



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**LAND CASE NO. 31 OF 2015**

**BAHATI PROPERTIES LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**1. ATTORNEY GENERAL**

**2. SAID M. MABAVU**

**3. ANNA W. DEREVA**

**4. ABDALLA MWACHIBULO HEMA**

**5. FATUMA S. NCHIZUMO**

**6. OMAR MASHAKA**

**7. MAHFUDH MOHAMED MWAMTUKU**

**8. RAMA MATANO MWAURINDA.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The Plaintiff/Applicant filed a notice of motion dated 6<sup>th</sup> September 2016 brought under the provisions of section 3A of the Civil Procedure Act, Order 5 Rule 14, Order 40 Rule 1 (a), 3 & 4 of Civil Procedure Rules and section 13, 18 & 19 of the ELC Act. The application seeks for prayers in summary;

**a) Restraining the Respondents from alienating, selling, transferring or in any manner whatsoever from dealing with all that parcel of land known as Kwale/Diani/149 (hereinafter referred to as the suit property).**

**b) An order that the 2<sup>nd</sup> to 7<sup>th</sup> Respondents and their representatives be ordered to vacate all that parcel of land No Kwale/Diani Beach/149. Further they be restrained from entering upon any part thereof and/or developing or constructing or wasting the same.**

2. The application is supported by the grounds listed on the face of it inter alia that the applicant is the registered proprietor of the leasehold interest of L.R No Kwale/Diani Beach/59 which occupy the exact geographical position and boundaries as Kwale/Diani Beach/149. Secondly that the 6<sup>th</sup> defendant and others had been allotted the suit property by the Government and are claiming to be the proprietors

thereof. That the plaintiff which was in possession of the suit property until 25<sup>th</sup> August 2016 and paid valuable consideration for the same has a prima facie case with probability of success and stands to suffer irreparable loss unless the orders sought are granted.

3. The application is further supported by the affidavit sworn by Sheba Mohamed who deposes as the company secretary. She deposed that the plaintiff is the registered owner of L.R Kwale/Diani Beach 59 as per copy of certificate of official search annexed as **MSB – 1**. She gave a narrative of this land before independence in paragraphs 4 & 5 of the affidavit. Ms Sheba deposed that the plaintiff learnt through various sources that the suit parcel was the new number given to plot No 59 after re – survey of the area to create Diani Beach road.

4. The applicant deposes that on 13.7.2016, it received a phone call from Ayub Jasab that he had been served with a letter from D.C.I on land fraud investigation and he was summoned to appear before the D.C.I on 15.7.2016 without fail. The letter was annexed as **MSB – 8** although they were not told the name of the complainant. Subsequently on 25.8.2016 the plaintiff received a call from his caretaker that they had been evicted from the land by a group of persons accompanied by police officers. It is the plaintiff's case that it is imperative for this Court to intervene and issue an order of injunction as the Respondents have resorted to extra – judicial means and are misusing the plaintiff to steal a match on the plaintiff by forcefully evicting its employees and caretaker therefrom.

5. The application is opposed by the 2<sup>nd</sup> to the 7<sup>th</sup> Respondents vide a replying affidavit sworn by Said M. Mabavu. Mr Mabavu deposes that plot No Kwale/Diani Beach/149 belongs to them as a family and also as persons who received grant and allotment from the government. That they have always been on this land even without title documents. That through a separate dispute between some of their family & Dignified Ltd, the Respondents discovered the plaintiff's lease ceased to exist in 1994. That this suit is an afterthought as they have not invaded the land or chased away the plaintiff's caretaker.

6. The plaintiff filed skeleton written submissions which was highlighted on 18.1.2017 when the defendants offered oral submissions. The applicant submitted that mandatory injunction is grantable at an interlocutory stage where the case is clear. To support their case, it cited case law of **Robai Aguja & Another vs KPLC (2015) eKLR** and **Maher Karim vs Edward Oluoch Odumbe (2015) eKLR** stating this case is clear. For instance that the plaintiff had sub – let part of the property to Kencell for 14 years from 1<sup>st</sup> May 2000. They applied for renewal of the lease which was granted on 1.1.2014. That they have always been in possession.

