



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 43 OF 2017**

**MARGRET ERICK OMOLO.....PLAINTIFF/APPLICANT**

**VERSUS**

**1. RICHARD TOBY RUSTEAU**

**2. MARY DUDU NELSON.....DEFENDANTS/RESPONDENTS**

**RULING**

1. This is the Notice of Motion dated 16<sup>th</sup> February 2017. It is brought under Order 40 rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 63(e) 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya.

2. It seeks orders;

a) Spent

b) Spent

c) That pending the hearing of this suit, this Honourable Court be pleased to grant temporary injunction restraining the 2<sup>nd</sup> Defendant/Respondent, her servants or agents from trespassing, constructing or continuing to construct, developing or in any other manner dealing with the suit premises known as "Plot Mgumopatsa/Mazeras/21."

d) That costs of this application be provided for.

3. The grounds are on the face of the application and are as follows;

i. That the 2<sup>nd</sup> Defendant/Respondent has commenced construction of a residential house on "Plot No Mgumopatsa/Mazeras/21" the suit premises without any colour of right or justification.

ii. That there is danger that the 2<sup>nd</sup> Defendant/Respondent will start laying claim to the suit property or a portion thereof.

iii. That unless the orders sought are granted the Plaintiff/Applicant will suffer irreparable loss.

iv. That the 2<sup>nd</sup> Defendant/Respondent has ignored demand and notice.

4. The application is supported by the affidavit of Margaret Erick Omolo, the Plaintiff/Applicant herein sworn on the 15/1/2017.

5. The application is opposed. There is a replying affidavit sworn by Richard Toby Rusteau, the 1<sup>st</sup> Defendant/Respondent, sworn on the 21/3/2017.

6. On the 12/4/2017 it was agreed between the parties that the application be canvassed by way of filing written submissions. Submissions were filed and a date for ruling was given.

7. It is the Plaintiff's case that she purchased the suit property jointly within her late brother Andrea Maduri in the year 1965.

Since then she has lived on the said property. Both parents were buried there. Since she had no children, she consented to the property to be registered in the names of her brother and the 1<sup>st</sup> Defendant in the understanding that the two would hold it in trust for her.

That in 2006 the suit property was registered in the names of Andrea Maduri and the 1<sup>st</sup> Defendant.

8. Further that the 1<sup>st</sup> Defendant has authorized the 2<sup>nd</sup> Defendant to put up structures on the said property in total disregard of the interests of the Plaintiff/Applicant and in breach of the trust for which he holds the property. That it is the intention of the Defendants to push the Plaintiff out of the suit property.

The Plaintiff/Applicant will suffer irreparable loss if these orders are not granted as permanent structures would be erected by the 2<sup>nd</sup> Defendant. That the Plaintiff/Applicant has demonstrated a prima facie case with a probability of success based on the trust for which the 1<sup>st</sup> Defendant held the property. He prays that the application be allowed.

9. It is the Defendant's case that the Plaintiff has failed to establish a prima facie case with a probability of success at the trial.

That she failed to make full and frank disclosure of all relevant facts surrounding this matter. They have relied on the case of;

a) **Paul Gitonga Wanjau –versus- Gathuti Tea Factory Company Limited And 2 Others, Nyeri HCCC No 28 of 2015 which quoted with approval the case of Mrao Limited –versus- First American Bank of Kenya And 2 others (2013) KLR 125.**

b) **Kenleb Cons Limited -versus- New Gatitu Service Station And Another.**

10. That the Plaintiff has no legal or equitable right which requires protection by injunction.

Further if any damage will be occasioned to the Plaintiff, she can be compensated by an award of damages.

That the balance of convenience tilts in favour of maintaining the status quo for an injunction will bar the Defendants from accessing their homes.

They pray that the application be dismissed with costs.

11. I have considered the Notice of Motion dated 16/2/2017 and the supporting affidavit together with the annexures. I have considered the replying affidavit and the annexures. I have also considered the submissions of both counsels and the authorities cited.

The issues for determination are;

i) Whether the Plaintiff/Applicant's case has met the threshold for grant of temporary injunctions.

ii) Who should bear costs?

12. It is 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.**

13. In the case of **Mrao Limited –versus- First American Bank Limited And 2 Others (2013) eKLR** the Court of Appeal gave a definition of what amount to a prima facie case.

Has the Plaintiff herein made out a prima facie case with a probability of success at the trial?

The Plaintiff/Applicant states that he purchased the suit property jointly with her late brother Andrea Maduri in 1965. She consented to the property to be registered in the name of her brother and the 1<sup>st</sup> Defendant on the understanding that the two would hold it in trust for her.

14. It is not in doubt that the suit property is registered in the names of Andrea Maduri and Richard Toby Rusteau (1<sup>st</sup> Defendant).

The 1<sup>st</sup> Defendant has authorized the 2<sup>nd</sup> Defendant to put up structures on the suit property in total disregard of the Plaintiff/Applicants interests.

15. The 1<sup>st</sup> Defendant on the other hand contends that the Plaintiff has no legal or equitable right to the suit property.

He claims that the suit property was a gift from his mother. He did not attach any supporting documents. He relied on the Mariakani SRMCC No 439 of 2015.

I notice that the Plaintiff/Applicant is not a party to the above suit.

The Defendant admits the Plaintiff/Applicant has erected a house on the suit property.

16. The Plaintiff/Applicant seeks injunctive orders against the 2<sup>nd</sup> Defendant/Respondent. The 2<sup>nd</sup> Defendant/Respondent is not the registered owner of the suit property.

It is not clear what her interest on the suit property is. The 1<sup>st</sup> Defendant admits he is the one who authorized the 2<sup>nd</sup> Defendant to put up a structure on the suit property.

17. I find that the Plaintiff/Applicant has established a prima facie case with a probability of success at the trial. She will be able to demonstrate to the court how the 1<sup>st</sup> Defendant came to hold the suit property in trust for her. These are issues which will be determined at the trial.

As the 2<sup>nd</sup> Defendant appears not to have any recognized claim on the suit property. Section 28 of the Land Registration Act 2012 provides under Subsection (b) trust as an overriding interest. The Plaintiff/Applicants contention is that the 1<sup>st</sup> Defendant holds the land in trust for her.

I find that the best way to deal with the situation herein is to issue injunction orders.

18. The Plaintiff has also demonstrated that she will suffer irreparably if the 2<sup>nd</sup> Defendant is allowed to put up the structures.

The Plaintiff may end up losing her suit property.

I have considered all the facts and I find that this is a fit case to issue injunction orders.

19. I find merit in this application and I grant the orders sought namely;

a) That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the 2<sup>nd</sup> Defendant/Respondent, her servants or agents from trespassing, constructing or continuing to construct, developing in in any other manner dealing with the suit premises known as Plot Mgumopatsa/Mazeras/21.

b) Costs of the application to abide the outcome of the main suit.

**It is so ordered.**

**Dated, signed and delivered at Mombasa on the 2<sup>nd</sup> day of November 2017.**

**L. KOMINGOI**

**JUDGE**

**2/11/2017**