



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 544 of 2011

**JAMI IYATU TAALIMIL QURAN
(JTQ).....PLAINTIFF**

VERSUS

ABOUD ATHMAN.....1ST DEFENDANT

KOMBO MIKDAD.....2ND DEFENDANT

JUMA HAMADI.....3RD DEFENDANT

RULING

(1) The Plaintiff seeks an order to restrain the Defendants, personally or through their employees, servants or agents from occupying any building or portion of plot No. Mombasa/Block I M.S./15 or in any way interfering with the running of the management of the Plaintiff institutions thereon, or development existing on the plot. The Plaintiff complains that the 2nd and 3rd Defendants were its employees whose services it had terminated and who had, with the assistance of the 1st Defendant, taken over the Plaintiff's said suit property, forcefully remained thereon and kept the Plaintiff out of the affairs of its own property.

(2) The application by Notice of Motion dated 6th October 2011 was based on a Plaintiff filed on the same date and supported by the affidavit of a trustee of the Plaintiff sworn on the same date. The Plaintiff claims to be lessee of the plot Mombasa/Block I M.S./15 from its owners, the Wakf of Abdalla and Mohamed Hussein Kaderdina, on which it has set up developments including a Mosque, Islamic school (Madrassa), nursery school, secondary school, staff houses/rooms and amenity buildings. The 2nd and 3rd Defendants who were employees of the Plaintiff, respectively as Imam and Muadhin, breached the terms of their employment contracts by forcefully engaging in teaching at the Madrassa classes prompting the Plaintiff to suspend them from employment on the 25th May 2011. According to the Plaintiff's trustee's affidavit at paragraph 9: -

“despite their suspension from the Plaintiff's employment the 2nd and 3rd Defendants continued indulging themselves in unauthorised activities and with the cooperation of the 1st Defendant they incited Faithfuls praying at Sakina Mosque and forcefully took over possession of the suit property thereby chasing the guards stationed by the Plaintiff at the suit property and further chasing away other teachers and employees loyal to the Plaintiff.”

The Plaintiff then terminated the employment of the 2nd and 3rd Defendants and gave them notice to vacate its premises, which inspite of intervention by the police and area administration they did not heed, hence the present proceedings. The Plaintiff has exhibited its lease, the Wakf document, the letters of

employment of the 2nd and 3rd Defendants, their suspension, and termination; and notices to vacate the premises as annexures to the supporting affidavit of its trustee.

(3) The Defendants have filed a written statement of defence, replying affidavits by the Defendants, witness statements and written submissions in opposition to the Plaintiff's case. The Defendants' principal defence which is set out at paragraphs 4, 5 and 6 of the Defence and reiterated in the Defendants' replying affidavits and written submissions is as follows: -

“4. The Defendants admit the contents of paragraph 3 of the Plaintiff particularly that the Plaintiff was the lessee of Plot No. Mombasa/Block I M.S./15 but deny that Wakf of Abdalla and Mohamed Hussein Kaderdina are the rightful owners of the aforesaid Plot as alleged herein and hence put the Plaintiff to strict proof.

5. The Defendants vehemently deny the contents of paragraph 4 of the Plaintiff and further aver that the Plaintiff never constructed and/or has no right whatsoever over the property referred to in paragraph 4 (a)-(f) as the same were constructed by well wishers from the Kingdom of Saudi Arabia for the sole benefit of Likoni Community and no individual person or organisation can claim ownership of the same in exclusion of the intended beneficiaries.

6. Though the Defendants were employed by the Plaintiff as teachers the Defendants deny that they have occupied staff quarters forcefully and aver that they were also appointed as Imam and Muadhin respectively by the Community and are therefore in occupation of their staff residence by virtue of this appointment.”

The Defendants further contend that the High Court has no jurisdiction over the matter emanating from a Wakf and **“it is only the Kadhi's Court which is well positioned to adjudicate on such issues.”** The Defendants also complain that there are several suits over the same subject matter in several courts whose object is **“to hound the community out of the suit premises”** and the particulars of the suits are set out in the replying affidavit of the 1st Defendant.

(4) I have considered the matter and find that three issues are raised for the determination by the court as follows: -

(a) whether the court has jurisdiction to deal with the matter of the Wakf;

(b) whether the interlocutory injunction sought will be granted pending the hearing of the suit; and

(c) what directions are to be given for the hearing of the suit in view of the 3 other allegedly related suits before the courts.

