



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC NO. 78 OF 2015

IN THE MATTER OF: THE TAWHEED GIRLS SECONDARY SCHOOL

IN THE MATTER OF: THE CONTEMPT PROCEEDINGS

BETWEEN

1. ALI ABDALLA SALIM

2. ALI YISLAM ALI BASHAMAKH

3. MOHAMED SALIM

AHMED.....PLAINTIFFS

AND

1. ABUBAKAR MASOUD

2. MUNIR ABUBAKAR MASOUD (as Members of Tawheed Muslim Association).....DEFENDANTS

AND

1. THE DIRECTOR OF SURVEY

2. LANDS COMMISSIONER.....THIRD PARTIES

RULING

Introduction

1. On 11th December, 2014, Chitembwe J allowed the Plaintiff's Application dated 4th March, 2014.
2. While granting the Application for injunction, the Judge held as follows:-

“The current status seems to be that the Applicants are the ones running the school. I will

grant the Application so that the running of the school is not interfered with.....”

3. The 2nd Defendant has now filed an Application dated 14th March, 2016 in which he is seeking to cite the 2nd Plaintiff for contempt of court and for the sentencing of the 2nd Plaintiff for contempt of court.

4. The 2nd Defendant is also seeking for an order discharging, varying or setting aside the temporary injunction that was granted on 11th December, 2014.

The 2nd Defendant's/Applicant's case:

5. The 2nd Defendant has deponed that the High Court granted to the Plaintiffs a qualified temporary injunction; that the 2nd Plaintiff authorized his partner to make false statements of truth on oath and that as a result of the false statements of truth and disclosure statements, the High Court inadvertently erred and made the wrong decision by granting the Application for injunction.

6. The 2nd Defendant has further deponed that making false statements of truth or disclosure statements to court is contempt of court under part 81.17 (a) and (b) of the Civil Procedure (Amendment No. 2) Rules 2012 of UK.

7. The 2nd Defendant lastly deponed that in breach and violation of the letter and spirit of the temporary injunction, the said Mr. Ali Yislam went ahead and cut down a decade's old sentimental mango tree contrary to the environmental, social and cultural values and principles; that the 2nd Plaintiff has built a permanent administration office in the disputed school and that the 2nd Plaintiff has gone beyond his allowed limit under the implied terms of the Temporary injunction.

The 2nd Plaintiff's/Respondent's case:

8. The 2nd Plaintiff deponed that he has not contravened any order of this court; that the injunctive order that is in place is against the Respondent and that he has not made any false statements on oath.

9. According to the 2nd Plaintiff, the 2nd Defendant is playing judge, jury and executioner at the same time and that the issues that have been raised are before the court for determination.

10. It is the 2nd Plaintiff's deposition that it is the Board of the School which made the decision to chop off the mango tree because it was almost collapsing.

11. The 2nd Plaintiff finally deponed that no grounds have been set forth to warrant the review of the injunctive orders that are in place and that the 2nd Respondent has been filling unwarranted applications to scuttle the expeditious hearing of this matter.

The 2nd Defendant's/Applicant's Supplementary Affidavit:

12. The 2nd Defendant filed a Supplementary Affidavit in which he deponed that the 2nd Plaintiff's advocate wrote a letter dated 10th March, 2014 notifying four tenants of the Defendants' Association to vacate the house of the Defendants which are part of the disputed suit property in breach of the status quo orders that were issued on 27th February, 2014.

Submissions:

13. The 2nd Defendant/Applicant submitted that on 27th February, 2014, the court granted an order of status quo; that the school was to be run by the headmistress pending the hearing of the suit and that one month later, the Plaintiffs' advocate did a letter to the his tenants ordering them to vacate the suit

property. This, according to the 2nd Defendant, was an affront to the status quo order.

14. The 2nd Defendant submitted that although the Plaintiffs were ordered to serve him with the licence of the school, they have not done so.

15. The 2nd Defendant further submitted that the mango tree that was cut down on the 2nd Plaintiff's instructions had sentimental value; that the cutting down of the mango tree needed NEMA's permission and a permit from Kenya Forest Service which was never obtained and that being an economic crop, a mango tree feeds people during famine.

16. The 2nd Defendant submitted that a mango tree can never be attacked by termites as alleged by the Plaintiffs.

17. The 2nd Defendant/Applicant submitted that the Plaintiffs have put up a new building without the permission of the court; that the injunction that was granted by the court did not give the Plaintiffs a free hand to deal with the property as they wished and that in any event the said injunction has since lapsed.

The Plaintiffs'/Respondents' submissions:

18. The Plaintiffs' advocate submitted that the issues before the court are in respect of the ownership of the suit property and the management of the school that is standing on the land.

19. Counsel submitted that the Plaintiffs have filed the documents that the 2nd Defendant is complaining about; that if the cutting down of the mango tree was done contrary to the law, an appropriate report should be made to the concerned authorities and that the issue about the ownership of the mango trees is not before the court.

20. The Plaintiffs' advocate submitted that his clients were allowed to run and manage the school; that management entails putting up shelter and cutting down of a tree if it poses any danger to the students and that the cutting down of the mango tree did not violate the order of the court.

21. The Plaintiffs' counsel submitted that the issue as to whether the 2nd Plaintiff gave false testimony on oath or the legality of the title document can only be dealt with at trial and that the Application should be dismissed.

