



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LANDS COURT**  
**AT MALINDI**  
**CIVIL SUIT NO .17 OF 2017**

NGAITA MBIRE JAMES.....PLAINTIFF

=VERSUS=

1. WANJE MASHA
2. ABDILAH SHALI
3. SAID BAKARI
4. OMARI MBWANA HERI
5. BIDALI SWALEH
6. MBWANA SUDI
7. KARISA MASHA.....DEFENDANTS

**RULING**

1. Before me is a Notice of Motion Application dated 2<sup>nd</sup> February 2017. The Plaintiff Ngaita Mbire James is seeking for Orders as follows: -

1. Spent

2. Spent

3. **THAT the Officer Commanding Mtwapa Police Station be ordered to give security to the Court Bailiff to ensure vacant possession of Plot No. 168/III/MN registered as CR 4197/1 and provide security and maintenance of peace during and after vacant possession.**

4. **THAT a Mandatory Order of injunction do issue restraining the Defendants by themselves, servants, workmen and/or agents, or otherwise however(sic) from wasting, alienating, selling, disposing, encroaching, erecting structures, threatening the plaintiff with harm and eviction, trespassing onto and/or in any other way dealing with the plaintiff's property being Plot No. 168/III/MN registered as CR 4197/1 Mtwapa, Kilifi District within the County of Kilifi and an order directed to the Defendants to stop interfering in any way with the Plaintiff's peaceful enjoyment of the suit property pending the hearing and**

**determination of this suit.**

**5. THAT an order for vacant possession directed at the Defendants to vacate the Plaintiff's Plot No. 168/III/MN registered as CR 4197/1 and in default eviction be effected against the Defendants and all those bound by the said Order.**

**6. THAT the costs of this application be borne by the Defendants.**

2. The Application is supported by the Applicant's Affidavit sworn on 2<sup>nd</sup> February 2017. The gist thereof is that the plaintiff is the registered owner of Plot No. 168/III/MN which he purchased in 1998. Recently, the Defendants have without any colour of right forcefully entered/encroached upon the property and proceeded to erect thereon various structures. It is the Plaintiff's case that the Defendants acts are illegal, malicious and calculated to hurt the plaintiff and deprive him of his property.

3. The Application is opposed. In near similar Replying Affidavits, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Defendants in addition to filing Grounds of Opposition variously depone that they have resided in the suitland for periods ranging from 12 years(for the 2<sup>nd</sup> Defendant) to 15 years (for the 3<sup>rd</sup> Defendant). It is the Defendants case that they have lived in the suitland for the various periods indicated openly and without any interference from the plaintiff until January 2017 when he attempted irregularly to have them evicted without following due process and by misusing police officers. The Respondents aver that they resisted the attempted irregular eviction and together with their families, are still occupying the suitland.

4. I have carefully considered the Application as well as the response by the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants. I have also considered the rival submissions and authorities placed before me by the Learned Advocates for the parties. The 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants did not file any response to the application.

5. In *Kenya Breweries Ltd -vs- Washington Okeyo(2002)EA 109*, the Court of Appeal held that the test for the grant of a mandatory injunction was as correctly stated in Vol. 24 of Halsbury's Laws of England, 4<sup>th</sup> Edition Paragraph 948 that:-

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and a summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**

6. Similarly, in *Sharrif Abdi Hassan -vs- Nadhif Jama Adan (2006) eKLR(Civil Appeal No. 121/2005)*, the Court of Appeal observed that:

*“The courts have been reluctant to grant a mandatory injunction at the interlocutory stage. However, where it is a prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property.”*

7. I have looked at the circumstances of this case. It is the Plaintiff's case that the Defendants have recently invaded his piece of land and commenced construction of all manner of structures thereon. The Plaintiff has produced photos of the structures built on the suitland which structures he states were barely three weeks old as at the time this application was filed in court.

8. On their part, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents have filed near similar affidavits denying the allegations. The Defendants state in the Affidavits that they have lived on the suitland for periods ranging from 12 to 15 years. It is their case that their stay on the suitland has been open and without any interference. Indeed on 15<sup>th</sup> March 2017, they proceeded to file a Statement of Defence and

Counterclaim in which they now claim to be entitled to the suitland by way of adverse possession. No statements or evidence have however been filed in support thereof.

9. I note that in all the Replying Affidavits, nothing has been attached to show that the Defendants have been on the suitland longer than the time stated by the plaintiff. Indeed surprisingly, the Defendants merely dismiss the date stated by the plaintiff as the age of the structures but have not tried to show that there were any older structures or buildings on the suitland. The photos presented to this court clearly show that the structures are either newly built or are in the stage of construction.

10. On his part, the 6<sup>th</sup> Defendant merely relies on two grounds of opposition to the effect that the suit is misconceived and amounts to a gross abuse of this court process.

11. I think on the material placed before me, this is a clear case in which a mandatory injunction ought to be issued at the interlocutory stage. It is clear to me that the Defendants are recent entrants into the suit premises with the hope that a case in court would take time as they continue to benefit from the suitland. That is why they dare the plaintiff in their Affidavits to follow due process in evicting them. The plaintiff has now followed that process and they have failed to satisfy me that they deserve to remain in the suitland any longer.

12. The upshot is that I allow the application dated 2<sup>nd</sup> February 2017 in terms of prayers 4 and 5 thereof. The Plaintiff shall also have the costs of this application.

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

**J.O. OLOLA**

**JUDGE**