



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 34 OF 2017

IN THE MATTER OF: AN APPLICATION BY SWAFIA SWALEH MAHDI AND FATMA SWALEH MAHDI FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: PLOT NO. 817/XVII/MI

AND

IN THE MATTER OF: PART V OF THE PHYSICAL PLANNING ACT CAP 286

AND

IN THE MATTER OF: ORDER 53 RULE 1(1) (2) & (4) OF THE CIVIL PROCEDURE RULES, 2010, AND SECTION 8 OF THE LAW REFORM ACT CAP 26

BETWEEN

1. SWAFIA SWALEH MAHDI

2. FATMA SWALEH MAHDI.....APPLICANTS

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

AND

SALMA SWALEH MAHDI.....INTERESTED PARTY

RULING OF THE COURT

The Application

1. By a Notice of Motion dated 22nd June, 2017 the Ex parte Applicants pray for orders that:

(1) This Honourable court be pleased to issue an order of mandamus compelling the County Government of Mombasa to demolish the illegal structure constructed by the Interested Party as an extension to the flat on Plot No. 817/XVII/MI.

(2) That the costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit jointly sworn by the Ex parte Applicants on 16th June, 2017.

3. The Ex parte Applicants' case is that the Respondent has refused and/or declined to perform its statutory obligation to demolish the illegal

structure made by the Interested Party as an extension to the flat on Plot No. 817/XVII/MI even though it had taken cognizance of the illegality of the construction of the same and issued notices of demolition to that effect, and in those notices threatened to demolish the same by itself if the same is not done as notified. That the said extension was illegally and poorly done, without an architectural plan at all, causing the same to completely block the drainage meant for among others, storm water, thereby rendering the subject flat inhabitable and inaccessible, posing serious risk of health hazard, and if the situation is left as it is now, the subject flat, risk condemnation by the Respondent itself. The Applicants states that Plot No. 817/XVII/MI together with the subject flat, standing therein, is part of the estate of Swaleh Mahdi Swaleh which the Ex parte Applicants administered, and the said confirmation was done without their authority and/or consent, and also without considering the interest of other three beneficiaries who shared the same, and their respective tenants. The ex parte Applicants avers that the Respondent has statutory obligation to control development within its jurisdiction, which power and obligation include demolition of buildings which are not in conformity with the Physical Planning Act, and it is their prayer that this court does compel the Respondent by way of mandamus, to demolish, the subject illegal extension made on the flat aforesaid. The Applicants aver that mandamus is the only effective remedy available to them.

Submissions

4. Mr. Odongo, counsel for the Ex parte Applicants submitted that the Applicants are the administrators of the estate of the late Swaleh Mahdi Swaleh as per copy of Certificate of Confirmation of Grant. The said Swaleh Mahdi Swaleh was their father, and was survived by the eight (8) beneficiaries shown on the said Certificate of Confirmation namely:

- (1) Karama Bint Faraj
- (2) Atiya Bint Abdalla
- (3) Swafiya Swaleh Mahdi Swaleh
- (4) Fatma Swaleh Mahdi Swaleh
- (5) Shekha Swaleh Mahdi Swaleh
- (6) Suluha Swaleh Mahdi Swaleh
- (7) Salma Swaleh Mahdi Swaleh
- (8) Aziza Swaleh Mahdi Swaleh

5. The deceased left several property one being Plot No. 817/XVII/MI which plot is fully developed with a flat comprising of four (4) units of three (3) bedrooms each. When the estate was being distributed, this flat was given to Swafia Swaleh Mahdi, Shekha Swaleh Mahdi, Aziza Mahdi and Salma Swaleh Mahdi who took a flat each. Salma Swaleh Mahdi the Interested Party herein took one flat on the ground floor and their sister Salma occupied hers while the three of them rented theirs. Sometime in the year 2015 The Applicants received complaints from the tenants that their sister Salma was constructing an extension on the building which construction was going to block the storm water drainage. This construction was done in haste and hurried manner, and was finalized before the situation could be rectified. The matter was reported to the office of the Director of Physical Planning and Architecture, and also to the office of the Chief Building Inspector, Mombasa County. The said officers promised to act on it as per the copy of complaint letter dated 4th November, 2015. By his letter dated 7th March, 2016 to Salma Swaleh the Interested Party herein the Chief Building Inspector gave her 30 days from the date of receipt to demolish the subject illegal structure, failure of which the County Government of Mombasa (the Respondent) was to move in and do it itself. What followed later is that the said Salma Swaleh was charged before the Municipal Court for failure to comply with the aforesaid notice. During the prosecution of the said criminal case, Salma (the Interested Party) came up with an approved Building Plan, which is apparent on the face of it that it was prepared and submitted for approval long after the construction of the subject structure, as the same was approved on 15th August, 2016. However, that plan was purportedly made by their father who had died over 25 years ago. The Applicants then notified the Director of Physical Planning and Architecture, Mombasa County of the fact that the said development plan was a forgery since their father, Swaleh Mahdi Swaleh who purportedly made the application had died, and further that it was approved after the structure complained of had been constructed. The director caused the same to be cancelled. Unfortunately, the entry made in the document of cancellation were of different property and of a different development plan. This turn of events forced the Applicants to write to the Chief Officer, Department of Land, Planning & Housing, Mombasa County, vide letter dated 21st February, 2017 to express their position in writing. Thereafter, by a notice taking effect from 1st March, 2017 the Director of Physical Planning and Architecture, Mombasa County went ahead and cancelled the said development plan. After that the Respondent decided to remain silent about the whole issue, and moved on as if there were no complaint about the subject structure which silence forced the Applicants to seek an intervention from this court. The Applicants believe that the Respondent has statutory power and obligation to control development within its jurisdiction which power and obligation include demolition of buildings which are not in conformity with the Physical Planning Act, and it is their prayer that this court does compel the Respondent by way of mandamus, to demolish the subject illegal extension made on the flat aforesaid.

6. The application was not opposed, despite the same being served on the Respondent and on the Interested Party and pursuant to Affidavit of Service sworn by David Wachira on 27th September, 2017.

The Determination

7. As the application was not opposed, the duty of this court is merely to find out if the Applicants have made a case on a balance of probability.

8. Pursuant to the foregoing, I am persuaded that the Ex parte Applicants have made a case for the intervention of this court. Besides, the orders sought are merited and the Respondent has a duty to regulate buildings in the city of Mombasa.

9. In the upshot the motion is allowed as follows:

(1) An order of mandamus is hereby issued compelling the County Government of Mombasa, and its director of Physical Planning to demolish the illegal structure constructed by the Interested Party as an extension to the flat on Plot No. 817/XVII/MI.

(2) The costs of this application shall be for the Ex parte Applicants.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 16th day of April, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Matheka holding brief Odongo for Ex parte Applicant

Mr. Kaunda Court Assistant