



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO.362 OF 2016

CYRIL J.O. OBIRO PLAINTIFF/APPLICANT

VERSUS

1. ANWAR MOHAMED

2. ABDUL KASSIM..... DEFENDANTS/RESPONDENTS

RULING

This is the Notice of Motion dated 24/11/2016. It is brought under Order 40 Rules 1,2, 3 of the Civil Procedure Rules Section 3, 3A, 1A and 1B of the Civil Procedure Act. It seeks orders;

1. spent

2. spent

3. THAT the honorable court do issue a temporary injunction against the defendants, their employees, servants and/or anybody acting on their directions from further constructing , selling, disposing and/or interference with the plaintiff's ownership of the undivided portion of plot NO.185/II /MN measuring 30 feet by 15 feet situated at Mishomoroni pending the hearing and determination of this suit.

4. THAT costs of this application be provided for.

The grounds are on the face of the application. The main one being the plaintiff/applicant is the owner of undivided portion of **PLOT NO.185/II/MN** measuring 30 feet by 15 feet within Mishomoroni.

Further that the 1st defendant has invaded the plaintiff/applicant said portion and is busy carrying out construction without the consent and/or authority of the plaintiff/applicant. The application is supported by the affidavit of Cyril J. O Obiro the plaintiff/applicant herein sworn on the 29/11/2016.

The application is opposed. There is a replying affidavit filed in court on the 24/1/2017. The same is sworn by the 2nd defendant Abdul Kassim on the 23/1/2017.

When the application came up for hearing on 24/1/2017 it was agreed by both parties that the application be canvassed by way of written submissions. Both counsels then filed written submissions. In their written submissions counsel substantiated their clients respective positions stated in their respective

affidavits.

I have considered the pleadings, the application, submissions of counsel and the authorities cited.

The issues before court are:

- 1. Whether the plaintiff/applicant has made out good case to warrant the orders sought.**
- 2. Who should bear the costs of this application.**

I have considered the facts that have emerged and the legal principles applicable.

The principles were laid down in the precedent setting case of **GIELLA –VS- CASSAMAN BROWN (1973) EA 358**

They are as follows:

First the applicant must show that he has a prima facie case with a probability of success at the trial.

Secondly, normally an injunction will not be granted unless the applicant shows that damages would not be an adequate remedy for injury suffered or likely to be suffered unless the injunction is granted.

Thirdly if the court is in doubt it will decide on the balance of convenience. It is the plaintiff/applicant contention that he owns the plot. He annexed a sale agreement as annexure **CJ -001**. He also annexed copies of receipt showing proof of payments as annexures **CJ-002** and **CJ – 003** respectively.

He has also annexed photographs showing construction of the 1st defendant's annexure **CJ-004**.

It is the plaintiff's further contention that he will suffer irreparably if the 1st defendant is allowed to continue with the construction. The 1st defendant did not file any replying affidavit in response to the plaintiff's application.

It is therefore not clear how he acquired the plot. The 2nd defendant in his replying affidavit admits that the plaintiff purchased the portion from him. Although he claims to have sold the other portion to the 1st defendant there is nothing to confirm this.

The 1st defendant's claim that the plaintiff has constructed on his own portion is neither here nor there is no proof.

I find that the plaintiff has demonstrated that he has a prima facie case with a probability he has also demonstrated that he will suffer irreparably if the 1st defendant to go on with the construction. I find merit in this application and I grant the orders sought namely.

1. THAT a temporary injunction do hereby issue against the defendants, their employees, servants and/or anybody acting on their directions from further constructing, selling, disposing and/or interference with the plaintiff's portion of PLOT NO.185/II/MN measuring approximately 30 feet by 15 feet situated at Mishomoroni pending the hearing and determination of this suit.

2. The costs of this application do abide the outcome of the main suit.

Orders accordingly

L. KOMINGOI

JUDGE

25/4/2017