



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO.213 OF 2019

MUNIR MOHAMED SKETTY.....PLAINTIFF

AND

1. MUDATHIRI SOMOE BWANA

2. OMAR FARAJA ALIAS SACHMO

3. FARUK REISAL

4. MUSA FRANCIS

5. YUSUF IMAM

6. DAUD MAHMOUD

7. HAMZA MOHAMED

8. BASS ALI

9. ALI DODO

10. NASSIR KETE

11. ADNAN SWADIK.....DEFENDANTS

RULING

1. The applications before me for determination is the Notice of Motion dated 27th November, 2019 by the plaintiff seeking an order of injunction restraining the defendants/respondents from entering and interfering with, selling, offering for sale and/or disposing of by public auction the property known as MOMBASA/BLOCK XVI/160 pending the hearing of the application inter-partes and pending the hearing of this suit, and the notice of motion dated 28th February, 2020 by the defendants seeking to set aside the ex-parte orders made herein on 2nd December, 2019. When the two applications came up on 1st October, 2020, the court directed that the defendants' application be treated as a response to the plaintiff's application.

2. The plaintiff's case as elaborated in the plaint is that he is the registered owner and is in possession and occupation of all the property known as MOMBASA/BLOCK XVI/160 (hereinafter referred to as "the suit property") holding the same as a Trustee of the Wakf of Mohamed Shafii and Amina Binti Abdulrehman. The plaintiff states that in or about August 2019, the defendants by themselves, their agents, servants and/or employees and without any colour of right or permission, consent or authority of the plaintiff invaded and trespassed onto the suit property which hosts a mosque which the defendants have barred the plaintiff from accessing. The plaintiff avers that the defendants' actions constitute not only trespass, but a violation of the plaintiff's constitutional right to private property and to quiet and peaceful enjoyment of the suit property. In the suit, the plaintiff wishes to have orders of permanent injunction and exemplary damages against the defendants.

3. The plaintiff states that he has reported the matter to the police severally and tried resolving the matter to no avail. The plaintiff states that the interference by the defendants has occasioned him and other worshippers irreparable harm. In the affidavit in support of the application,

the plaintiff has annexed a copy of the Title Deed in his name, copies of medical records and copies of OB extracts from the police.

4. In opposing the plaintiff's application the defendants filed the notice of motion dated 28th February, 2020 which was supported by the affidavit of Mudathir Somoe Bwana, the 1st defendant herein. It is the defendants' contention that the mosque is built on PLOT NO.MOMBASA/BLOCK XVI/1345 decreed by the High Court to be a road reserve, and not on the suit property. The defendants have annexed a copy of a decree in Mombasa High Court Civil Suit No.307 of 1997 and a copy of cancelled Certificate of Lease for TITLE NO. MOMBASA/BLOCK XVI/1345. The defendants aver that the plaintiff implied that he owned the mosque yet the same belongs to the community of Bibi wa Shafi Estate and that it was not built by the plaintiff. The defendants contend that all the residents of Bibi wa Shafi Estate, including the plaintiff is welcome to pray at the said mosque. They further contend that the plaintiff is now misusing the ex-parte orders issued by the court on 2nd December, 2019 by seeking to take control of the mosque by chasing away the Imam and caretaker who were appointed by the community of Bibi wa Shaffi Estate who are "ratibs" or pray at the mosque. It is on that basis that the defendants want the court to set aside the ex-parte orders of 2nd December, 2019.

5. The application was canvassed by way of written submissions. Only the plaintiff filed submissions. I have considered the application. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her right has been infringed.

6. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a prima facie case with a probability of success and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience.

7. It is not in dispute that the suit property is registered in the plaintiff's name. While the plaintiff's case is that the mosque is on the suit property, the defendants aver that the mosque is standing on what was formerly PLOT NO. MOMBASA/BLOCK XVI/1345 which was decreed by the High Court in Civil Case No. 307 of 1997 to be a road reserve and the title cancelled. The defendants do not deny the plaintiff's title.

8. Given the above position, and in particular the fact that the plaintiff is holding title in respect of the suit property which has not been challenged, and given that the title in which the defendants base their claim on is no longer in existence, the same having been cancelled, I find that the plaintiff has established a prima facie case with a probability of success. Further, the plaintiff certainly stands to suffer irreparable loss if the suit property is alienated or its character changed.

9. Given the above discourse, I do allow the application for injunction in terms of prayer 3 of the motion dated 27th November, 2019. Costs of the application to be borne by the defendants.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 1st day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant