

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC LAND CASE NO. 192 OF 2016

RAPHAEL NDOLO.....PLAINTIFF/APPLICANT

-VERSUS-

SAMUEL MUTURI MAURA

IBRAHIM ABDALLA BAKARI MASHA....DEFENDANTS/RESPONDENTS

RULING

1. In this notice of motion dated 15th July 2016 and brought under the provisions of Section 1A, 1B, & 3A Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rules 1, 2 & 3 and Order 51 of the Civil Procedure Rules 2010, the plaintiff/applicant asked for the following orders:

1. Spent

2. Spent

3. That this Honourable Court be pleased to restrain the Defendants by themselves, their employees, servants, agents and or employees from fencing, alienating, selling, transferring trespassing, dealing and/or interfering in any manner with all that piece of land known as Plot Number 2535 (Original No. 416/3) Section VI Mainland North pending the hearing and determination of this suit.

4. That cost of this application be provided for.

2. The application is supported by applicant's affidavits dated 15th July 2015 & 31st October 2016 and the grounds listed on the face it and the submissions filed. The application is opposed by the Defendants vide the replying affidavit deposed to by Samuel Muturi Maura, the 1st Respondent. He annexed copies of his statement filed in the suit pending before the Chief Magistrate's court. The Respondents also filed written submissions.

3. I have considered the pleadings and the submissions on record. Both parties have annexed copies of title documents. The applicants' title is in the name of Esther Nduku alias Mwelu Malua whom they depose is their mother. The respondents on their part annexed copies of title and certificate of postal search showing the suit plot is jointly registered in their name.

4. The applicants pleaded that the respondents obtained their title fraudulently. The respondents on their part plead that there is nothing to show that the applicant owns the land as his documents are contradicting each other i.e whether Esther Nduku & Mwelu Malua refers to one and the same person.

5. The issues being raised by both parties are quite substantive and cannot be determined by an interlocutory application. Further based on the evidence presented to the court by both sides it is not practicable to state which party has a better case without adduction of evidence. This can only be done during the hearing of the case. The applicant did not satisfy me that if the orders of injunction are not given then he will suffer irreparable loss.

6. However on a balance of convenience, I find possession tilt in favour of the applicant. I say so based on the face of the documents annexed as **RN10 & 11** in the supporting affidavit. Annex **RN10** is a reference filed by a tenant against the applicant while RN11 are copies of letters & cheques forwarding the due rent. For this reason I will confirm the orders in terms of prayer 3 of the motion with a rider that in the interest of justice, the applicant shall also not dispose of or undertake any developments on the suit property until the suit is heard and determined on its merits. The costs of the application are ordered in the cause.

DATED, SIGNED & DELIVERED THIS 9TH DAY OF MAY 2017

A. OMOLLO

JUDGE