



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT 39 OF 2008

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1 MOHAMMED SALIM ALI MOHAMED JUMA

2 JUMA ALI MOHAMMED JUMAPLAINITFFS

VERSUS

1 COMMISSIONER OF LANDS

2 KWIK FIT TYRES AND AUTOCARE LIMITEDDEFENDANTS.

R U L I N G

Coram: Before Hon. Justice L. Njagi

Court Clerk – Ibrahim

Mr. Okongo – for Applicants

This application is brought by a chamber summons dated 3rd March 2008, and taken out under section 63 and 3A of the Civil Procedure Act and, Order XXXIX rules 1,2 and 3 of the Civil Procedure Rules. The applicant seeks from the court the following orders-

1. THAT in view of the urgency, this application be heard ex-parte in the first instance and prayer 2 herein below be granted on an Interim basis pending the hearing of the application inter partes.
2. THAT the 2nd defendant by itself or through its servants, agents or employees or assigns be restrained by a temporary injunction from constructing or continuing to construct a wall and other structures on land known as Mombasa/Block XVI/1394 until the hearing and determination of this suit.
3. THAT the 2nd defendant be ordered by way of a mandatory injunction to demolish the wall and other structures that it has constructed and /or put up n land known as Mombasa/Block XVI/1394 pending the hearing and determination of this suit.
4. THAT the 2nd defendant by itself or though its servants, agents or employees be restrained by way of a temporary injunction form selling, leasing, transferring, charging, mortgaging and/or in any other manner whatsoever and however dealing with land known as Mombasa/Block XVI/1394 until the hearing

and determination of this suit.

5. THAT the costs of this application be provided for.

The application is supported by a 47 paragraph affidavit sworn on 3rd March, 2008, by JUMA ALI MOHAMMED JUMA, the 2nd plaintiff/Applicant, and is premised on some 15 grounds. These are-

- a) The parcel of Land known as Mombasa/Block XVI/1394(hereinafter referred to as the “disputed plot”) registered in the name of the 2nd defendant as the leasehold proprietor was excised from a road reserve and a public road.
- b) The lease dated 17th March, 2000 granted by the 1st Defendant in favour of the 2nd defendant is null and void.
- c) The 2nd defendant is currently putting up and/or constructing a wall and other structures on the disputed plot which wall and structures are likely to block the plaintiff’s access to a building on land known as Mombasa/Block XVI 1342 owned by the plaintiffs,
- d) The structure being put up by the 2nd defendant is “(sic) “ out of a character” (sic) with the surrounding changes in land as of the area “(sic);
- e) The construction works by the 2nd defendant would therefore interfere with the clean and healthy environment of the area which has been enjoyed by “the plaintiff”(sic) and the area residents over the years.
- f) The 2nd defendant has not obtained an environmental impact assessment license from the National Environmental Management Authority to carry out the said construction works;
- g) The 2nd defendant has not obtained an approved plan for the structures being put up from the Municipal Council of Mombasa.
- h) The construction works being undertaken by the 2nd defendant on the suit premises are illegal;
- i) The Plaintiffs have been using for over twelve(12) years an access road passing through the disputed plot to access their building.
- j) The Plaintiffs have acquired a right over the said access road through adverse possession and also by way of an easement of a right of way.
- k) The 2nd defendant’s act of digging trenches and putting up walls and other structures on the disputed plot is not only illegal and unlawful but a breach of the plaintiff’s proprietary right and easement aforesaid.
- l) The plaintiffs and their tenants who are residing in the plaintiff’s building would be unable to access the building if the 2nd defendant’s construction works continue and cover the said access road.
- m) The plaintiffs have a case against the defendants with a high probability of success.
- n) Unless the orders sought are granted, the plaintiffs stand to suffer irreparable harm.
- o) In the circumstances, the balance of convenience favours the plaintiffs.

The application first came for ex-parte hearing on the 4th March, 2008, under a certificate of urgency. The court certified the same as urgent in terms of prayer 1. As an interim measure of protection, the court

also granted a temporary injunction for 14 days in terms of prayer 2, and directed that the application be served for hearing within 14 days.

An Affidavit of service which is on the court record and sworn by one a Fred Ondieki Mogotu a process server of this court, shows that the 2nd defendant was served on 7th March, 2008, while the 1st Defendant/Respondent was served on 10th March, 2008. The injunction application does not really involve the 1st respondent. Nevertheless, he was still served out of, I suppose, abundance of action.

When the matter came for inter-partes hearing on 13th March, 2008, Mr. Okongo appeared for the applicant, but there was no attendance by either the 1st respondent or the 2nd respondent.

Being satisfied that the application was duly served in sufficient time for the 2nd respondent, against whom the application was directed, to attend, the court elected to proceed ex-parte. Mr. Okongo thereupon argued that in spite of service having been effected, the respondents had not entered appearance or filed any documents. He therefore submitted that the application was unopposed and urged the court to grant orders 2, 3 and 4 as prayed.

I am in agreement with Mr. Okongo. The application was directed at the 2nd respondent who was served 6 days before the hearing date. This was sufficient time for the 2nd respondent to attend. The court record shows that neither of the respondents has entered appearance or filed any replying affidavit. Further more, none of them attended court.

In those circumstances, the application is unopposed and the plaintiffs are entitled to the orders sought.

I accordingly order that orders 2, 3 and 4 of the application herein by chamber summons dated 3rd march, 2008 be and are hereby granted as prayed. The costs thereof to be paid by the respondents to the applicants.

Dated and Delivered at Mombasa this ...19th Day of ..March.. 2008.

L. NJAGI

JUDGE