



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO 13 OF 2017**

**INDERJEET SINGH RATAN SINGH.....1<sup>ST</sup> PLAINTIFF**

**RAMADHAN MOHAMED MWASENGEZA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HAMISI NDUNI MWINYAMIRI.....1<sup>ST</sup> DEFENDANT**

**AMADI MWINYAMIRI.....2<sup>ND</sup> DEFENDANT**

**RAMA JUMA MWINYAMIRI.....3<sup>RD</sup> DEFENDANT**

**HAMISI BUNGARI MWINYAMIRI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application dated 24<sup>th</sup> January 2017 the Plaintiffs/Applicants are seeking for orders that pending the hearing and determination of this Application and the suit, the Defendants by themselves, their agents, servants, employees and/or assignees be restrained by way of a temporary injunction from selling, sub-dividing, transferring, disposing, utilizing in anyway whatsoever with plot known as Parcel **NO.KWALE/RAMISI PHASE IIA/1821** measuring 1.7ha located within Kimondo, Kwale County.

2. The Application is made on the grounds that in 2012 the 1<sup>st</sup> Plaintiff purchased the said parcel of land **PARCEL NO. KWALE/RAMISI PHASE IIA S.S./1821** from one Mwinyamiri Hamad Tsumo (now deceased) and he in turn sold and transferred it to the 2<sup>nd</sup> Plaintiff in the year 2014. That upon the demise of Mr. Mwinyamiri Hamad Tsumo, the Defendants who are sons to the deceased declined to allow access of the plot to the Plaintiff. The Application is further supported by the Affidavit of Inderjeet Singh Ratan Singh, the 1<sup>st</sup> Plaintiff sworn on 24<sup>th</sup> January 2017 and a Supplementary Affidavit sworn on 15<sup>th</sup> March 2017. Briefly, the 1<sup>st</sup> Plaintiff depones that he bought the suit land in the year 2012 from Mwinyamiri Hamad Tsumo and after obtaining consent from the Msambweni Land Control Board the same was transferred and registered in his name and a Title Deed issued to him on 20<sup>th</sup> January 2014. That within the year 2014, the 1<sup>st</sup> Plaintiff sold and transferred the same parcel of land to the 2<sup>nd</sup> Plaintiff. The Plaintiffs depones that the previous owner, Mwinyamiri Hamad Tsumo later passed on and to their surprise the family members of the deceased including the Defendants who were fully aware of the sale have denied the Plaintiffs access to the suit land. It is the Plaintiffs' contention that the Defendants have no authority to deny them access to the Suit Land because the same had been sold by the deceased to the 1<sup>st</sup> Plaintiff and are fully aware that the consideration was received by the deceased. The

Plaintiffs further depone that they have established a *prima facie* case against the Defendants and hence Interim Orders should be granted restraining the Defendants from denying the Plaintiffs access to the Suit Land.

3. The Application is opposed by the Defendants who filed a Replying Affidavit sworn by Hamisi Mwinyi Tsumo, the 4<sup>th</sup> Defendant on the 20<sup>th</sup> February 2017. In the said Affidavit, the Defendants depone that they dispute the registration of the 1<sup>st</sup> Plaintiff as owner of land parcel number **KWALE/RAMISI PHASE IIA S.S./1821**. The Defendants depone that the agreement between the 1<sup>st</sup> Plaintiff and Mwinyiamiri Hamad Tsumo is null and void as at the time of drawing the Sale Agreement, the said Mwinyiamiri Hamad Tsumo was not the registered owner of the said property and therefore could not sell what he did not own. The Defendants further depone that the deceased died on 29<sup>th</sup> May 2013 while the Suit Property was registered in his name and title issued on 8<sup>th</sup> August 2013. It is therefore the Defendants contention that under the circumstances, it was impossible for the deceased to have signed any transfer and Land Control Board documents, and that there could never have been any sub-division of the Suit Property after the demise of the registered owner unless through succession proceedings. The Defendants state that no sub-division was done on the ground and the Suit Property has no beacons as no surveyor has visited it for purposes of sub-division. According to the Defendants, the 1<sup>st</sup> Plaintiff did not have good title to the property that he could pass to the 2<sup>nd</sup> Plaintiff and that they have declined to vacate from the Suit Property because they believe the 2<sup>nd</sup> Plaintiff's title is a nullity and is tainted with irregularities. The Defendants further state that the Plaintiffs are in breach of agreement as they have not paid the full consideration because there is a balance of Kshs.1,359,980.00. It is the Defendants argument that the purported Sale Agreement was a nullity and unenforceable. They also dispute that the Plaintiffs made payments of kshs.1,398,165 to the Agricultural Finance Corporation and state that the amount paid was Kshs.970,020. The Defendants state that they were not made aware of any monies received by Mwinyiamiri Hamad Tsumo (deceased) from the Plaintiffs.

