



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 293 OF 2016**

**WILLIAM OBONYO (Suing his behalf of the Estate of  
the late Gilbert Obonyo Nyagol).....PLAINTIFF**

**-VERSUS-**

**PUBLIC TRUSTEE.....1<sup>ST</sup> DEFENDANT**

**LORNA ENOS MITO .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 13<sup>th</sup> October, 2016. It is brought under Section 1A, 1B, 3A, 63(e) of the Civil Procedure Act, Order 40 Rule 1, Order 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. It seeks orders;
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, their agents, servants and/or any other person acting on their instructions from transferring, disposing, interfering and/or meddling with all that is Plot Numbers 3/8 and 5/8 Chaani until the hearing of the suit.
  - d. That costs of this application be provided for.
3. The grounds are on the face of the application and are listed as paragraphs 1-7. I do not need to reproduce them here.
4. The application is supported by the affidavit of William Obonyo, the Plaintiff/Applicant herein sworn on the 13<sup>th</sup> October, 2016.
5. The application is opposed. There is a replying affidavit sworn by Jafred Erima Maliro, the Assistant Public Trustee sworn on the 10<sup>th</sup> February, 2017.
6. On the 7<sup>th</sup> March, 2017 it was agreed that the application be disposed by way of written submissions.
7. On 4<sup>th</sup> April, 2017 Mr. Maliro for the Defendants/Respondents informed the court that they had filed submissions. A date was taken for highlighting.
8. On 27<sup>th</sup> April, 2017 a ruling date was taken. However, when I retired to write the ruling, I realized the submissions were not on record. The Advocates were notified by a letter dated 16<sup>th</sup> October, 2017. The submissions were then filed.
9. It is the Plaintiff's case that the deceased Gilbert Obonyo Nyagol is the owner of the suit properties.  
They have attached a letter of offer dated 15<sup>th</sup> April, 1985 by the Housing and Development Department as annexure "WO2." Annexure

“WO2” also contains various letters from the now defunct Municipal Council of Mombasa to the deceased.

10. That later, the deceased due to his advancing age donated a power of attorney in favour of his eldest son Enos Mito Obonyo to transact on his behalf in respect of the suit property and to hold it in trust on behalf of the deceased and all other dependants.

Later on the said Enos Mito Obonyo passed on and the Plaintiff got a letter from the 1<sup>st</sup> Defendant purporting to take over the suit properties.

11. It is the Defendants case that this application lacks merit, is misplaced, made in bad faith and a calculated move by the Applicant to deny the 2<sup>nd</sup> Defendant from benefiting from the estate of her late father. They annexed a copy of a letter of confirmation of ownership from the county government of Mombasa. The letter confirms the two plots are in arrears of rates and rent that the 1<sup>st</sup> Defendant/Respondent is struggling to clear the arrears.

12. That the Plaintiff and the estate of Gilbert Obonyo Nyagol (deceased) has no right to the subject property capable of being protected and that the Plaintiff will not suffer irreparable injury if the injunction is not granted.

The Plaintiff’s case has not met the conditions set out in the case of *Giella –versus- Cassman Brown And Copmany Limited (1973) EA 358.*

13. The Defendants also relied on the case of *Punda Milia Cooperative Society –versus- Savings And Loan (K) Limited (2009) eKLR*

*Nguruman Limited –versus- Jan Bonde Nielsen And 2 Others (2014) eKLR*

That the Plaintiff has failed to establish a prima facie case with a probability of success as neither he nor the deceased Gilbert Obonyo Nyagol is the registered owner of the suit plots.

Further that the Plaintiff has failed to demonstrate what irreparable injury he will suffer if the injunctive orders are not granted.

That the balance of convenience tilts in favour of the Defendants who are in possession of the suit premises and managing the same.

14. That the issues raised by the Plaintiff can only be determined in a full hearing. The 1<sup>st</sup> Defendant ought to be allowed to continue collecting rent.

That the 2<sup>nd</sup> Defendant is wrongly sued as she has no legal capacity to be sued as he is neither the registered owner of the suit Plot nor is she the administrator of the estate of Enos Mito Obonyo. They pray that the Plaintiff’s suit and the application be dismissed with costs.

