



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LANDS COURT**

**AT MOMBASA**

**ELC NO. 239 OF 2017**

**KHADIJA KIBWANA SWALEH.....PLAINTIFF**

**VERSUS**

**AMINA SULEIMAN ABDALLA.....1<sup>ST</sup> DEFENDANT**

**ASHA SULEIMAN ABDALLA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 27<sup>th</sup> June 2017. It is brought under Order Rule 1, 2 and 3 of the Civil Procedure Rules, Section 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and all enabling provisions of the Law.

2. It seeks orders that;

a) Spent.

b) This Honourable Court do grant an injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, their agents, servants, employees, assignees and/or any other person authorized by them from selling, disposing, alienating, transferring and/or in any other way disposing of the 1<sup>st</sup> and 2<sup>nd</sup> properties that is Plot Number Mombasa/Block XVII/1328 and Plot Number 46/Section I Mainland North pending the hearing and determination of the suit herein.

c) Spent

d) Costs of this application.

3. The grounds are in the face of the application and are;

a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants forged the documents of ownership of the suit properties herein and/or fraudulently obtained them by;

i) Manipulating, deceiving and/or lying to the administrators of the estate of Gulam Hussein Mohammed Ali Noorbhai into transferring the 1<sup>st</sup> property to her and not to the deceased.

ii) Manipulating and/or deceiving and/or taking advantage of the deceased's old age and sickness and transferring the 1<sup>st</sup> property to herself.

iii) Deliberately refusing to change the records at the Mombasa County rates department making the Plaintiff and her siblings and the deceased believe that the 1<sup>st</sup> property was still registered in the name of the deceased.

iv) Deliberately erasing the deceased's name on the transfer document and inserting her own name so as to appear as though she was the owner of the 2<sup>nd</sup> property instead of the deceased.

4. The application is supported by the affidavit of Khadija Swaleh Kibwana, the Plaintiff/Applicant sworn on the 27<sup>th</sup> June 2017.

5. The application is opposed. There is a replying affidavit sworn by Asha Suleiman Abdalla, the 2<sup>nd</sup> Defendant/Respondent herein undated

and filed in court on the 25<sup>th</sup> September 2017.

6. I have considered the Notice of Motion dated 27/6/2017 and the supporting affidavit. I have also considered the Replying affidavit and the annexures. I have considered the oral submissions of both counsels. The issue for determination is whether the Plaintiff has made out a prima facie case to warrant the grant of temporary injunction.

7. In their submissions, counsel substantiated their clients' respective positions stated in their respective affidavits. It is now appropriate to consider the facts that have emerged and the legal principles applicable.

8. The principles were laid down in the precedent setting case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 385.*

First the Applicant must show that he has a prima facie case with a probability of success as the trial.

Secondly, normally any injunction will not be granted unless the Applicant shows that he is likely to suffer an injury which cannot be compensated by damages if the injunction is not granted.

Thirdly, if the court is in doubt, it will decide on a balance of convenience.

9. It is the Plaintiffs/Applicants case that the 1<sup>st</sup> Defendant fraudulently transferred Land Parcel Number Mombasa/Block XVII/1328 to herself. That she took advantage of her relationship with the deceased who was then sickly and aged.

That is clear that the original owner knew the 1<sup>st</sup> Defendant as the deceased's representative.

Further that section 26 of the Land Registration Act, 2012 empowers this court to annul the title if sued to the 1<sup>st</sup> Defendant.

10. That the Plaintiff has demonstrated a prima facie case with a probability of success at the trial. That she is likely to suffer irreparably if the injunctive orders are not granted as the properties are likely to be disposed of.

That the replying affidavit was filed in clear contravention of Order 51 Rule 14 of the Civil Procedure Rules and that the affidavit sworn by the 2<sup>nd</sup> Defendant is defective as it contains averments attributed to the 1<sup>st</sup> Defendant without a written authority hence should be struck out.

11. The Defendants/Respondents on the other hand contend that the Plaintiff is not the heir of the deceased Zena Swaleh. That the deceased was their aunt and she had adopted them.

The Defendants were residing with the deceased until she passed on. Further that Land Parcel Number Mombasa/Block XVII/1328 was purchased by the deceased and the 2<sup>nd</sup> Defendant's father.

The 2<sup>nd</sup> Defendant has since sold the property to a third party and Plot Number 46/Section I/Mainland North is registered in the names of the 1<sup>st</sup> Defendant.

That the two properties are not registered in the deceased names. They pray that the application be dismissed.

12. I find that the Plaintiff/Applicant has failed to establish a prima facie case with a probability of success at the trial.

The two properties are not registered in the names of Zena Swaleh, the deceased. In the case of *Mrao Limited –versus- First American Bank Limited And 2 Others (2003) KLR 125* the court in determining what amounts to a prima facie case stated,

**“So what is a prima facie case? I would say that in Civil cases, it is a case in 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.”**

13. I find that the Plaintiff's case has failed to meet the above test. The issue of her being an heir to the deceased is a matter of evidence which will be determined at the trial.

I also find that the particulars of alleged fraud on the part of the 1<sup>st</sup> Defendant will be determined at the trial.

14. I find that the Plaintiff has failed to demonstrate that she is likely to suffer irreparable loss or injury if the orders of injunction are not granted. The Plaintiff is not in possession or occupation of the two properties.

They are registered on the 1<sup>st</sup> Defendant and a third party respectively.

I find that the Plaintiff has failed to show what loss she will suffer. In the event that she succeeds at the trial she can be compensated by an award of damages.

The balance of convenience tilts in favour of the Defendants who are in possession of the suit properties.

15. The Defendants/Applicants' counsel admits that they served the replying affidavit late. The reason he gave was that parties were still negotiating on the possibility of an out of court settlement.

I am guided by the principle enunciated in Article 159 (2) (d) of the Constitution. This court is more concerned with delivering substantial justice. The replying affidavit has been filed and served. I decline to strike out.

16. All in all I find that the application herein lacks merit. The same is dismissed. The costs do abide the outcome of the main suit.

**It is so ordered.**

**Dated, signed and delivered at Mombasa on the 31<sup>st</sup> day of October 2017.**

**L. KOMINGOI**

**JUDGE**

**31/10/2017**

**Mr. Kitonga :** We will be seeking leave to file our defence.

**Court :** Leave granted to the Defendants to file and serve their defence within 14 days.

**L. KOMINGOI**

**JUDGE**

**31/10/2017**