7. The applicant submits further that their title was first in time. That they had not filed an inhibition against the suit property because the files were missing at the lands office hence their prayers for prohibition in Nos. 3, 6 & 7. On this, the applicant relies on the case of **Giella vs Cassman Brown & Gitway Investment Ltd vs Tajmal Ltd (2006) eKLR**.

8. The Respondents on their part submit that the issue of occupation is disputed and that it is the applicant who attempted to use the police to gain occupation. The Respondents also submit that green card for plot No 59 is confirmed as not existing in the lands registry and that it ceased to exist in 1975 after the government conducted the re – survey to create a road. The Respondents continued that in 1992 there was no plot No 59 to be bought. It is the defendants' submissions that they have a title supported by documents therefore it would be unreasonable to issue injunction in favour of a person who does not have a valid title. Lastly the Respondents submitted that there is no clear case before the Court and that the facts of the case laws cited are distinguishable from this case. Finally that until a trial is conducted, it is not easy to determine the legitimate title.

9. From the pleadings herein, it is quite obvious that both sides are holding titles in their hands. The applicant has annexed a certificate of lease issued on 31.8.2008 in its favour for Kwale/Diani Beach/59 while the Respondents have a certificate of lease in their favour for Kwale/Diani Beach 149. From annexure **MSB – 5** being the survey report, it is also clear that both plots refer to the same plot on the ground.

10. The circumstances when an interlocutory mandatory injunction can be issued has been laid out by the Court of Appeal in several case laws. For example in the case of **Robai Kadili Agufa & Another vs Kenya Power & Lighting Co Ltd (2015) eKLR** cited by the applicant quoted several Court Appeal decisions which stated that mandatory injunction on an interlocutory application ought not to be granted in the absence of special circumstances and then only in clear cases where the Court thought that the matter ought to be decided once or where the defendant had attempted to steal a match on the plaintiff.

11. According to the applicant, the case is clear because they had a caretaker on site and that they were issued with a certificate of lease on 1<sup>st</sup> October 2007. Further that it has always been in possession as is corroborated by the affidavits of its employees that they were unlawfully evicted on 25<sup>th</sup> August 2016. From the applicant's own documents annexures **MSB 6 a – 6 g**, shows the applicant was aware the 2<sup>nd</sup> – 6<sup>th</sup> respondents were holding title No Diani Beach/149 as at 29<sup>th</sup> September 2014 before this suit was filed in 2016. Annexure **6 h** being notice to the Attorney General outlined the remedies that applicant was going to seek in the intended suit that was to be filed. Secondly while reading the affidavits of Mohamed Mwinyi Mazecha, Rashid Salim Bogi and Alfian Nassir Halsan, I make a conclusion that none of these staffs were residents on the suit premises. All the staffs said there were seven bed roomed house and three other two bed roomed houses with none of them stating which ones they occupied. For instance Mohamed in paragraph 12 of his affidavit states that he was scared to go back with the police to the suit premises. In paragraph 13, he said he left his contacts and went home. Rashid Salim in paragraph 6 states that they ran towards the very bushy area and escaped by jumping over the wall. He & Alfian then proceeded to go to their homes.

12. Probably the applicant infers its staffs were denied entry but eviction where someone is not resident does not apply. The defendants are also claiming they have been in possession. In situation where both sides have shown title, it raises a dispute as to which of the two titles is the authentic one. Such a dispute can only be resolved through a hearing. There the circumstances presenting themselves in this case is not clear. Further, the fact of who was in possession before filing this suit is also in dispute and it would be difficult for this Court to reach a conclusion without evidence/hearing of which party is lying and who is stating the truth. It is my finding that the facts of this case do not meet the threshold for granting an interlocutory mandatory injunction.

13. Having analysed the facts above showing possession and existence of two titles, it is prudent that the suit property be preserved pending hearing and determination of this suit. For this to be achieved, I shall allow pray (7) of the motion. Each party will bear their respective costs of the application.

**Dated, signed and delivered at Mombasa this 11<sup>th</sup> day of April 2017**

**A. OMOLLO**

**JUDGE**