15. I have considered the pleadings, the application, the supporting affidavit and the annexures.

I have also considered the replying affidavit, the written submissions and the authorities cited.

The issue for determination are:

- i. Whether or not the Plaintiff’s case has met the threshold for grant of temporary injunction.
- ii. Who should bear costs?

16. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were set down in the precedent setting case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 358.*

They are as follows;

First, the application must show that he has a prima facie case with a probability of success at the trial

Secondly, it should be shown that the Applicant is likely to suffer an injury which cannot be adequately compensated by damages if the injunction is not granted.

Thirdly, if there is doubt the court should act in a balance of convenience.

17. It is the Plaintiff’s case that the deceased Gilbert Obonyo Nyagol is the owner of the suit properties.

By a letter dated 15<sup>th</sup> April, 1985 marked “WO2” addressed to;

**“Gilbert Obonyo Nyagol**

**C/o Enos Mito Obonyo**

**P. O Box 90104**

**MOMBASA**

**Letter of offer**

**Plot Allocation No 3/8/ Second Urban World Bank Project Mombasa**

**This is to confirm that the date of which this offer is deemed to have taken effect is 1<sup>st</sup> January, 1985 and the grace period of 38 months will end on the 31<sup>st</sup> December, 1987.**

**You are hereby authorized to commence the developments of your above mentioned plot as described in our letters of offers .....**

18. There are two other letters annexed to the Plaintiff's application in respect to the said plot.

There is also annexed an affidavit sworn by Gilber Obonyo Nyagol on the 24<sup>th</sup> June, 1986. His intention was for Enos Mito Obonyo to be allocated the house and to develop it on his behalf and that of other Defendants.

19. The Defendants on their part rely on a copy of the letter of confirmation of ownership from the county government of Mombasa. It is mentioned in paragraph 2 of the affidavit sworn by Jafred Erima Maliro, the Public Trustee on the 10<sup>th</sup> February, 2017.

The said letter is not annexed. The court has no opportunity of seeing the details. The Defendants filed a memorandum of appearance on 16<sup>th</sup> February, 2017.

They have not filed a statement of defence.

It is not clear how Enos Mito Obonyo acquired the property.

20. I find that the Plaintiff has established a prima facie case with a probability of success.

In the case of

**Mrao Limited –versus- First American Bank Limited And 2 Others (2013) KLR 125**, the Court of Appeal 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.”**

21. The Plaintiff/Applicant is the son of the late Gilbert Obonyo Nyagol.

Annexure “WO1” shows that he is one of the beneficiaries of the estate of the late Gilbert Obonyo Nyagol.

I find that he has shown how the property was acquired by his late father.

22. I find that he has established a prima facie case with a probability of success at the trial.

He has also demonstrated that him and the other beneficiaries stand to suffer irreparably if these orders are not granted. He risks not getting any money to pay fees for the other beneficiaries of the late Gilbert Obonyo Nyagol.

23. The balance of convenience tilts in favour of the Plaintiff who has been left with the responsibility of taking care of other beneficiaries of the late Gilbert Obonyo Nyagol.

I notice that he has not sought letters of administration intestate with respect of the estate of his late father. He is advised to move with speed and regularize this position.

In the meantime, I find that it is necessary in the interest of justice to preserve the estate of the deceased Gilbert Obonyo Nyagol.

24. I therefore find that this is a fit case to grant the orders sought. I find merit in this application and I grant the orders sought namely;

i. That a temporary injunction is hereby issued restraining the Defendants by themselves, their agents, servants, and/or any other person acting on their instructions from trespassing, disposing, interfering and/or meddling with all that is plot Numbers 3/8 and 5/8 Chaani until the hearing and determination of this suit.

ii. That costs of this application be in the cause.

**It is so ordered.**

**Ruling Dated, Signed and Delivered at *Mombasa* on the 23<sup>rd</sup> day of *November* 2017.**

**L. KOMINGOI**

**JUDGE**

**23/11/2017**