



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

**AT MALINDI**

**LAND CASE NO. 235 OF 2016**

**BONIFACE AGGREY OMONDI.....PLAINTIFF**

**= VERSUS =**

**1. OMAR JUMA SAID**

**2. STIMSON KENGA FUNDI.....DEFENDANTS**

**RULING**

1. Before me is an application dated 6<sup>th</sup> September 2016 brought pursuant to the Provisions of Order 40 Rules 1, 2, 3, 4 and 10 Order 51 Rule 1 and 15 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A and 63(a) of the Civil Procedure Act. The Applicant Boniface Aggrey Omondi is seeking: -

**“That temporary orders of injunction do issue restraining the defendants by themselves, servants, workmen and /or agents, or otherwise howsoever, from any further trespass, encroachment, access and howsoever from dealing with the Plaintiff’s property known as Plot No. 843 measuring approximately 84 x 60ft situated at Majengo Mapya, Mtwapa pending the hearing and determination of this application and suit.”**

2. The application is supported by an Affidavit sworn by the Applicant on 6<sup>th</sup> September 2016. The gist of the application is the contention that the Applicant is the beneficial owner of the described property which was sold to him by one Omar Juma Saidi (the 1<sup>st</sup> Respondent) on 7<sup>th</sup> October 2013. It is the Plaintiff/Applicants’ case that soon after purchasing the property he proceeded to fence it off but on or about 20<sup>th</sup> August 2016, he visited the land only to find that someone had pulled off part of the fence and was hurriedly putting up a structure on the land with the aim of defeating his entitlement. Consequently, the Applicant carried out investigations which revealed that the 2<sup>nd</sup> Respondent, Stimson Kenga Fundi, was the one responsible for the development after the 1<sup>st</sup> Defendant and his wife sold to him the very same plot which the 1<sup>st</sup> Defendant had sold to the Plaintiff/Applicant.

3. The Application is opposed. In a Replying Affidavit sworn and filed in court on 24<sup>th</sup> October 2016, the 2<sup>nd</sup> Respondent avers that on or about 20<sup>th</sup> August 2013, he purchased a parcel of land known as Plot No. 637 situated at Majengo Mapya in Kikambula for Kshs 390,000/=. The said plot measuring 50ft by 100ft was purchased from the then owners named as Constance Makorani and Mohamed Maulid Ruwange.

4. It is the 2<sup>nd</sup> Defendant’s case that since the Plots had no title deed, he needed to pay membership fee of Kshs 10,000/= to a group known as Mwatundo Community Based Organisation. He did as requested and

was issued with a receipt for Plot No. 637 on 13<sup>th</sup> June 2016 after which he proceeded to the plot and commenced construction thereon. When the construction reached the Lintern stage the Plaintiff served him with a Court Order stopping the construction on the basis that the Plaintiffs/Applicant was the owner of the plot. The 2<sup>nd</sup> Defendant then reported the matter to the sellers who advised him to report the matter to Mtwapa Police Station. The police investigations led to the arrest of the 1<sup>st</sup> Defendant who was then charged with a Criminal Offence. It is therefore the 2<sup>nd</sup> Defendant's case that the Plaintiff is aware of where his problem lies and he has instead wrongly decided to sue the 2<sup>nd</sup> Respondent.

5. I have perused the Plaintiff's application and the Affidavit in Reply. I have also considered the oral submissions made by Learned Counsels for the Plaintiff and the 2<sup>nd</sup> Defendant. In *Giella -vs- Cassman Brown (1973) EA 358*, the conditions for the grant of an interlocutory injunction were settled as follows:

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

6. In light of the above, it is incumbent upon this court to first and foremost establish if the Plaintiff herein has at the onset made out a prima facie case with a probability of success. In *Mrao -vs- First American Bank of Kenya Ltd & 20 Others (2003) KLR 125*, the court stated that:

**“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

7. Turning to the facts of this case, it is pertinent that the plot of land claimed by both the Plaintiff and the 2<sup>nd</sup> Defendant is unsurveyed and no title deeds have been issued thereupon. According to the Plaintiff, he bought his parcel of land known as Plot No. 843 measuring approximately 84 x 60 ft from one Omar Juma Saidi on 7<sup>th</sup> October 2013. He has annexed to the Supporting Affidavit a Sale Agreement (marked B1) as evidence of the purchase. He has also annexed a receipt (marked B2) showing that he paid transfer fees of Kshs 10,000/= to the said Mwatundo Community Based Organisation for Plot No. 843.

8. On his part, the 2<sup>nd</sup> Defendant avers that he is the owner of Plot No. 637 measuring 50ft by 100ft which contrary to the Plaintiff's assertion he bought from a different party and not the 1<sup>st</sup> Defendant. He has equally annexed a Sale Agreement (marked SKF 1) in support of his position as well as a receipt for the sum of Kshs 10,000/= paid as membership fees to the said Mwatundo Community Based Organisation. The said receipt shows that the payment is for Plot No. 637.

9. While it is clear that the suit premises were described differently by both parties, nothing has been placed before me to show that the land whose measurement is equally indicated to be 84 x 60ft by the Plaintiff and 50ft x 100ft by the 2<sup>nd</sup> Defendant is one and the same. While the whole area in dispute can be said to be unsurveyed, it is evident that both the sellers to the Plaintiff and the Defendants are said to be members of an organization known as Mwatundo Community Based Organisation. Receipts issued by the organization which apparently is in custody of the land records for the area clearly indicate that the Plaintiff paid a Transfer Fee of Kshs 10,000/= for Plot No. 843 on 7<sup>th</sup> October 2013 while 2<sup>nd</sup> Defendant paid a membership fee of similar amount for Plot No 637. There is therefore every possibility that the two parcels of land are separate and distinct and if not the Plaintiff ought to have brought this out more clearly. That has not been done in this case.

10. Secondly, even though the 2<sup>nd</sup> Defendant has stated clearly that this matter was under investigation and the police found that the 1<sup>st</sup> Defendant had irregularly sold land to the Plaintiff, the Plaintiff has throughout these proceedings failed to respond to the said allegations. I therefore take note that just as

pointed out by the 2<sup>nd</sup> Defendants that the 1<sup>st</sup> Defendant has been arrested and charged by the police for obtaining money by false pretense in regard to this case, the Plaintiffs attempted to serve the 1<sup>st</sup> Defendant with the court papers herein at Shimo La Tewa Prison. In their Affidavit of Service filed in court on 1<sup>st</sup> March 2017 the Plaintiffs Advocates indicate that on 24<sup>th</sup> February 2017, they confirmed that indeed the 1<sup>st</sup> Defendant is being held at Shimo La Tewa Prison. The Plaintiff was not however candid enough to tell this court why the 1<sup>st</sup> Defendant was being held at the prison.

11. Whatever the case, the Plaintiff/Applicant has failed to demonstrate that he stands to suffer any loss and/or damage which cannot be compensated by an award of damages. From the evidence annexed by the Plaintiff himself to the Supporting Affidavit (marked B-3), it is clear that it is the 2<sup>nd</sup> Defendant who is in the suitland and has began carrying out constructions thereon.

12. Accordingly, I find no merit in the application dated 6<sup>th</sup> September 2016. The same is hereby dismissed with costs to the 2<sup>nd</sup> Respondent.

**Dated, signed and delivered at Malindi this 16<sup>th</sup> day of June, 2017.**

**J.O. OLOLA**

**JUDGE**