Analysis and findings:

22. This matter has been partly heard by this court. Indeed, the Plaintiffs closed their case and the Defence case is ongoing.

23. The 2nd Defendant is seeking for the committal of the 2nd Plaintiff to jail and for the discharge or variation of the orders of injunction that were granted by the court on 11th December, 2014.

24. In summary, the 2nd Defendant is aggrieved that despite the status quo order that was made by the court on 27th February, 2014, the Plaintiffs advocate proceeded to order the Defendant's tenants out of the suit property by way of a letter dated 10th March, 2014; that the Plaintiffs have failed to produce the school's licence even after having been ordered to do so by the court and that the Plaintiffs have cut down an old mango tree and put up a new building on the suit property.

25. The 2nd Defendant's final complaint is that the 2nd Plaintiff is contemptuous of this court because he has given false testimony in the amended Affidavit sworn on 12th March, 2014.

26. In the Originating Summons that was filed by the Plaintiffs, the issues that were framed by the Plaintiffs for determination by the court are whether the Defendants, as members of Tawheed Muslim

Association have equitable rights and interests in Tawheed Girls Secondary School; whether the Plaintiffs are the legitimate trustees of the school and whether the Defendants should be restrained from interfering with the running and management of the school.

27. In the Amended Counter-claim , the Defendants have also raised issues which they want this court to determine.

28. The issues raised in the amended Counter-claim are whether the Plaintiffs registered a trust for the school by false misrepresentation; whether the Plaintiffs fraudulently applied for and obtained a fake Deed Plan for L.R. No.8604 and whether the Plaintiffs have printed or caused to be printed defamatory remarks against the Defendants.

29. On 11th December, 2014, the court allowed the Plaintiffs' Application dated 4th March, 2014 in which it restrained the Defendants from “interfering, obstructing, impeding and or otherwise tempering with the running and management of Tawheed Girls Secondary School pending the hearing and determination of the suit.”

30. The Plaintiffs were allowed by the court to run the school to the exclusion of the Defendants or their agents pending the hearing of the suit.

31. Although the 2nd Defendant has alleged in his Supplementary Affidavit that the Plaintiffs' advocate purported to evict his tenants from the suit property by way of a letter dated 10th March,2014, the 2nd Defendant did not prove that the said letter was in breach of the order of the court.

32. According to the letter dated 10th March,2014, the Plaintiffs advocate informed the four individuals to vacate the school staff quarters so as to allow school teachers to occupy the said houses.

33. By the time the said letter was done, there was an order of status quo that had been made by the court on 27th February, 2014 as follows:-

“Status quo be maintained so that no party interferes with the running of the school.”

34. There is no evidence that has been placed before me to show that the eviction of the four individuals who were occupying the houses interfered with the running of the school.

35. To the contrary, according to the letter, the houses were to be used by the teachers which in my view is in tandem with the smooth running of the school.

36. The 2nd Defendant has deponed that the failure by the Plaintiffs to supply him with a copy of the school's licence as ordered by the court is contemptuous.

37. The 2nd Defendant has however not denied that the said document forms part of the Plaintiffs' documents that are on record and were served on him.

38. In any event, if a party is supposed to produce a document during the discovery in support of his case and he fails to do so, the presumption that the court will make is that he does not have the document and his case may fail on that account. The court cannot punish such a party by imprisoning him as submitted by the 2nd Defendant.

39. The 2nd Defendant has submitted that the 2nd Plaintiff should be punished by this court for cutting down an old mango tree that was standing on the suit property.

40. The orders of this court allowed the Plaintiff to run and manage the school. The Plaintiffs were not restrained from cutting trees and doing anything that would change the nature of the suit property.

41. In the absence of a positive order restraining the Plaintiffs from cutting trees on the suit property or putting up permanent structures, and in view of the fact that the court allowed the Plaintiff to run and manage the school pending the hearing and determination of the suit, I am not satisfied that the Plaintiffs disobeyed the orders of the court by cutting down the mango tree or putting up buildings on the land in dispute.

42. The 2nd Defendant submitted that the 2nd Plaintiff is in contempt of court by giving false information.

43. According to the 2nd Defendant, it was on the basis of the false information that the court granted the injunctive order; that the 2nd Plaintiff is not a bona fide trustee of the school and that the Plaintiffs literally stole a property of the Defendants' Association and had it transferred into their trust.

44. The issue of whether the Plaintiffs are the bona fide trustees of Tawheed Girls Secondary School or not is supposed to be determined by the court after viva voce evidence has been tendered.

45. It is only the court that will determine, upon evaluation of the evidence on record, as to whether the school should be run and managed by the Plaintiffs or the Defendants.

46. Consequently, the court cannot determine at this stage the veracity of the 2nd Plaintiff's depositions because that will be holding "a trial within a trial" which is not permissible. The Defendants will have to close their case and allow the court to determine the issues that are being raised in the current application with finality.

47. It is for that reason that this court, having granted the Applicant an injunctive order pending the hearing and determination of the suit, that it cannot discharge or vary those orders until the suit is heard and determined. The reasons that the court gave while granting the injunctive orders are still valid.

48. For those reasons, I dismiss the 2nd Defendant's Application dated 14th March, 2016 with costs.

Dated, signed and delivered in Malindi this 27th day of **May**, 2016.

O. A. Angote

Judge