



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 49 of 2008

- 1. AWADH SAID BIN SWALEH**
- 2. OMAR BIN FUNZI**
- 3. ARNEST JAMES KAGALI**
- 4. JANE SAMNA NICAPO.....APPELLANTS**

VERSUS

- 1. KEA OMAR**
- 2. SYMON GATURI MUGO**
- 3. ANTHONY KENNEDY ODHIAMBO DOLA**
- 4. OSMAN MUHATI**
- 5. HEMED GADDAFI**
- 6. JOHN NGIRA**
- 7. MICHAEL KIMANZI**
- 8. QUEERINE A. ODUORI.....RESPONDENTS**

RULING

The genesis of this dispute is a General Power of attorney dated 17th March 1993. That power of attorney was donated by one Said Saleh Said and Awadh Said Saleh to one Abubakar Rahul Ndira. Purporting to use the power conferred on him by the said power of attorney, the said donee executed leases in favour of several third parties including the 2nd to the 8th respondents herein in respect of various portions of LR No. Plot No. 426 Section I Mainland North Mombasa Municipality (hereinafter called “the suit property”). The suit property however is not registered in the names of the donors of the power of attorney alone. It is infact registered in the names of the second donor Awadh Said Saleh (5/9

share), Omar Bin Funzi ($\frac{2}{9}$ share) and Charity Cherotich Tylor (As administrator of Maria Sylvia Taylor) ($\frac{2}{9}$ share).

A dispute seems to have developed between the donors of the power of attorney and the donee regarding execution of the powers under the power of attorney which led to the donors revoking the power of attorney. Following the revocation of the Power of Attorney Awadh Said Saleh jointly with his co-proprietors of the suit property instituted Mombasa CM CC NO. 3564 of 2007 against the donee of the power of attorney Abubakar Rahul Ndira and 8 others namely Kea Omar, the first respondent, Symon Gatari Mugo, Anthony Kennedy Odhiambo, Dola Osman Muhati, Hemed Gaddafi, John Ngira, Michael Kimanzi and Queerine Onyango Oduori (the 2nd to 8th respondents).

I must clarify that by the time the suit was filed Charity Cherotich Tylor the administrator of the Estate of Maria Sylvia Taylor was herself deceased and Arnest James Kagali and Jane Samna Njilapo (the 3rd and 4th plaintiffs) had been appointed administrators to the estate of the said Charity Cherotich Tylor.

In the plaint before the Chief Magistrate's Court the plaintiffs seek three injunctive reliefs, damages and costs. The 1st and 2nd injunctive reliefs are expressed as follows:-

“(a) An injunction to restrain the 1st defendant by himself, his servants or agents or otherwise howsoever from trespassing unto the suit property for let or offering for let portions thereof, collecting ground rent from tenants thereon and/or from dealing in any manner whatsoever in the suit property and/or with the tenants in possession of any portion thereof.

(b) An injunction to restrain the 2nd defendant by himself, his servants or agents or otherwise howsoever from trespassing unto the suit property to demarcate and subdivide the suit property into portions to be let to third parties and/or to strangers to the plaintiff by the 1st defendant.”

That plaint formed the basis of the appellants' Chamber Summons which was filed simultaneously with the plaint. In the Chamber Summons the appellants primarily sought similar injunctive reliefs on an interim basis. The grounds relied upon by the appellants were 7 and 4 of them complained of the actions of the 1st defendant Abubakar Rahul Ndira. Infact 3 of the reliefs sought by the appellants on an interim basis were sought against the same defendant. The affidavit in support of the chamber summons raised major complains against the 1st defendant. Indeed the crux of the complains stem from alleged unlawful or wrongful acts of the 1st defendant.

Yet when this appeal was lodged the name of the 1st defendant was not included. The reason for the failure to include the 1st defendant can only be gleaned from the averments in the supporting affidavit of the first appellant. He avers at paragraph 4 that the 2nd to 8th respondents purportedly entered into lease agreements with one Abubakar Rahul Ndira (now deceased). Indeed the rights of the rest of the respondents if any, derive their life from the leases executed in their favour by the said Abubakar Rahul Ndira and the appellant's major complains are against him.

There is no evidence that any effort has been made to substitute the said defendant. I am not hearing the appeal now but in the absence of representation for the deceased 1st defendant I am not able to say that

the appeal in its present form is competent. With regard to the Chief Magistrate's Court case, the parties thereto will have to move the court appropriately under Order XXIII Rules 27 and 4 (1) of the Civil Procedure Rules. The importance of proceedings under the two rules cannot be over emphasized particularly in view of the fact that this appeal is from a decision of the Lower Court on an interlocutory application.

I am alive to the fact that the high court has power in the exercise of its appellate jurisdiction to grant orders of injunction if it thinks just to do so. In the exercise of that jurisdiction the court should avoid the situation where an appeal if successful would be rendered nugatory (See **Venture Capital & Credit Ltd – v – Consolidated Bank of Kenya Ltd [2004] 1 EA 348.**) The appellants have an arguable appeal.

The appellants in this appeal inter alia challenge the trial Magistrate's appreciation of the doctrine of *Res Judicata*. They also raise the scope of the power of attorney donated by the first appellant and another to the deceased 1st defendant. The appellants also challenge the trial Magistrate's understanding of the principles of granting temporary injunctions.

I cannot say that the grounds upon which the appellants challenge the trial Magistrate's decision are not arguable in view of the fact that the suit piece of land is registered in the names of persons some of who were not parties to the power of attorney.

In the premises if there had been representation for the 1st defendant who is at the center of the dispute between the parties, I would have been inclined to grant an injunction pending appeal. But since the 1st defendant has to date not been substituted, to grant the orders sought would be to condemn the estate of the 1st defendant unheard, which would offend against our very jealously guarded maxim of natural justice that a party should not be condemned unheard.

In the premises the application is dismissed with costs. The appellants in my view are not remedy less. They can use the venue of the other suits pending in the lower court to urge their cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Mandela Ms for the Applicants and Kenzi for the Respondents.

F. AZANGALALA

JUDGE

24TH JUNE 2008

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