



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**PETITION NO. 26 OF 2020**

**IN THE MATTER OF: ARTICLE 23 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLES 10, 19, 20, 23, 47, 49, 162(3) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLE 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010.**

**BETWEEN**

**TABITHA MUKUNI MBOKO.....PETITIONER**

**AND**

**MINISTRY OF TOURISM AND WILDLIFE.....1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to a Notice of Motion dated 24<sup>th</sup> September 2020 which is supported by affidavit of Tabitha Mukuni Mboko and seeks the following orders:-

**a. Spent.**

**b. A temporary injunction be issued against of the 1<sup>st</sup> Respondent its agents, servants and/or employees restraining them from demolishing, evicting the Petitioner/Applicant and/or interfering whatsoever with the peaceful and quiet enjoyment of the property known as Plot No 6513/MN pending the hearing and determination of this application.**

**c. A temporary injunction be and is hereby issued against of the 1<sup>st</sup> Respondent its agents, servants and/or employees restraining them from demolishing, evicting the petitioner/Applicant and/or interfering whatsoever with the peaceful and quiet enjoyment of the property known as Plot No 6513/MN pending the hearing and determination of the suit.**

**d. That the Officer Commanding Bamburi Police Station (OCS) be directed to enforce and ensure full compliance with the Court orders herein.**

**e. That the costs of this application be provided for.**

2. In the application, the Petitioner states that she has been and continues to carry on business on Plot No 6513/MN. She produced a single business permit and licence to sell alcoholic drinks from the County Government of Mombasa. The Applicant further stated produced an eviction letter from the 1<sup>st</sup> Respondent dated 10<sup>th</sup> September 2020 demanding the Petitioner give vacant possession of Plot No 2120/MN to the 1<sup>st</sup> Respondent within 7 days failure to which demolition would take place. The Applicant concludes by stating that the 1<sup>st</sup> Respondent demand to the Petitioner to vacate Plot No 2120/MN is unjustifiable since the business is on Plot No 6513/MN which does not belong to the 1<sup>st</sup> Respondent. The Petitioner prays that this Court do grant the orders as prayed failure to which the main suit will be rendered nugatory and the Petitioner will suffer irreparably.

3. The application is opposed by the Respondents vide grounds of opposition dated 21<sup>st</sup> October 2020, which state that the documents attached in the application issued by the County Government of Mombasa are not proof of ownership of the Plot No 6513/MN. That the notice to vacate is not addressed to the Petitioner who has failed to demonstrate the loss suffered in the hands of the 1<sup>st</sup> Respondent. The Respondents asked Court to dismiss the application with costs.

4. The Petitioner filed written submissions on 19<sup>th</sup> January 2021 and submitted that she has been lawfully carrying out her business registered as Jambo Restaurant with a business permit and liquor licence from County Government of Mombasa on Plot No 6513/MN. That the 1<sup>st</sup> Respondent has not proved ownership of Plot No 6513/MN which is adjacent to Plot No 2120/1/MN. That indeed the 1<sup>st</sup> Respondent served the Petitioner with the notice to vacate and that she is apprehensive that the 1<sup>st</sup> Respondent would proceed to evict her from Plot No 6513/MN.

5. The Petitioner further submitted that the onus is on the 1<sup>st</sup> Respondent to evict persons on Plot No 2120/1/MN and not Plot No 6513/MN which the Petitioner occupies. That the Petitioner has significantly invested in Plot No 6513/MN with her restaurant and any eviction would cause her to suffer loss.

6. The 1<sup>st</sup> Respondent filed submissions on 15<sup>th</sup> January 2021 and submitted that the Petitioner had not proved ownership and therefore failed to prima facie prove ownership of suit property. That the Petitioner had also failed to demonstrate the irreparable injury she might suffer if the orders sought are not granted.

7. The 1<sup>st</sup> Respondent further submitted that the Petitioner is abusing the court process as she has filed a similar suit in the lower court. That the Petitioner had violated Section 90 of the Tourism Act 2011 that establishes the jurisdiction of the Tourism Tribunal to hear and determine complaints lodged within 60 days of occurrence of the cause of action and award damages, order status quo as well as review or set aside decision made by tourism agencies. That Section 9 (2) of the Fair Administration Action Act states that the court shall not review an administrative action unless the mechanisms have been exhausted, which have not been exhausted by the petitioner herein.

8. The 1<sup>st</sup> Respondent relied on the Court of Appeal case of Speaker of the National Assembly V James Njenga Karume (1992) eKLR where it was stated *“where there is a clear procedure for redress for any particular grievance prescribed by the Constitution of an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”* The 1<sup>st</sup> Respondent concluded by submitting that the Petitioner has breached mandatory provisions of law by filing the suit before exhausting judicial remedies available and thus the suit should be dismissed with costs.

9. This court has considered the application, submissions in support and against and list of authorities. The issue before this court is whether the Petitioner has met the threshold to be granted a temporary injunction against 1<sup>st</sup> Respondent pending hearing and determination of the suit.

10. The Petitioner have sought a temporary injunction restraining the 1<sup>st</sup> Respondent from demolishing or, evicting the Petitioner and interfering with the petitioner’s peaceful and quiet enjoyment of the property Known as Plot Number 6513/MN pending hearing and determination of the suit.

**11. Order 40 Rule 1 of the Civil Procedure Rules** provides as follows:-

**“Where in any suit it is proved by affidavit or otherwise—**

**that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”**

12. Temporary injunction is a provisional remedy that is invoked to preserve the subject matter in its existing condition. Its purpose is to prevent dissolution of the petitioner’s rights. The main reason for use of a temporary injunction is the need for immediate relief. While granting temporary injunction the Petitioner need to establish the following:-

**a. Whether the plaintiff has a prima facie case,**

**b. Whether the plaintiff would suffer irreparable injury if his prayer for temporary injunction is disallowed.**

**c. Whether the balance of convenience is in favour of plaintiff.**

13. The Petitioner has stated that she has been and continues to carry on business on Plot Number 6513/MN. The letter dated 10<sup>th</sup> September 2020 from the 1<sup>st</sup> Respondent refers to Plot No 2120/1/MN and not Plot No 6513/MN which the Petitioner states to be in. The Petitioner has therefore failed to establish a prima facie case as the notice from the 1<sup>st</sup> Respondent is not directed to the Petitioner or any other occupier of Plot No 6513/MN. The notice issued is over Plot No 2120/1/MN which the petitioner states is not occupying. More over the petitioner will not suffer any injury as she is not occupying Plot No 2120/1/MN. Instead, the petitioner is very clear that she is carrying out a business on Plot No 6513/MN. It is quite clear that these two are different plots.

14. Having said that, the relief of injunction cannot be claimed as of right. It is discretionary and an equitable relief. This court can only grant it when and where it is absolutely necessary and this is not one of the circumstances. This court therefore finds no merit in the Notice of Motion 24<sup>th</sup> September 2020 and it is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2021**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**