



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

Civil Case 176 of 2005

ABUBAKAR MOHAMED :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

COUNTY COUNCIL OF LAMU :::::::::::::::::::::: 1ST DEFENDANT

SAARY GENERAL SUPPLIES :::::::::::::: 2ND DEFENDANT

RULING

In the Complaint filed on 1.9.2005, Abubakar Mohamed (hereinafter “the Plaintiff” has sued the County Council of Lamu (hereinafter “the County Council”) and Saary General Supplies (hereinafter “the 2nd Defendant/Applicant) seeking two orders apart from costs that is (a) a declaration that the purported offer or allotment of the suit property to the 2nd Defendant/Applicant by the County Council is irregular null and void and should be nullified and an order of prohibitive injunction to restrain the Defendants from trespassing on the Plaintiff’s property.

The 2nd Defendant/Applicant entered appearance on 15.9.2005 through M/s Timamy & Company Advocates. A defence was however delivered much later on 8.10.2007. The 2nd Defendant/Applicant also raised a counter-claim for primarily a mandatory injunction to compel the Plaintiff to remove a chain link wire erected around the 2nd Defendant’s Plot 2 and thereby allow the 2nd Defendant/Applicant unlimited access to the said plot. Shortly thereafter the 2nd Defendant/Applicant on 12.10.2007 lodged a Chamber Summons under a Certificate of Urgency seeking a mandatory injunction in the terms prayed for in the Counter Claim. That is the application that finally was placed before me for hearing on 10.4.2008 despite the Order of Hon. Seron J. made on 12.10.2007 that the application was urgent. The record shows that after the application was certified urgent it took the 2nd Defendant/Applicant more than four (4) months to list the application for hearing.

Be that as it may the application is based on the following grounds as expressed on the face of the application.

- (a) That the Plaintiff has caused to be erected a fence around the 2nd Defendant/Applicant’s plot thereby making it completely impossible for the Applicant to gain access and/or entry to his plot.**
- (b) That the erecting of the fence as stated in (a) above is illegal and/or unlawful and has thereby**

arbitrarily and without any colour of right denied the Applicant the utilization and or use of his plot.

(c) That the Applicant is the lawful and or legal owner of the subject plot as lessee from the Lamu County Council.

There is an affidavit in support of the application sworn by one Thabit Salim Khamisi who says that he is the brother of one Najim Salim and they both trade in the name of Saary General Supplies the 2nd Defendant. The affidavit gives the background of the dispute and explains the second Defendant/Applicant's claim to the suit property around which the Plaintiff has caused to be erected a wire fence. In the premises the 2nd Defendant/Applicant contends that its business will suffer loss unless the injunction is granted.

The application is opposed and there is a replying affidavit sworn by the Plaintiff. The Plaintiff depones that the said Thabit Salim Khamis has no locus standi to depone or participate in these proceedings because he is not one of the proprietors of the 2nd Defendant/Applicant. It is further deponed in the affidavit that the 2nd Defendant/Applicant was not allocated the Plaintiff's property but was allocated a part of the property which was formally owned by K.P.A. He (the Plaintiff) further swears that he has been on the suit property upon which he carries on the business of making motor boats and dhows. In the premises the Plaintiff is of the view that the 2nd Defendant/Applicant has not satisfied the conditions for the grant of a mandatory injunction.

I have considered the pleadings, the application, the affidavits, the annexures thereto, the submissions of counsel and the authority cited. Having done so, I take the following view of this matter. The 2nd Defendant/Applicant seeks a mandatory injunction for the court to compel the Plaintiff to remove the chain link wire fence erected around the suit property. That is the same order sought in the counter-claim. Therefore, if I allow this application the entire counter-claim will have been determined save for the issue of costs. I will have determined the central issue of title in dispute at this interlocutory stage without taking evidence.

An order of mandatory injunction at an interlocutory stage is rarely granted and only **“when the Plaintiff's case is clear and incontrovertible”** (see **Malindi Air Services and Another –v- Halima Abdinour Hassan: Nairobi C.A. NO. 2002 (UR)**). In **Locabail International Finance Limited -v- Agroexport and others [1986] I ALL ER p. 901** it was observed as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which would be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the court had to feel a high decree of assurance that at the trial it would appear that the injunction had rightly been granted that being on different and higher standard than was required for a prohibitory injunction.”

Has the 2nd defendant/applicant established the kind of circumstances discussed in the Locabail International Finance Ltd (supra) case?

The plaintiff claims that the property in dispute is his and supports his claim by documentary evidence. He says he has been doing business of making motor boats and dhows thereon. The 2nd defendant/applicant makes a similar claim upon the same property and has also supported its claim by documentary evidence. The issue is therefore not cut and dry. It is not a simple case of a chain link wire fence. It is a claim to title. The 2nd defendant/applicant lays its claim to the suit property as lessee from the Lamu County Council. Yet the latter have not been served with this application. The 2nd defendant/applicant's affidavit evidence is challenged on the ground that the evidence is given by a party who is not a partner in the business carried on under the name of the 2nd defendant/applicant. Indeed the

plaintiff has exhibited documentary evidence issued by the Registrar of Companies showing that the deponent of the supporting affidavit is not known at the Registrar's office. The 2nd defendant/applicant's right to bring this application is itself in doubt.

In the premises, I am not satisfied that the 2nd defendant/applicant has established the conditions or circumstances for the grant of the mandatory injunction sought. Its application is without merit and is dismissed with costs to the plaintiff.

I order that the parties do give discovery and agree on issues with dispatch and on conclusion of pre trial procedures, a hearing date be given for trial on priority basis.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Ruling read in the absence of counsel and their clients.

F. AZANGALALA

JUDGE

6TH MAY 2008