



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LANDS COURT**

**AT MALINDI**

**ELC CIVIL SUIT NO.9 OF 2017**

**GABRIEL MWEWE .....PLAINTIFF/RESPONDENT**

**VERSUS**

**ALBERT MUNGWANA PHILIP.....DEFENDANT/APPLICANT**

**RULING**

1. I have before me a Notice of Motion application dated 19<sup>th</sup> January 2017 seeking a temporary injunction to issue restraining the Respondent by himself, agents, servants, legal representatives or any other person claiming interest through them from trespassing, entering, remaining(in), selling, alienating and/or dealing with the suit property.
2. The Application is supported by an Affidavit sworn by the Applicant Gabriel Mwewe on 19<sup>th</sup> January 2017. In the said Affidavit, the Applicant avers that he is the rightful owner of the suit property by virtue of an agreement of sale between himself and one Mary Nyacomba Kinaro dated 1<sup>st</sup> December 2016. It is his case that he purchased House No. BR 48 situated on Plot No. 1389 Barani area in Malindi after the seller proved her ownership of the same through confirmation of Grant issued vide Malindi High Court Succession Cause No. 120 of 2015.
3. It is the Applicant's case that soon after the purchase, he was surprised by the behavior of the Respondent who moved to the premises and started disconnecting water and electricity. It is therefore his case that an injunction should be granted herein in order to avoid more damage to the suit property.
4. The Respondent Albert Mungwana Philip is opposed to the grant of an injunction as sought by the Applicant. In a Replying Affidavit sworn on 30<sup>th</sup> January 2017, he avers that the property in dispute belonged to his father Filipino Wambogo Okusimba alias Philip Aboko (now deceased). It is his case that his father who died on 8<sup>th</sup> March 1982 had purchased the suit property from one Omar Bin Abdalla Bin Daghar in 1966.
5. The Respondent avers that since the purchase of the property as aforesaid, his father, was paying ground rent and he continues to do so to the Estate of Said Seif Salim who are the registered owners of the parcel of land on which the house is built. It is the Respondent's case that the said Mary Nyacomba Kinaro had no proprietary interest in the house and could not therefore sell the house to the Applicant as purported in the application before me and it is accordingly his prayer that the application be dismissed.
6. I have gone through the Application together with the Affidavits in Reply. I have equally studied the submissions placed before me by the counsels for the respective parties herein. The principles on the

grant of injunctions have long been settled. In the often-cited case of **Giella versus Cassman Brown & Company Ltd (1973) EA 358**, the court held that:

*“The conditions for the grant of an interlocutory injunctions are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be 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 a balance of convenience.”*

7. In the foregoing circumstances, it is incumbent upon this court to first and foremost consider whether the Applicant has established a “prima facie” case with a probability of success. A “prima facie” case as was stated in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR (Civil Appeal No. 39 of 2002)** include: -

*“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.*

.....

*A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.*

8. In **Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR (Civil Appeal No. 77 of 2012)**, the Court of Appeal proclaimed that: -

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...”*

9. In the case before me, the Plaintiff/Applicant avers that he purchased House No. BR 48 situated on Plot No. 1389 Barani Area but without the land on which it is situated from one Mary Nyacomba Kinaro. In support of his case, he has annexed (and marked “GMI”) a copy of a Sale Agreement dated 1<sup>st</sup> December 2016 indicating that he bought the house for a sum of Kshs 2,500,000/=. In the Sale Agreement, the suit property is described as follows:

### **Property**

*The property includes ALL THAT standing House without land constructed on Plot No. 1389- Malindi being House No. Br 48 situated at Barani area within Malindi Town in Kilifi County in which the Vendor is an absolute owner by virtue of GRANT AND CERTIFICATE(OF) CONFIRMATION OF GRANT in High Court Succession Cause No. 120 of 2015 at Malindi as attached hereto.*

10. It is the Applicant’s case that during the purchase of the house, he confirmed the authenticity of the Certificate of Grant as a result whereof he was satisfied that the house genuinely belonged to the seller. He is therefore surprised by the acts of the Respondent in proceeding to disconnect water and electricity to the premises.

11. I am not however convinced that a Certificate of Confirmation of Grant listing a certain property in the schedule thereto on its own is ipso facto evidence of ownership of the property. The only other

evidence adduced by the applicant to show ownership of the property is a Building Plan allegedly given to him by the vendor- the said Mary Nyacomba Kinaro- with nothing else to show how the property was acquired.

12. I have taken note that the grant was issued to Mary Nyacomba Kinaro as the Legal Representative of the Estate of one Johnson Otiaye Wambogo. At Paragraph 10 of the Replying Affidavit, the Respondent contends that the only relationship between himself and the said Johnson Otiaye Wambogo was that of a Landlord and Tenant and that the property has never changed hands since 1966 when it was bought. There are demands for rent annexed to the Replying Affidavit. Other than a general denial, the Applicant has not put anything before me to show that the Respondents averments were untrue and/or how the late Johnson Otiaye Wambogo had acquired the property.

13. On the other hand the Defendants have clearly shown in their annexures the history of the property since 1966 including evidence of purchase from the previous owners and payment of rates throughout the years.

14. I note from Paragraph 3 of the further affidavit (titled “Reply to the Respondent’s Replying Affidavit”) sworn by Gabriel Mwewe on 15<sup>th</sup> February 2017 that there is an allegation that the Respondent herein and Mary Nyacomba’s Kinaro’s husband were brothers. That might as well be the case. It is however my view that if that were so, it was incumbent upon the Applicant to show how the estate had been distributed as between the brothers and how accordingly Mary Nyacomba Kinaro’s husband came to acquire the suit property.

15. Arising from the foregoing, I am not satisfied that the Applicant has made out a prima facie case with a probability of success.

16. The Application dated 19<sup>th</sup> January 2017 is accordingly dismissed with costs to the Respondent.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of July, 2017.**

**J.O. OLOLA**

**JUDGE**