



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 38 OF 2015

FAKHURUDDIN AHMEDALI CHAKERA & OTHERS.....PLAINTIFFS

-VERSUS-

COUNTY GOVERNMENT OF MSA.....DEFENDANT

RULING

1. The plaintiffs filed their suit against the defendant on 5th March 2015.

Together with the suit, they filed an application under Order 40 of the Civil Procedure Rules seeking the following orders ;

1. Spent

2. Spent

3. An injunction be issued restraining the defendant by itself, servants or agents from entering, demolishing, evicting or in any other way interfering with the plaintiffs structures, quite enjoyment or possession of the suit property known as sub division No 140 Mombasa Block XI/1066 pending the hearing and determination of this suit.

4. Costs of the application be provided for.

2. The application is supported by several grounds listed on the face of it and the affidavit sworn by Fakhruddin Ahmedali Chakera, the 1st plaintiff/Applicant. The plaintiffs state that they are registered as owners in common of the suit land and are in possession thereof. The applicants states further that on 29.1.15 the defendant or its employees threatened to demolish the structures and evict the tenants therein which threats are unlawful.

3. The applicants confirmed that they have not been served with any notice of wrongdoing and if the demolition is carried out, they will suffer irreparable loss whose particulars they have set out in paragraph 11 of the affidavit in support of the motion. They urged the Court to allow the orders sought.

4. The application is opposed by the respondent vide a replying affidavit sworn by Lucas Oruko the chief building inspector of the respondent. The respondent deposed that he had requested the applicants'

tenants numbering 45 to open up the access road. It annexed a “location plan” as 'L0.2' showing access road encroached upon by the notified individuals. According to the respondent, the illegal structures were demolished so that as at May 2015, there was no structure on the public access road. The Respondent deposed that it does not have any claim to the suit property.

5. Further, the Respondent denied any attempt to demolish any legally constructed structures on the suit parcel. It however admitted that if there are any structures blocking the public access road then they are entitled to demolish at the costs of the persons notified. It also contended that the orders sought are not available to the applicants as no injury was suffered as a result of removal of the illegal structures. He urged the Court to dismiss the motion.

6. The applicants mention in their submissions that they had filed a supplementary affidavit which I did not find on record. I have considered the rival submissions filed by both parties. There is no dispute that the applicants are registered owners of the suit parcel. The applicants' claim is based on information received from one of his tenants who has sworn an affidavit.

7. The Respondents on their part states that they were only concerned with clearing structures encroaching on the public access road and they issued notices to the persons whose structures had encroached on the road. The notices issued were annexed to the replying affidavit. The applicant submits none of the persons issued with the notices are his tenants. The issue for determination is therefore whether there is a prima facie case established for the temporary orders of injunction earlier issued to be confirmed.

8. In the affidavit sworn by Eric Godwin Mwadime the plaintiffs' tenant, he deposed that he runs a business in the plaintiffs premises. He deposed that on 28.1.2015 there was a fire which burnt down part of his structures and the defendants' fire brigade helped to put out. Further that in the process of putting out the fire, one of the officers of the Respondent claimed the suit premises belonged to them. They came again on the 29.1.2015 in the company of agents from department of lands and informed him that the property belonged to the county government.

9. Mr Mwadime confirmed that the Respondent's officer ordered him and other tenants to remove all the property from the premises within 24 hours and on 30.1.2015, he saw bulldozers which flattened his store as well as the premises gate. It is on this information that the applicants sought the orders. In the plots given by the Respondent at paragraph 3 and 4 of the replying affidavit, the suit premises is not included. The Respondent deposed that all the structures that had encroached on the public access had been demolished as at May 2015.

10. Besides the store of Mr Mwadime none of the other tenants are mentioned to have had their structure demolished. The Respondent expressed no intention or plan in their replying affidavit to demolish any structures on the suit premises legally constructed. The applicants have also not expressed any objection to the Respondent's action of opening up public access road as authorised by its by – laws.

11. From the pleadings and the submissions rendered, I take the view that there is no visible threat against the applicants' peaceful and quiet possession of the suit premises posed by the Respondent. The Respondent has deposed on oath that it does not oppose the applicants claim to ownership of the suit premises save for the public access road. The applicants should not use their ownership of the premises to allow their tenants to encroach on the access road.

12. Consequently, I find this application does not meet the threshold set forth in the case of *Giella vs Cassman Brown* for granting injunction. The threat alleged if real was in respect to structures encroaching on the public access road and not on the suit premises. The defendants having removed the structures complained of and the applicants property not being affected by the said demolition I see no purpose the injunction is set to serve. The application is hereby disallowed with an order that each party to bear its respective costs.

Ruling dated and delivered in Mombasa this 12th February, 2016

A. OMOLLO

JUDGE