

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 36 OF 2021

SULEIMAN MOHAMED SAID AL-BUSAIDY

SOUD SALIM SOUD ALI SALIM KHAFLAN (*Both suing as trustees of the estate of the late Mohamed Said Suleiman (Deceased)*).....**PLAINTIFF/APPLICANT**

VERSUS

KENYA PORTS AUTHORITY.....**DEFENDANT/RESPONDENT**

RULING

The application is dated 17th March 2021 and is brought under Article 40 and Article 59(2) (b) of Constitution of Kenya 2010, Section 66(c) of the Land Act No. 6 of 2012 and Order 36 Rule 1(b) of the Civil Procedure Rules Section 1A and 1B and 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified urgent and the same be heard ex-parte in the first instance.
2. That the Defendant/Respondent herein be compelled by way of mandatory injunction to surrender and/or hand over vacant possession of Plot No. Mombasa/Block/XXVI/17 located within Kizingo area Mombasa County.
3. That the Officer Commanding Station (OCS) Central Police Station do ensure compliance of the court orders by providing security and maintaining peace during eviction.

The application is based on the following grounds that the Plaintiffs are the trustees of the trust of the late Mohamed Said Suleiman(Deceased) by virtue of vesting order issued by the Honourable court on 16th day of September 2019 Vide High Court and Probate Administration cause No. 31 of 1988. That the late Mohamed Said Suleiman was the first trustee of the Late Sheikhah Binti Ali who was the registered owner of plot No. Mombasa/Block/XXVI/17. That on or about 1st day of September 1920 the Defendant and or their predecessor in title namely East African Standard Limited entered into a private lease or indenture agreement with the late Sheikhah Binti Ali for a term of 99 years. That it was in the terms of the said 99 years lease and or indenture agreement that at the expiration of the said term the company (herein the Defendant) will remove all buildings, erections or improvements made or improvements made by the company on the said premises provided always that the surface of the plot be restored and that any damage is forthwith repaired at the expense of the company (the Defendant). That the said lease and or indenture expired on or about 30th day of September 2019 by effluxion of time. That the Plaintiffs vide letter dated 16th day of June 2019 informed the Defendant of the expiry of the lease and that they did not intend to renew their lease after expiry. That vide letter dated 14th day of October requested to be supplied with copies of documents tracing the Plaintiff Mohamed Said Suleiman for them to investigate and compare with their records. That vide letter dated 18th day of October 2019 the Defendants were supplied with all the documents ascertaining that the 1st Plaintiff as the administrator of the estate of the late Mohamed Said Suleiman and an order appointing the Plaintiffs as the trustees of the Sheikhah Binti SaliM and further vesting order vesting the subject plot to the two Plaintiffs. That vide letter dated 20th November 2019 the Plaintiffs through their advocates wrote to the Defendant requesting vacant possession for the subject property but the Defendant declined and or refused to vacate the suit premises and threatened to file an adverse possession claim against the Plaintiffs' rights to the said property. That the Defendant vide letter dated 12th day of October 2020 the wrote to the Plaintiffs' advocates stating that the Defendant committee on land use and development had sat on 9th July 2020 and proposed that the Defendant be compensated for the building they had constructed in the suit property despite their being an express clause in the said agreement on how the Defendant are supposed to surrender the subject property to the Plaintiffs. That all efforts to have the Defendant surrender vacant possession of the suit property peacefully and amicably have been futile rendering the suit and the application herein necessary. That the Defendant's acts has denied the Plaintiff his rights to use and draw benefits from the suit property occasioning them loss and damages because instead of yielding up vacant possession, they are threatening to file an adverse possession suit against the Plaintiff. That continued stay of the Defendant in the suit property after expiry of the 99 years lease is a gross affront of the Plaintiff's right to property as recognized under Article 40 of the Constitution. That the Plaintiff's case is straight forward that deserves mandatory injunction as the issue for determination is clear-cut, straight forward and which the court can determine summarily.

The respondent stated that the prayer for mandatory injunction sought by the Plaintiff is a substantive prayer whose effect if granted, would dispose of the entire suit without granting the Defendant and any of the parties that may be affected by such order an opportunity to be heard. That the entire application seeks to circumvent the express provisions of Section 152E of the Land Act No. 6 of 2012. That the Applicant is guilty of material non-disclosure in that: although the prayer for mandatory injunctive orders sought by the Plaintiff is made against the Defendant solely, the effect of the same should it be granted will be to dislodge the occupation by third parties (families and their children) of the dwelling houses in the suit property. The occupants of those houses have not been enjoined in the instant proceedings thus condemning them unheard and infringing on their constitutional right to accessible and adequate housing. That the entire application it is based only on

speculations does not meet the threshold for the grant of mandatory injunctive orders.

This court has considered the application, grounds of opposition and the applicant's submission therein. The applicant seeks a mandatory injunction to compel the respondent to surrender and/or hand over vacant possession of Plot No. Mombasa/Block/XXVI/17 located within Kizingo area Mombasa County. I have perused the plaint filed in court on the 18th February 2021 which seeks an eviction and/or ejection of the Defendant from the suit premises namely, Plot No. Mombasa/Block/XXVI/17. I find that the mandatory injunction is a substantive and final order which cannot be granted at this interim stage. This court will have to listen to all the parties in order to give its final orders. I find this application has no merit and is dismissed with costs. Parties are advised to comply with order 11 and list the matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE