



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**LAND CASE NO. 81 'B' OF 2013**

**OMAR HASSAN SEIF.....PLAINTIFF**

**-VERSUS-**

**1. MAJALIWA MOHAMED HAMISI**

**2. FATUMA MOHAMED HAMISI.....DEFENDANTS**

**RULING**

1. In this notice of motion dated 16<sup>th</sup> July 2013 and brought under the provisions of Order 40 of the Civil Procedure Rules and the overriding sections of the Civil Procedure Act, the plaintiff/applicant asked for the following orders :

**1. That the application be certified as urgent.**

**2. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and or severally be restrained from whether by themselves, their servants or agents by way of a temporary injunction from building, erecting or constructing any structure or building or any portion thereof on or upon the suit land known as KWALE/DARIGUBE/830 or any portion thereof or on or upon the said land until the hearing and determination of this suit or further orders of this Court.**

**3. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves their servants or agents be ordered to demolish the permanent house that they have constructed in suit land known as KWALE/DARIGUBE/830 failing which the plaintiff be authorized to so demolish the said construction at the 1<sup>st</sup> and 2<sup>nd</sup> defendants expenses.**

2. The application is brought on the grounds that the defendants have commenced construction of a permanent house on the suit land. It is also supported by the affidavit deposed to by the applicant in which he states he is the administrator of the estate of Aisha Hassan Kikanda – deceased. That the deceased is the legal owner of L. R No Kwale/Darigube/830. Mr Omar deposes that the defendants had during the adjudication exercise fraudulently secured the registration of the suit land into their name as per copy of official search annexed as ‘OHS 3’. He also annexed a photograph of a permanent house under construction as “OHS 2”.

3. The application is opposed by the defendants vide their grounds of opposition dated 16<sup>th</sup> August 2013. In the grounds, the defendants states:

**i. The application is fatally defective**

**ii. That the applicant has failed to file and serve the application contrary to order 40 of the Civil Procedure Rules.**

4. The parties' advocates filed written submissions which I have considered. From the defendants' submissions, they contend this application is defective because the applicant has not taken out letters of administration to bring this suit. However the plaintiff annexed as "**OHS – 1**" a copy of limited grant of letters of administration issued to him on 14<sup>th</sup> March 2013. Therefore this ground of opposition is without any basis.

5. The issue for determination now is whether the application meets the criteria for granting the orders of temporary injunction. In the search certificate annexed by the applicant, it shows the defendants were registered as owners of the suit land on 27<sup>th</sup> July 2007 and issued with a title deed the same date. The photos annexed are not very clear but it shows a built wall. While in the defendants' documents, the pictures show a permanent house that is already roofed next to two houses with makuti roofings. The applicant is seeking an order stopping construction as well as for demolition of the houses already built.

6. On stopping of construction this in my view is overtaken by events as the house is already complete. A temporary injunction cannot undo what is already done. In the case of **DPP vs Justus Mwendwa Kathenge & 2 others (2016) eKLR**, the Court of Appeal re-emphasized the purpose of issuing temporary injunction "*as a vital tool intended to preserve the property in dispute until legal right and conflicting claims are established so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, alienated or where a party intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. Because of its importance and susceptibility to abuse certain guidelines were developed while considering an application for injunction i.e. the three well – known tests enunciated in Geilla vs Cassman Brown (1973) E. A 358.*"

7. The three tests are; Prima facie case, irreparable loss and balance of convenience. On prima facie case, the applicant has not attached any document to bring or put any nexus of the suit land and the deceased. He filed a list of documents dated 21<sup>st</sup> May 2013. There were no documents mentioned in that list filed. The applicant claimed that the defendants secured registration into their names fraudulently during the adjudication process. If the defendants are first registered owners as is put forth by the applicant himself, then he cannot challenge their title on account of fraud. For the reason that there is no evidence shown that the deceased and or the applicant has any interest in the suit land, I find this application as failing to meet the first test of prima facie case with probability of success.

8. The applicant has also not pleaded that if the orders sought are not granted, he will suffer irreparable loss. He merely states that he will suffer loss if the construction continues and that in my view is not sufficient given the defendants have been registered owners of the suit land since 2007 to 2013 some six years before this suit was brought. It is therefore my finding that prayer (2) of the motion has no merit.

9. The applicant also prayed for an order of demolition of the structures built. This is a prayer for mandatory injunction. It is well settled in law that mandatory injunction can only be granted in very clear cases. As pointed out in paragraph 8 above, the defendants have been registered as owners of the suit land since 2007. Section 24 & 25 of the Land Registration Act gives them absolute rights over the land until the contrary is proven. Such contrary circumstances can only be proved as provided under section 26 through a hearing. Secondly the applicant has not shown anything linking his interests or rights over the suit land. It is therefore obvious this is not a clear case where a mandatory injunction can be granted at this interim stage.

10. The applicant has failed to lay a basis upon which this Court can grant him the orders he is seeking. Consequently I make a finding that the application lacks merit and proceed to dismiss it with costs to the defendants.

**Dated and delivered at Mombasa this 6<sup>th</sup> day of April, 2017.**

**A. OMOLLO**

**JUDGE**