIFF**

**VERSUS**

**ZEINAB ABOUD.....DEFENDANT**

**RULING**

1. The defendant/applicant moved the Court under the provisions of sections 1A, & B, 3A, 63 (e) and 80 of the Civil Procedure Act and Order 12 rule 2, 7 Order 45 and Order 50 vide the motion dated 4<sup>th</sup> August 2014. He sought the following orders ;

**1. Spent**

**2. Spent**

**3. That this Honourable Court be pleased to review, vary and/or set aside the Order made by Hon. Justice A. Omollo on the 26th July, 2016 pending the hearing and determination of this application.**

**4. That this Honourable Court be pleased to enlarge time and deem the Replying affidavit attached herewith as duly filed, upon payment of the requisite filing fees.**

**5. That upon the reviewing, varying and/or setting aside of the Order made by this Court on 26<sup>th</sup> July 2016, the Court be pleased to re-hear the Plaintiff/Respondent's Application dated 17<sup>th</sup> May, 2016.**

**6. That this Honourable Court grants costs of the Application**

**7. That this Honourable Court makes such Orders it deems fit in the circumstances.**

2. The motion is supported by grounds contained on the face of it inter alia that the said order has the effect of restraining the defendant from entering her suit premises. Secondly that it amounts to condemning the defendant unheard. Further that mistake of Counsel should not be visited on a party. The application is also supported by facts deposed to by the applicant in his affidavit of 4<sup>th</sup> August 2016.

3. The application is opposed by the plaintiff. She deposed that she already executed the orders in the presence of the O.C.S Bamburi Police Station. Further that there is no defence filed challenging her suit

and that this Court is not meant to condone lawlessness. She deposed that the orders sought are overtaken by events and urged the Court to dismiss the application.

4. This suit has not been determined on its merits and therefore no final decree has been issued. The record shows the defendant was given time to file a replying affidavit to the plaintiff's application for injunction dated 17<sup>th</sup> May 2016. They did not do so within time but he says it was mistake of his counsel who failed to attend this Court on 26.7.2016 when the application was set down for hearing and hence he should not be punished.

5. I have considered the explanation the defendant has offered particularly that he is claiming the plot as a purchaser. Taking into account the fact that this suit has not been concluded, an order of injunction obtained should not be used to close out a party from being heard. The purpose of an injunction is to preserve the suit the subject of dispute but does not confer ownership as the plaintiff is implying in her replying affidavit that she already executed the orders and hence there is nothing for this Court to review and or vary.

6. For the reason that every party is entitled to be heard in accordance to the rules of natural justice and the provisions of article 50 91) of the Constitution on the right to fair hearing, I do vary the orders allowing the plaintiff's application as presented and instead I issue the following orders ;

**A temporary order of injunction be and is hereby issued restraining the defendant or his agents from carrying out any new constructions on the suit land particularly continuing building/erecting the perimeter fence until this suit is heard and determined.**

7. The application dated 4.8.16 is thus allowed in above terms with costs to the Plaintiff/Respondent.

**Dated and delivered in Mombasa this 10<sup>th</sup> Day of February 2017**

**A. OMOLLO**

**JUDGE**