4. In the Supplementary Affidavit filed in response to the Defendants Replying Affidavit the 1<sup>st</sup> Plaintiff depones that an Agreement for Sale was executed on 9<sup>th</sup> March 2012 in which the sum of Kshs.110,000.00 was paid to Mwinyiamiri Hamad Tsumo for purposes of carrying out survey and beaconing of land parcel **NO.RAMISI PHASE IIA/1830** while the sum of kshs.500,00.00 was received by the deceased as the initial deposit of the consideration of Kshs.2,550,000.00. The Plaintiffs aver that the death of the deceased on 29<sup>th</sup> May 2013 did not vitiate the Sale Agreement executed on 9<sup>th</sup> March 2102. The Plaintiffs state that the deceased had been offered the land on 27<sup>th</sup> June 2010 by the Director of Land Adjudication and Settlement and that demarcation, survey and sub-division were duly carried out. It is their contention that the deceased died after he had executed the Sale Agreement, sub-division and transfer documents that gave rise to Suit Property. The Plaintiffs aver that the 4<sup>th</sup> Defendant plucked out and destroyed all the beacons that had been placed by the surveyor because the 1<sup>st</sup> Plaintiff insisted in giving the balance of the purchase price to the Legal Representative of the estate of the deceased upon getting Vacant Possession and not to the 4<sup>th</sup> Defendant who was demanding for it. The Plaintiffs maintain that they have a good title to the Suit Property. Both parties filed Written Submissions which I have read and I need not reproduce their contents here.

5. I have carefully considered the application herein. The main issue that I have to determine is whether the Plaintiffs have satisfied the conditions for grant of Interlocutory Injunction as laid down in the case of **Giella – V – Cassman Brown & Co Ltd**. First, the Plaintiffs must show that they have a *prima facie* case with a probability of success; secondly, that they stand to suffer irreparable damage, and if the Court is in doubt, that the balance of convenience lies in their favour.

6. The Plaintiffs have demonstrated that they are the registered owners of the Suit Property following the successful purchase of the property from the previous registered owner, Mwinyiamiri Hamad Tsumo. The Plaintiffs have furnished a copy of the Agreement for Sale between the previous registered owner and the 1<sup>st</sup> Plaintiff. They have also stated in their Supporting Affidavits how the property was sub-divided and transferred by the previous registered owner. The 1<sup>st</sup> Plaintiff sold the property to the 2<sup>nd</sup> Plaintiff who is

now the registered owner. From the evidence on record, I am satisfied that the 1<sup>st</sup> Plaintiff regularly and procedurally acquired the Suit Property and that upon registration of the transfer in his favour, he regularly and procedurally transferred it to the 2<sup>nd</sup> Plaintiff. From the defence filed, the Defendants who are the sons of the previous registered owner allege that the 1<sup>st</sup> Plaintiff only paid part of the purchase price. Any issue about payment of outstanding balance or indeed about the agreement can only be challenged by the Legal Representatives of the deceased. The 1<sup>st</sup> Plaintiff has stated that he could not pay the outstanding balance of the purchase price to the 4<sup>th</sup> Defendant because he was not the Legal Representative of the late Mwinyiarimiri Hamad Tsumo. In my view, the 1<sup>st</sup> Plaintiff was right in insisting on making payment only to the Legal Representatives of the estate of the deceased.

7. The Plaintiffs under the provisions of section 24 of the Land Registration Act became vested with the absolute ownership of the Suit Property and further under Section 25 of the Act the right of ownership acquired by the Plaintiffs are indefeasible except as provided under the Act. Section 25 (1) of the Land Registration Act provides as follows:

**25 (1) the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject-**

***a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, ; and***

***b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register.***

8. The Plaintiffs having been registered as proprietors and having been issued with a Title Deed over title **NO.KWALE/RAMISI PHASE IIA S.S./1821** are in terms of Section 26 (1) of the Land Registration Act entitled to the protection of the Law.

9. It is my considered view that the Plaintiffs have established a *prima facie* case with a probability of success. As regards irreparable damage, the conventional thought on land related matters is that deprivation of an interest in land is not sufficiently remediable by an order of compensation in damages. In addition, the effect of the refusal of the order for injunction in this case is that the Plaintiffs cannot utilize their land freely for the purpose for which they intended by purchasing it. I find such loss to be irreparable damage to the Plaintiffs. The balance of convenience if I had doubt in the matter, lies in favour of the Plaintiffs who are the registered owners and lawfully acquired it from the previous registered owner rather than with the Defendants who have no claim over it.

10. Accordingly, I find merit in the Application and grant the order for a temporary injunction in terms of prayer 3 of the Notice of Motion dated 24<sup>th</sup> January 2017.

11. The costs of the Application are granted to the Applicants.

**Ruling delivered, dated and signed at Mombasa this 28<sup>th</sup> day of September 2017**

**C. YANO**

**JUDGE**