



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 295 OF 2008

IN THE MATTER OF: THE WAKF OF TIME BINTI ALI BASHIR
IN THE MATTER OF: TITLE NO. MOMBASA/BLOCKXLII/153
IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300
LAWS OF KENYA

ASILA MOHAMED BIN ALI.....PLAINTIFF

VERSUS

1. RUKIYA BINTI SOUD BASHIR.....1ST DEFENDANT

2. SOUD BIN HAFIDHI.....2ND DEFENDANT

3. MOHAMED NOOR MUDHIR.....3RD DEFENDANT

RULING

The originating summons herein relates to the plaintiff's prayer for the court to make declaration that the **WAKF of TIME BINTI ALI BIN BASHIR** created on 7th March 1942 was valid, legal and still in force. Further it seeks for declaration that plot No. Mombasa/Block /153 is WAKF property. The plaintiff seeks for the court to cancel and nullify the registration of that WAKF property in the name of the 3rd defendant.

By a chamber summons dated 16th October 2008 the plaintiff prays for an interlocutory injunction pending the hearing of this suit. The plaintiff seeks an injunction to restrain the defendants from transferring or alienating that property. The plaintiff in support of that application relies on the same facts as those that support the originating summons. The facts are that the WAKF property is situated in Mombasa Island Old Town. That the plaintiff's paternal aunt created and registered a WAKF over her property then known as Mombasa 534 section III. That the WAKF property was given an new title number under the Registered Land Act Cap 300 being Mombasa Block XLII/153. The new title was in possession of the 1st defendant. That the 1st defendant in collusion with the 3rd defendant fraudulently sold the WAKF property to the 3rd defendant which was contrary to the express irrevocable provisions of WAKF of TIME BINTI ALI BIN BASHIR. The plaintiff stated that the beneficiaries of the WAKF property would suffer irreparable loss if the 3rd defendant alienated the same. In submissions, the plaintiff relied on a book Muslim law by KASHI PRASAD SAKSENA 4th edition pg 538. It is stated in that book as follows:

“when any Wakf property is unlawfully alienated, any person interested in the objects of the wakf may institute a suit to set aside the unlawful alienations and for the enforcement of the provisions of the Wakf”.

Plaintiff submitted that the WAKF property being under a valid and subsisting WAKF could not be alienated. The 3rd defendant in his replying affidavit stated that at the time of purchase of that property there was no indication that the vendors had no authority to deal with the property as they did. He said that he was a bona fide purchase and only came to know there was contention over that purchase when the plaintiff filed Mombasa CMCC No. 3769 of 2004. He annexed a copy of the interim injunction that was issued in that Chief Magistrate’s Court case which was to subsist for 14 days from 5th August 2004. The 3rd defendant also sought that the plaintiff’s prayer be disallowed on the basis that this case was not a suitable one to be heard by way of originating summons. In that regard he relied on various cases. Firstly, he relied on **GABRIEL MGHENDI & 2 OTHERS VES THE REGISTRAR OF SOCIETIES HCCC 14/05 ‘OS’ MSA** where the court struck out the originating summons on the basis that the action was complex and contentious. It was held in that case that:

“such procedure is primarily designed for the summary and “ad hoc” determination of points of law or construction or of certain questions of fact, or for obtaining specific directions of the Court, such as trustees, administrators or (as here) the Court’s own executive officers. That dispatch is an object of the proceedings is shown by order 36 which provides that they shall be listed as soon as possible and heard in Chambers unless adjourned by a Judge into Court”.

The second case was **BHANG BHERI VS MEHDI KHAN [1965] EA 94** where the court in approving the finding in the case of **JAFFER RAMJI AND ANOTHER VS JAFER MOHAMED REHIM [1957] EA 699** had this to say:

“The scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited”.

Although the 3rd defendant submitted that the plaintiff had not alleged impropriety in the transaction where he was registered as an owner of the property; to the contrary the plaintiff did so state in her affidavit in support of the application, the plaintiff stated:

“that the action of the 1st and 2nd defendant in disposing of WAKF property to the 3rd defendant clearly violated the express and irrevocable provisions of the WAKF of TIME BINTI ALI BIN BASHIR. “

Finally the 3rd defendant submitted that a restriction had been registered against the property as provided under section 136 (1) of the Cap 300 and hence that there was no need for an injunction order to be issued.

