



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 276 OF 2015

IBRAHIM SALIM NYENYEAPPLICANT

-VERSUS-

MUSLIM EDUCATION & WELFARE ASSOCIATION.....1ST RESPONDENT

AWADH ALI SALIM.....2ND RESPONDENT

AWADH SALIM.....3RD RESPONDENT

SAID SALEH SAID.....4TH RESPONDENT

RULING

1. The application for determination is dated 27.10.2015 in which the applicant seeks the following orders ;

1. Spent

2. Spent

3. This Honourable Court be pleased to order that Mombasa Senior Resident Magistrate's Court Civil Number 2316 of 2012 ; Muslim Education & Welfare Association versus Wakfu of Madrasatul Hassaniya and Mombasa Senior Resident Magistrate's Civil Suit number 4694 of 2003; Awadh Ali Salim versus Salim Nyenye be and are hereby withdrawn from the Chief Magistrate's Court at Mombasa and transferred to the Environment and Land Court in Mombasa and consolidated with this Suit for further hearing and disposal and that all further proceedings in these two suits be and are hereby stayed pending further orders by this Court.

4. The Honourable Court does grant an injunction restraining the 1st Defendant/Respondent, its agents and/or servants or any other person acting under its authority from however interfering with the plaintiff's quiet and peaceful possession and occupation of MOMBASA/BLOCK/X/222 and/or in any way from selling, transferring, leasing, charging or in any other way creating any dispositions or third party rights or claims to this property pending the hearing and determination of this suit or alternatively, the *status quo* obtaining as at the time of filing this Suit be and is hereby maintained over the said Suit Land.

2. The application is supported by what are referred to as grounds. The grounds as listed basically amount to the adduction of evidence which is premature at this stage. The application is also supported by the affidavit deposed to by Ibrahim Salim Nyenye. Briefly Mr Nyenye deposes that the applicant was given L. R Nos Mombasa/Block XV/222 and 223 by the late Swaleh Nguru. That the 3rd and 4th Respondents illegally sold this land to the 2nd Respondent who in turn sold the same to the 1st Respondent.

3. The applicant has mentioned related suits over the same subject matter which he requests to be transferred to this Court and consolidated with this case. In ground 15, he stated that the interests of justice will be served by the maintenance of the current *status quo* over Block/XV/222. Some of the issues raised in the affidavit relates to matters that should be for determination in the main suit. For instance paragraph 44 and 45 of the affidavit as regards claim for adverse possession i.e the operation of the madrassa without permission of the respondents for a continuous period of over 12 years.

4. The application is opposed by all the Respondents who have each sworn an affidavit. The 1st Respondent through Abdul Wahab Ali deposed that the 1st Respondent is the legal owner of the suit property (Block XV/222) which the applicant has trespassed on. He deposed that a claim of adverse possession cannot arise where an occupier has been given permission to occupy the land. Further that there is no proof that this land belonged to a *wakf* unless it is proved at the trial and the applicants' case has no probability of succeeding.

5. The 1st Respondent in paragraph 11 of his replying affidavit states that he has no objection to the consolidation. The 1st Respondent deposes that the applicant has contravened the provisions of section 10 (2) of the *Wakf* Commissioners Act by failing to register the *Wakf* properly. He urged the Court to discharge the injunctive orders issued *exparte*.

6. The 2nd, 3rd and 4th Respondents have also deposed to similar facts as the 1st Respondent. The 2nd Respondent deposed that the applicant has not demonstrated how the suit properties became a *Wakf* or if they applied to the *Wakf* commissioners to have the two properties registered on a *Wakf*.

7. Both parties filed written submissions which they have supported with several case laws. In the applicant's submission, he has given the history of how the two parcels of land were acquired and for what purpose. Since the Respondents have no objection to the transfers of SRMCC No 4694 of 2003 and SRMCC 2316 of 2012 from the Chief Magistrate's Court to this Court and their consolidation with this suit case, I will not refer to the portion of submissions in that regard.

8. On merit of the prayer for injunctive orders, the applicant submit they have met the test set in the case of **Giella vs Cassman Brown (1973) E. A 358**. The applicant submits that Madrasatul Hassaniya and allied structures were erected on this land in 1962 and since then it has remained there being used for purposes of teaching and learning Islam as per the wishes of Swaleh Nguru. He continued that the 3rd and 4th Respondents misrepresented that the suit property was capable of inheritance omitting the fact that a *Wakf* had been created over the property. Therefore alienation leading to a transfer to any part of the land to any person was legally ineffective.

9. The applicant submits that in the eyes of the law and the general public would be great injustice and no amount of damages would be adequate to compensate. He relied on the case of **ELC 151 of 2014, K. A. N. U vs Patrick Gitau Mbugua & 2 Others (2014) eKLR**. The applicant submits that it is only fair that *status quo* that has prevailed on the suit property since 1962 be respected. He quoted **Mbuthia vs Jimba Credit Ltd (1988) KLRI**, the statement of the Court of Appeal "that in disputes concerning land, it is usual to grant an injunction to protect the parties profound interest whether as a residential property or as captured asset of production". He urged the Court to grant the orders sought.

10. The respondents submitted on non-compliance with *Wakf* Commissioners Act by the applicant particularly section 10. They accuse the applicant of being guilty of the offence under section 10 (4) and has thus come to Court with unclean hands. The respondents did not submit on the merits of the

injunctive orders being sought by the applicant.

11. From the pleadings filed, annexures thereto and submissions rendered, it is not doubted that the applicant is in possession of the suit property MOMBASA/BLOCK XV/222. This is confirmed by the suit filed against it vide SRMCC 2316 of 2012 where the 1st Respondent is seeking eviction orders in regard to this property. The respondents admit as much except they accused the applicant of trespass.

12. Further, the respondents have averred that the applicants have not demonstrated that the suit property constitutes a *Wakf*. In equal breath, the applicant has accused the respondents of acquiring the title of the property illegally. These are matters to be determined at the hearing of the main suit. For now the fact that the applicant was in possession before any of the respondents obtained title gives them an upper hand in terms of having a prima facie case with a probability of succeeding as well as the balance of convenience tilting in their favour.

13. For the above reason and on the basis that the respondents' documents did not oppose both the prayers for injunction and transfer of the lower Court cases, this application is allowed in terms of prayer 3 and 4. Each party to bear their respective costs of the application.

Ruling dated and delivered at Mombasa this 29th day of July 2016.

A. OMOLLO

JUDGE