



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 260 of 2009

SALEH MOHAMED AHMED.....PLAINTIFF

-VERSUS-

MOHAMED BEREKI

1. ALI

MOHAMED SALIM

2. ALI

MOHAMED SALIM

3. ABUBAKAR

MOHAMED SALIM

4. OMAR

AHMED MOHAMED SALIM

5. SALEH

6. THE REGISTRAR OF LANDS.....DEFENDANTS

RULING

Two applications came up at the same time, against the background of the suit by way of plaint dated **31st July, 2009**, which is concerned with rights over two properties, namely, L.R. No. Mombasa/Block XXXI/1 and L.R. No. Mombasa/Block XXXI/2.

The plaintiff's Chamber Summons lodged with the plaint, was brought under Order XXXIX, Rule 1 of the earlier edition of the Civil Procedure Rules, and ss.63(e) and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The second application was brought by 1st, 2nd, 3rd, 4th, and 5th defendants, by Chamber Summons of **9th November, 2009** brought under Order VI, Rule 13(i)(a) of the earlier edition of the Civil Procedure Rules.

The second application has just one prayer, that the plaintiff's suit be dismissed with costs *for failure to disclose any reasonable cause of action*. The first application has one main prayer, set out as follows:

“THAT pending the hearing and determination of the suit herein the 2nd, 3rd, 4th and 5th defendants whether by themselves, their servants and/or agents be restrained by way of temporary injunction from any further trespass, occupation and/or in any other way dealing with properties known as MOMBASA/BLOCK XXXI/1 and MOMBASA/BLOCK XXXI/2.”

The plaintiff thus states his grounds for the application:

- (i) the plaintiff is the beneficiary of the estate of the late **Mohamad Ahmad Ali** who was the registered owner of the suit properties, and the defendants are mere trespassers thereon;*
- (ii) despite the plaintiff's objections, the 2nd, 3rd, 4th and 5th defendants have continued to trespass upon and illegally occupy the suit premises;*
- (iii) unless restrained by Court orders, the 2nd, 3rd, 4th and 5th defendants will continue with the aforesaid trespass, illegal occupation and/or waste of the suit properties.*

The defendants, by their application of **9th November, 2009** seek the dismissal of the suit on the following grounds:

- (i) the claim is barred under the Public Authorities Limitation Act – the transfer having been registered by 6th defendant on **16th May, 2005**, while the suit was filed on **5th August, 2009**; the period of limitation to recover land against the Government is three years;*
- (ii) the plaintiff has not pleaded that the **wakf** was actualized, and subsequently violated by the defendants; and it is not pleaded that the defendants were responsible for setting up the **wakf** but defaulted;*
- (iii) the 6th defendant was entitled to ignore the alleged restriction, since the suit premises was under the control of 1st defendant and his co-administrator; the plaintiff has not denied that 1st defendant was awarded a grant of representation by the High Court;*
- (iv) the plaintiff has not applied to set aside or annul the grant of representation issued by the High Court, and is therefore not entitled to challenge the validity of transactions carried out by 1st defendant in accordance with the terms of the grant;*
- (v) the claim for repossession in para.10 of the plaint does not lie, the plaintiff not having pleaded that the premises belonged to him prior to the registration of the transfer;*
- (vi) the claim for “loss of earnings and damages” in paragraph 11 of the plaint is misconceived, as no basis is laid for the same, nor is there a prayer for special or general damages in the suit;*
- (vii) the 2nd, 3rd, 4th and 5th defendants were innocent purchasers for value without notice, and no reason has been pleaded for restraining them from enjoying the fruits of their contract.*

Learned counsel **Mr. Chakera**, for the plaintiff, asked for injunctive Orders against the defendants, as prayed in the suit and in the application; and he asked for an Order of cancellation and/or revocation of the registered transfer of the suit properties. Counsel also sought a declaration that the occupation of the suit properties by 2nd, 3rd, 4th and 5th defendants was trespassory and wrongful.

Counsel submitted, on the basis of the evidence, that the plaintiff is a beneficiary of the estate of **Mohamed Ahmad Ali** (deceased) who had been the registered owner of the suit properties, and his dying wishes were to set up a **wakf** of these properties, for the benefit of family members and their offspring. After the deceased died, the beneficiaries and intended administrators of the estate voluntarily consented to the establishment of a **wakf** of the suit properties. The 1st defendant admits to having given consent for the establishment of the **wakf**; save that as the **wakf** objective remained unfulfilled, he had moved the **Kadhi's Court** in **Kadhi's Court Civil Case No.66 of 1997**, and obtained orders for securing the defendants' interest in the suit property.

Counsel contended that the defendants had misrepresented material facts, and had not acted in good faith, in securing the Orders of the **Kadhi's Court** regarding the suit property. From this contention, counsel advanced an argument of law which he submitted to represent the current state of affairs: *"it is our humble submission ...that the Kadhi's Orders regarding the said estate and the succession proceedings have not nullified the consent letter signed by all the beneficiaries/heirs of the estate. The said consent still has legal effect and should therefore be enforced accordingly."*

On that basis, counsel contested 6th defendant's action in registering a transfer of the suit premises to 2nd and 5th defendants, even when restrictions had been recorded against the titles.

Counsel relied on the terms of s.143 of the Registered Land Act (Cap.300, Laws of Kenya), which thus provides:

"(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

"(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or fault."