Is the plaintiff’s application defeated by the fact that the matters pleaded in the originating summons are too complex to be determined by way of originating summons? I respond to that argument by stating not at all. This is because order 37 Rule 19 (1) of the Civil Procedure Rules 2010. That rule provides, where an action is by way of originating summons and it appears to the court at any stage of the proceeding that the cause should be as though started by filing a plaint the court can order that the affidavits filed do stand as pleadings and that the suit do proceed as though filed by a plaint. I am in agreement with the 3rd defendant that the issues for consideration herein are complex and should not be entertained in an originating summons. It is for that reason that I order that this action do continue henceforth as though started by a plaint and the affidavits filed shall stand as pleadings. In considering the plaintiff’s chamber summons dated 16th October 2008, it should be noted that the plaintiff is obligated to meet the principles of granting an injunction as set out in **GIELLA VS CASSMAN BROWN [1973] E.A 358**. Those principles are as follows:

(i) That an applicant must show prima facie case with probability of success;

(ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(ii) When the court is in doubt, it will decide the application on the balance of convenience.

The plaintiff has exhibited the WAKF dated 7th March 1942. It is clear that the donee of the WAKF indicated that the property was to remain shared out to the named beneficiaries and thereafter ‘amongst their descendants from generation to generation per stirpes’. The plaintiff in my view has demonstrated a prima facie case with probability of success in view of the terms of the WAKF. The property was to go from generations to generations. It follows that for anyone to dispose off that property it would cause irreparable damage not only to the beneficiaries alive but also their future generation. Such WAKF according to Wikipedia web page can only be extinguished as follows:

“If the goods of the waqf are destroyed or damaged. Scholars interpret this as the case where goods are no longer used in the manner intended by the founder. The remains of the goods are to be reverted to the founder or his/her heirs. Other scholars, however, hold that all possibilities must be examined to see if the goods of the waqf can be used at all, exhausting all methods of exploitation before the termination. Thus, land, according to such jurists, can never become extinguished.

A wakf can be declared null and void by the kadi, or religious judge, if its formation includes committing acts otherwise illegal in Islam, or it does not satisfy the conditions of validity, or if it is against the notion of philanthropy. Since wakf is an Islamic Institution it becomes void if the founder converts to another religion.

According to the Maliki school of thought, the termination of the waqf may be specified in its foundation declaration. As the waqf would expire whenever its termination conditions are fulfilled (e.g. the last beneficiary). The waqf property then returns to the founder, his/her heirs, or whoever is to receive it.”

None of those conditions mentioned there seem to apply here. The plaintiff having satisfied the two principles of granting an injunction, I do find that the orders sought in the chamber summons dated 16th October 2008 ought to be granted. The granting of those orders in my view, would not be affected by the orders in Mombasa CMCC No. 3769 of 2004 because that Chief Magistrate Court file can be transferred to this court to be considered in this action. In any case there is no application made as provided under section 6 of the civil Procedure Act Cap 21 to stay this suit. The fact that there is a restriction as provided under section 136 (1) of Cap 300 would not stand in the way of this court issuing injunction orders because, this dispute is now before the court and the court should issue orders to preserve the property to ensure that when this case is finally heard and determined the title of the property will not have changed hands. I therefore grant the following orders:

1. An injunction is hereby issued restraining the defendants by themselves, their servants or agents from transferring, alienating, selling and or charging or interfering with the plaintiff’s occupation of plot Mombasa/Block XLII/153 pending the hearing and determination of this suit or one year from now whichever comes first.

2. This action shall henceforth be treated as though it was filed by way of a plaint and the affidavits filed herein shall be treated as parties pleadings.

3. The costs of the Chamber summons dated 16th October 2008 are awarded to the plaintiff to be paid by the 3rd defendant.

DATED and DELIVERED at MOMBASA this 25th day of April, 2012.

Mary Kasango

JUDGE