(5) Whether the court has jurisdiction to deal with the matter of the Wakf.

In raising the objection to the jurisdiction of the Court, the Defendants are guilty of contradiction and departure from their own previous pleading in the Plaintiff. At paragraph 4 thereof, the Defendants, while admitting that the Plaintiff was the lessee of the plot, “deny that Wakf or Abdalla and Mohamed Hussein Kaderdina are the rightful owners of the aforesaid plot.” Yet at paragraph 9 of the same plaintiff, the Defendants aver: -

“The jurisdiction of this Honourable Court is denied as this matter emanates from a Wakf known as “Abdalla Kaderdina and Mohamed Hussein Kaderdina Family Wakf for Masjid Jamia Sakina – Likoni and its only the Kadhi's Court which is well positioned to adjudicate on such issues.”

Section 5 of the Kadhi's Court Act (Cap. 11) while giving jurisdiction to the Kadhi's Court on matters of Muslim Law relating to personal status, saves **“the jurisdiction of the High Court or of any subordinate Court in any proceeding which comes before it.”** Furthermore, section 62 of the Civil Procedure Act grants jurisdiction to the High Court in cases of public charity. The objection as to

jurisdiction of the High Court is therefore not well founded and is dismissed.

(6) Whether application for injunction will be granted.

As regards the application for injunction, the same is couched in prohibitory terms although it is in fact an application for mandatory injunction. Indeed, the Plaintiff's other prayer is for an order of eviction of the Defendants who are alleged to have forcefully taken over the Plaintiff's Madrassa and, with regard to the 2nd and 3rd Defendants, refused to vacate the staff houses despite termination of their services.

It is established in a long line of cases including the famous **Kamau Mucuha v. Ripples Ltd (1990-94) EA 388** and the **Gusii Mwalimu Investments Co. Ltd v. Gusii Mwalimu Hotel (1995-98) 2 EA 100** and **Locabail International Finance Ltd v. Agro Export and Others (1986) 1 ALL E.R. 901**, that mandatory injunctions at the interlocutory stage may be granted but only in special circumstances and clear cases such as where a Defendant has attempted to steal a march on the Plaintiff. As held in the decision of **Mbuthia v. Jimba Credit Finance Corporation Ltd (1988) 2 KLR 1**, the court is at the interlocutory state not required to finally decide issues of fact but rather to weigh up the relevant strength of each side's propositions. The Court only need to feel sure, in the case of a mandatory injunction, that its grant would appear justified at the end of the trial. See **Shepherd Homes Ltd v. Par (1990) 3 ALL E.R. 402**, that what is required is a **“high degree of assurance that at the trial it will appear that the injunction was rightly granted.”**

I have weighed the Applicant's case which is supported by documents on its lease on the property, the Defendants' employment contracts and termination, and the Wakf deed of the lessors against the Defendants' response which I find self-contradictory and unsupported by any documentary evidence. I have noted contradictions in the Defendants' case (a) that the Defendants accept the Plaintiff's lease on the property yet deny the legal title of the lessor, the Wakf of Abdalla and Mohamed Hussein Kaderdina and (b) the Defendants claim that the development on the plot was done by well wishers from the Kingdom of Saudi Arabia for the sole benefit of Likoni Community yet at paragraphs 4 and 9 of the 1st Defendant's replying affidavit it asserted that the developments were constructed by **Likoni Muslim Community** and well wishers from the Kingdom of Saudi Arabia.

Further, the Defendants' case has credibility gaps in that the Defendants who claim that the Mosque, Madrassa, school and other buildings on the plot were built by **“members of Likoni Muslim Community and well wishers from the Gulf (Saudi Arabia)”** yet no details of the arrangements or agreement with the owners of the plot whether by lease, license, sale or gift are given so that even if it were true that they had constructed the buildings on the plot, there is no basis for invoking the proprietary estoppel principle against the legal owners of the plot under the rule in **Ramsden v. Dyson (1966) 1 H.L. 129** applied in Kenya by **Commissioner of Lands v. Hussein (1968) EA 585**. Moreover, the bare denial that the Plaintiff's lessor, the Wakf of Abadalla and Mohamed Hussein Kaderdina, is not the owner of the plot without any proof of ownership by any other party cannot rebut the Plaintiff's proof of Wakf transfer deed duly registered under the Registration of Title Act. The Defendants do not adduce evidence of the 2nd and 3rd Defendants' employment by the Likoni Community Association, the association's registration and the 1st Defendant's elective or appointive chairmanship thereof. The Plaintiff, on the other hand, has attached, in its trustee's replying affidavit, the service contracts of the 2nd and 3rd Defendants as employees of the Plaintiff as Imam and Muadhlin, respectively, and not as teachers as alleged by the Defendants.

