



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 36 OF 2015**

**FRANCIS CHABARI NYAGA .....PLAINTIFF/APPLICANT**

**VERSUS**

**PINA PANKAJ NIMAVAT..... 1ST DEFENDANT/RESPONDENT**

**SHABIR MOHAMED HAJI.....2ND DEFENDANT/RESPONDENT**

**LAND REGISTRAR, KWALE.....3RD DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL..... 4TH DEFENDANT/RESPONDENT**

**RULING**

1. In a notice of motion dated 3.3.15 brought by the Plaintiff/Applicant under Order 40 and 51 of the Civil Procedure Rules and the sections referred sought the following orders;

1 .....

2 .....

3 The 1st Defendant/Respondent acting by himself/herself or his/her agents, servants and or employees be temporarily restrained from encroaching into, trespassing, alienating, occupying, erecting buildings and/or other structures, or in any way dealing with or interfering with LR KWALE/DIANI COMPLEX/914 measuring 0.27 HA, at Diani, Kwale County pending the hearing and determination of the suit “hereafter the suit property”.

4 That the 3rd and 4th respondents be restrained from altering and/or opening any Green card in respect of the suit property in the name of the 1st defendant/respondent and/or his/her nominees pending the hearing and determination of the suit herein”

5 The officer Commanding station (OCS) Diani Police Station do enforce compliance of this Court's order.

2. The application is supported by the grounds on the face of it and the affidavit of the applicant. The applicant depose that he purchased this property from the 2nd defendant. He followed due process and go the tittle deed in his name. The applicant commenced drilling a bore hole and pit latrine upon which the 1st respondent asked his workers to leave the suit plot. He also heard that the 1st defendant visited the offices of the 3rd defendant who then threatened to alter records. He

is apprehensive if the orders are not granted he will suffer loss and damage as she has invested heavily on the suit property. He also deponed that his right to quite possession has been impended. He urged the Court to grant the orders sought.

3. The application is opposed by the 1st, 3rd and 4th defendants. The 3rd and 4th defendants/respondents filed grounds of opposition while the 1st respondent filed a replying affidavit. The 1st respondent deposes the suit land belongs to her by her husband who purchased the suit property from the first registered owner in 1997. She has certificates of official searches, transfer forms and land control board consents showing how the property passed on to her and her co-registered owner. She has alleged the plaintiffs' documents are questionable and deponed that the plaintiff has not met the threshold to merit him receive the orders sought.
4. The advocates have filed their written submissions. The applicant in his submission gave a summary of the facts of his case. He submitted that he has approached the 3rd defendant to explain the circumstances of this case but the 3rd respondent has ignored him. He believes he has satisfied the principles set for granting injunctions. He cited the case of *Mrao Vs First American Bank Ltd. & 2 Others (2003) eKLR*. The applicant quoted section 26 of the land Registration Act that a certificate of title shall be taken as prima facie evidence that the person named there is the absolute and indepeasible owner. He further relied on the case of *Marion Leah Nyambura Vs Ali Jamaa (2014) eKLR* where the injuncti on was granted on the basis of balance of convenience.
5. The 3rd and 4th defendants relied on grounds as filed. The 1st defendant on her part submitted on the facts noting that the L.C.B consent was obtained on 18th September, 2013 two weeks before the sale agreement was drawn. She submitted the applicant has not established a prima facie case as the applicant's documents are objects of fraud as they have two many inconsistencies. In support of her submission, they rely on the case of *Kenya Commercial Finance Vs Afraha Education Society (2001) 1 EA 86*. On damages, 1st defendant submits the applicant has remedy as against the 2nd defendant with whom he entered into a sale agreement. She also contends the balance of inconvenience tilts in her favour. Therefore the 1st defendant urged the Court not to grant the orders sought and dismiss the application with costs.
6. The pleadings reveal that the suit land Kwale/Diani Complex/914 has two titles. One title is held by the 1st respondent that was issued to her husband on 4th August, 1997 and later transferred to 1st respondent on 4th November, 2001. The 2nd title is held by the applicant and issued on 18th October, 2013. The applicant deposed that he acquired his title from the 2nd defendant. The 2nd defendant has not sworn any affidavit. The record does not reveal whether he was served with the pleadings herein. The Court at this stage is thus denied an opportunity of knowing how the 2nd defendant acquired the suit title which he later passed on to the applicant. The Court therefore proceeds on the applicant's claim of purchaser for value without notice.
7. The applicant in a bid to prove he has a prima facie case annexed a copy of title issued on 6th September, 2006 to the 2nd defendant, certificate of official search dated 17th September, 2013, sale agreement dated 30th September, 2013, transfer form executed on 30th September, 2013, application for L.C.B. consent dated 18th September, 2013 and lastly a copy of the applicant's title issued on 18th October, 2013. In short the applicant submits that he acquired the title in a properly legally laid down process. The 1st defendant has also annexed same documents except issued earlier. The 1st respondent deposed that she purchased from the first registered owner and annexed copy of records (green card) and correspondence from the County government in terms of rates record. The 1st respondent went further to allege there are inconsistencies in the applicants' documents e.g. consent is dated earlier than the sale agreement. Secondly there is no receipt annexed as evidence payment of duty.
8. The applicant's complain is that the 1st defendant is interfering with his peaceful use of the land while the 3rd respondent was threatening to alter the records to remove his name. There is no transactions as relates to the title to the suit property between the applicant and the 1st respondent. There is no indication of any questions raised by the applicant in regard to documents put forth by

the 1st respondent. The equitable doctrine of ***“the first in time prevails”*** finds application in this case. However if applied wholly, it will amount to condemning the applicant unheard. Similarly if injunctive orders are issued against the 1st defendant, it amounts to this Court passing a decision on which of the titles is the genuine one between the two titles. In the circumstances, the only prayer the court can grant is prayer 4 of the application. I shall go further to issue an order directing the parties herein not to carry out any development and or any dealing on this land pending hearing and determination of the suit.

**Ruling signed, dated and delivered at Mombasa this 22nd day of July, 2015.**

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**A. OMOLLO**

**JUDGE**

**In the presence of:-**

Learned Counsel for the Plaintiff .....

Learned Counsel for the Defendants.....

Court Assistant Jescah