Counsel submitted that 6th defendant's action fell within the exceptions mentioned in s.143(2) of the Registered Land Act; and *"we therefore urge thisCourt to order a cancellation and/or revocation of the said transfers to 2nd to 5th defendants"*; and that *"the said defendants are precluded from invoking the said provisions by claiming to be innocent purchasers as they ought to have full knowledge of the restrictions placed on the title, upon...conducting an official search..."*

Learned counsel submitted that the restrictions *"were clearly indicated on the title and [this is] enough proof that the 2nd to 5th defendants did not exercise due diligence in acquiring the said suit properties"* – and so *"they should not be protected by the law."*

Counsel urged that the 1st, 2nd, 3rd, 4th and 5th defendants *"do not have the authority to invoke any provisions of the [Public Authorities Limitation Act] as they do not fall under the category of Public Authority."*

Counsel contested the defendants' claim that the suit bears no cause of action, relying on the High Court (**Visram,J**) decision in **Safepack Limited & 2 Others v. Gul Chemical Industries Ltd. & Another**, Nairobi HCCC No. 862 of 2000 [2005] eKLR; and on the Court of Appeal decision in **D.T. Dobie & Company (K) Limited v. Muchina & Another**, Civil Appeal No. 37 of 1978. In the latter case, **Madan, JA** had thus stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a Court of justice ought not to act in darkness without the full facts of a case before it.”

Counsel, in the instant case, urged that “*the cause of action has been clearly set out in paragraphs 7, 8 and 9 of the plaint.*”

Learned counsel, **Mr. Gathuku**, for 1st, 2nd, 3rd, 4th and 5th defendants, submitted that a sufficient case had been made in his clients’ grounds of opposition, of **28th August, 2009**, and by 1st defendant’s replying affidavit of **28th August, 2009** and by the other replying affidavits of **28th August, 2009**.

The question whether or not the plaintiff’s suit should be struck out and dismissed, in the first place, and in particular in view of the criteria laid out in **D.T. Dobie & Company (K) Limited v. Muchina & Another** (1978), is to be determined on the *overall character of the pleadings*: do these pleadings portray a *genuine gravamen*? is this a matter that touches on *significant rights-claims*? is there a *real contest*, that will best be resolved by a hearing of the parties? are *issues of fact or law* involved which call for judicial resolution? will it be *unfair* to decline to subject the claim to a process of organized hearing? if such questions must be answered in the affirmative, then this predisposes the Court to decline an application to strike out and dismiss a suit *in limine* for want of a cause.

From the *detailed facts* attending the plaintiff’s claim, particularly as shown in the above review of his application of **31st July, 2009**; from the many *conflicting claims* that led the plaintiff to file the cause; from the *necessary interpretation to relevant law* touching on the claim; and from the *need to examine case-authorities* in determining the conflicting claims, I am of the clear opinion that this is a case meriting the Court’s time and attention, in a *hearing*. It has a cause, and is not for striking out. That disposes of the defendants’ Chamber Summons of **9th November, 2009**.

The plaintiff, by his application of **31st July, 2009** seeks a temporary injunction against alleged trespassory acts of 2nd, 3rd, 4th and 5th defendants; and against any other dealings with the suit properties.

It emerges that 2nd, 3rd, 4th and 5th defendants have already obtained *registered title* for the suit properties; this is recognized by the plaintiff who, by his suit, seeks a *cancellation* of the same. By his supporting affidavit of **31st July, 2009** (para.10), the plaintiff acknowledges a *possessory fact* which, at the moment, attends the holding of title by 2nd, 3rd, 4th and 5th defendants:

“THAT the 2nd, 3rd, 4th and 5th defendants are still in occupancy of the suit properties and unless they are restrained by an Order of this Honourable Court the defendants intend to persist in their illegal possession of the suit properties occasioning ...waste, loss and/or damage.”

It is a fact, then, that the 2nd, 3rd, 4th and 5th defendants **do**, at this moment, have not only the *colour of right to the suit property*, but also the *possession* and indeed, *occupation* of the same. Convenience, therefore, as a matter of *equity* and *expediency*, stands in favour of the 2nd, 3rd, 4th and 5th defendants – and not of the plaintiff. In such a situation, the plaintiff is *not* entitled to injunctive relief.

That point may be elaborated. The party holding both the *indicia of title*, and *possession*, is a serious legal claimant, who is not to be disturbed in the course of an abridged, *interlocutory* hearing. All the evidence must be laid on the table, and proper argument on law canvassed, enabling the Court to make a comprehensive evaluation and to determine the respective *legal rights* of the parties; and all further orders follow from that foundation. This matter, therefore, is one not for interlocutory Orders, but for hearing and determination in the main cause.

I will, accordingly, make Orders as follows:

(1)The 1st, 2nd, 3rd, 4th and 5th defendants' application by Chamber Summons of 9th November, 2009 is dismissed.

(2)The plaintiff's application by Chamber Summons of 31st July, 2009 is dismissed.

(3)The suit of 31st July, 2009 shall be set down for hearing on priority: and to this intent the parties shall, within 30 days of the date hereof, comply with the pre-trial procedures including the lodgment and exchange of their bundles and lists of documents.

(4)This matter shall be listed for mention and directions within 40 days of the date hereof.

(5)Costs shall be in the cause.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 13th day of February, 2012.

**MAUREEN ODERO
JUDGE**