



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

**AT MOMBASA**

**CIVIL SUIT NO. 99 OF 2017**

**F W W (Minor suing through his grandfather**

**and next friend S W K.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SALIM SHAFI MWANADUNDU & 4 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The applicant moved the Court under the provisions of Order 40 rule 1 of the Civil Procedure Rules and section 63 (e) of the Civil Procedure Act seeking the following orders:

**a) Spent**

**b) Spent**

**c) That pending the hearing and determination of this suit there be a temporary injunction restraining the defendants by themselves or their agents, servants and/or employees from selling, alienating, occupying, entering or in any manner making construction of any structures or buildings on the plaintiff's subject matter land situated at CENTI KUMI area LIKONI SUB-COUNTY and measuring 72 feet by 50 feet.**

**d) That the costs of this application be provided for**

2. The application is supported by the many grounds listed on face of it and the affidavit of the applicant. The applicant avers that in the month of August 2016 the defendants started constructing a house and in the process annexed two rooms belonging to him. He came to Court to stop them from this action which the applicant states breaches his rights to own property. The applicant also annexed photographs of the impugned structures.

3. None of the five defendants filed grounds of opposition or replying affidavit to contest the facts set out in the application and the supporting affidavit. Secondly, during the hearing of the application, Mr Magolo for the 1<sup>st</sup> to 4<sup>th</sup> Defendants did not attend Court. The hearing of the application thus proceeded in the presence of Mr Atancha advocate for the applicant and Miss Mayabi advocate for the 5<sup>th</sup> Respondent.

4. Mr Atancha submitted that the 5<sup>th</sup> defendant who is a neighbor to the applicant has encroached on the

applicant's land thus the applicant has been denied access to his plot. He therefore seeks an order in terms of prayer 3 of the motion. Miss Mayabi on her part submits that the suit land has not been sufficiently described and that a blanket order of injunction will be pre-judicial to the 5<sup>th</sup> Respondent. Counsel also submitted that the sale agreement does not comply with the provisions of section 19 of the Stamp Duty Act and that the land described in the agreement is different from what is pleaded in the plaint. She therefore urged the Court to dismiss the application.

5. In considering whether or not to grant an order of temporary injunction, this Court is always guided by the three principles enunciated in the case of *Giella vs Cassman Brown* (1973) E. A to wit that the applicant has shown that he has a prima facie case with a probability of succeeding or that he is likely to suffer harm that is irreparable and cannot be compensated by an award of damages or that the balance of convenience tilts in the side of the orders being granted.

6. In the instant case, the applicant annexed a sale agreement as annexure W – 1 & W – 2 showing he bought the land measuring 72 feet by 50 feet in the year 2008 from Mr Salim Shaffi who is the first defendant. This fact is not contested as no reply was filed by any of the defendants. The plaintiff's assertion in paragraph 6 of his affidavit that the defendants jointly demolished the house he was constructing and took away the building materials (paragraph 8) is not denied. It is also not contested that the defendants started interfering with the applicant's plot sometime in August 2016 as set out in paragraph 11 of the supporting affidavit. To the extent that the interferences pleaded have not been denied, I am satisfied that the applicant has shown that he has a prima facie case with a probability of success and on this account only he is entitled to the orders sought.

7. The 5<sup>th</sup> defendant's submission that a blanket injunctive order will prejudice her is unfounded as the orders sought are specific to the plot located in Centi Kumi area measuring 72 by 50 feet. An order issued to preserve the said plot cannot be said to be blanket. The applicant is accusing the 5<sup>th</sup> Respondent with encroaching on this plot which fact has also not been denied. Whether the sale agreement does or does not comply with the provisions of section 19 of the Stamp Duty Act is not in issue that can be determined in the absence of a preliminary objection filed nor did the 5<sup>th</sup> Respondent submit that it took away the applicant's right over this land. Further the 5<sup>th</sup> Respondent is not a party to the said agreement.

8. In conclusion, I find no grounds raised by the Respondents why the orders should not be granted. In the result I allow the application in terms of prayer 3 or (c) of the motion with costs to the applicant.

**Dated, signed & delivered at Mombasa this 24<sup>th</sup> November 2017.**

**A. OMOLLO**

**JUDGE**