On a balance of probabilities, I find that the Plaintiff's case outweighs the Defendants' case with respect to the proof of title to the property and I feel certain that at the end of the trial, the Defendants shall be held as trespassers in view of their admissions relating to the Plaintiff's lease on the property; the 2nd and 3rd Defendants' status as employees whose contracts of service have been terminated and the Defendants' recognition in their objection to the court's jurisdiction of the Wakf of Abdalla and Mohamed Hussein Kaderdina; and the absence of any evidence to support the Defendants' assertions that the Plaintiff's lessor does not own the suit plot; that the construction thereon was done by Likoni Community Association and well-wishers and that the 2nd and 3rd Defendants were employees of the latter.

Accordingly, on the authority of the Court of Appeal decision in **Eric V. J. Makokha & 3 Others v. Lawrence Sagini & 2 Others Civil Application No. 20 of 1994 (The Dons' case)** once the 2nd and 3rd Defendants had their service contracts terminated by the Plaintiff, they also lost the right to retain the staff houses. With regard to the Defendants forcefully taking over the Plaintiff's institutions, which was not denied by the Defendants but sought to be explained on the Plaintiff's lack of title to the plot, it is trite law that the status quo to be maintained before trial is the status quo ante before the wrongful acts of the Defendants [see **Thompson v. Park (1941) 2 ALL ER 477** and **Shepherd Homes Ltd v. Sandham (1970) 3 ALL ER 402**] Moreover, section 90 of the Penal Code makes it an offence known as forcible entry for any person regardless of his right to the property to forcibly enter into a premises, and the Defendants may have committed that offence by their acts complained of by the Plaintiff.

In deprecating the Defendants' impunity in the forcible take-over, I would therefore grant an interlocutory mandatory injunction to remove the Defendants from the Plaintiff's institutions and restore the status quo ante, pending the full hearing and determination of the suit.

(7) However, I would not order immediate removal of the Defendants. Taking into account the nature of the premises in question being Madrassa, schools and staff houses, I would grant the 2nd and 3rd Defendants an opportunity to secure alternative accommodation and the 1st Defendant time to smoothly bring to an end his operations from the Plaintiff's institutions with minimum disruption of third party children and staff of the schools. Accordingly, I grant the Defendants sixty days (60) from the date of the ruling, to coincide with the new calendar year, to make arrangements to move out of the Plaintiff's institutions with liberty to the Plaintiff to move the court for orders for possession in default.

(8) What orders should be made for the disposal of the dispute between the parties?

It appears to me that the real dispute between the parties is a sub-terranean conflict between the Plaintiff's legal title and the Local Community's beneficial interest in the land as the Wakf's beneficiaries and it may call for an ingenious balance at the trial to recognise and uphold both the Plaintiff's legal title to the property and the Local Community's participation in the activities undertaken on the plot in furtherance of their interest thereon to ensure public benefit to them.

In view of the public nature of the dispute involving as it does a public charity respecting a religious establishment and associated schools, I would certify this matter and the matters related to it as set out in the 1st Defendant's replying affidavit as requiring urgent determination and disposal. For this purpose, I would order that the court files on **HCCC No. 667 of 2003; SRMCCC No 3518 of 2003; and SRMCC No. 3427 of 2004** be brought up before the High Court upon notice to all the parties therein for mention together with this matter for directions as to expedited disposal thereof in terms of section 1A of the Civil Procedure Act.

(9) Accordingly, for the reasons set out above, I make the following orders on the Plaintiff's application dated 6th October 2011: -

(a) The Plaintiff's application for injunction is granted as prayed.

(b) The Defendants shall have sixty (60) days to vacate the Plaintiff's institutions and houses by or before the 31st December 2012.

(c) This matter will be mentioned on the 15th November 2012 together with court files on **HCCC No. 667 of 2003; SRMCCC No. 3518 of 2003 and SRMCCC No. 3427 of 2004** with notice to all the parties for directions as to expeditious hearing of the dispute between the parties.

(d) Costs in the cause.

Dated and delivered on this 31st day of October 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Magiya for the Plaintiff

Mr. Wameyo for the Defendants

Miss Linda Osundwa - Court Clerk