

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 234 OF 2019

SERVE KENYA MINISTRIES.....PLAINTIFF

VERSUS

ISMAIL DENNIS OMONDI.....1ST DEFENDANT

THE LAND REGISTRAR, KWALE COUNTY.....2ND DEFENDANT

RULING

(Applicants seeking to be enjoined to this suit as defendants in the suit; plaintiff claiming to be the owner of the disputed land which is registered in the name of the 1st defendant; plaintiff contending that the land was bought with its own funds and therefore the 1st defendant holds it in trust; plaintiff filing an application for injunction and interim orders barring the 1st defendant from dealing with the suit land issued; applicants being tenants of the 1st defendant in the premises and claiming that they are affected by the interim orders; applicants further alleging that they have information that will assist the court in determining the dispute; applicants cannot be enjoined in the suit as substantive defendants for they are not claiming any title to the suit land; applicants can only serve as interested party as they may be affected by orders made especially on the application for injunction; application allowed to that extent)

1. Through an application dated 27 May 2020, Fredrick Siasa Munyithya, Daniel Achoka, Godfrey Ikanda and Elijah Musili Maanzo, all officials of South Coast Community Church, have applied to be enjoined to this suit as defendants, and further, to have orders issued on 24 December 2019 extended and amended to include them, so that the 1st defendant is restrained from interfering with their occupation of the land parcel Kwale/Ukunda/447 which is the subject of an ownership dispute between the plaintiff and 1st defendant. The plaintiff does not oppose the application but the 1st defendant has opposed the same and has filed Grounds of Opposition.
2. To put matters into context, the plaintiff commenced this suit through a plaint filed on 23 December 2019. Its case is that it is the rightful owner of the land parcel Kwale/Ukunda/447 which is however registered in the name of the 1st defendant. The plaintiff's case is that it provided the funds for the purchase of the land and thus the 1st defendant holds it in trust. There before, the 1st defendant used to serve as a pastor with the plaintiff church but it appears as if there was a fallout. The plaintiff avers that subsequently the 1st defendant removed the plaintiff's branding from the suit property and put up those of his ministry called Empower Africa. He also put his caretaker on the premises and demanded that the plaintiff's officials pay rent. In the suit, the plaintiff wants orders to have the 1st defendant compelled to transfer the suit property to it. Together with the suit, the plaintiff filed an application seeking orders to have the 1st defendant restrained from the suit premises pending hearing of the suit. Interim orders were issued on 24 December 2019 in favour of the plaintiff but the application is yet to be heard inter partes.
3. In this application, the applicants say that they have a lease agreement dated 31 July 2019 with the 1st defendant over the suit property. They aver that as at 1 February 2014, the plaintiff was the landlord of the property and they were paying rent to the plaintiff. Later, through the lease dated 31 July 2019, the 1st defendant leased the premises to the applicants. The applicants state that on 24 December 2019, the court issued orders restraining the 1st defendant from interfering with the quiet enjoyment of the suit property by the plaintiff. They state that the plaintiff has advised all tenants, including the applicants, not to remit any rent to the 1st defendant, while at the same time, the 1st defendant is demanding rent and has issued a notice asking the applicants to vacate the premises. They are apprehensive that unless the court intervenes, the 1st defendant will terminate their lease and evict them.
4. I have considered the application alongside the submissions of Mr. Munyithya, learned counsel for the applicants, and Mr. Ngonze, learned counsel for the 1st defendant. Mr. Ngonze's view was that the applicants can only serve as witnesses but not defendants. He was not persuaded that the applicants have met the test of being enjoined as defendants for they claim no right of ownership of the land. Mr. Munyithya on the other hand thought that the applicants have demonstrated that they have an identifiable stake and that they have information to confirm that the 1st defendant holds title as trustee.
5. Let me start by saying that at this moment in time, it has not been decided who between the plaintiff and the 1st defendant is the rightful owner of the suit property. The 1st defendant holds the title in his name but the plaintiffs are claiming that the same is being held in trust. That is an issue that will be decided after a hearing of the suit. It is however apparent that as registered owner, the 1st defendant did lease the suit premises to the applicants. When the matter was filed, the plaintiffs did seek interim orders of injunction to bar the 1st defendant from interfering or dealing with the suit premises, which orders were granted. Given that position, and unless the said orders are discharged, the 1st defendant cannot demand payment of rent from the applicants and cannot evict them. Final orders on how the premises will be preserved pending hearing of the suit will be made once the application is heard inter partes. I do not see any prejudice that the interim orders are causing the applicants because they actually bar the 1st defendant from interference with what is on the suit premises and that inevitably

includes the applicants. I do not therefore see any basis for variance of the interim orders that were issued.

6. The substantive question that I need to address myself is whether the applicants have made out a case to be enjoined as defendants. On this, I am not persuaded. As Mr. Ngonze pointed out, the core issue in the suit is who between the plaintiff and the 1st defendant ought to be declared the rightful owner of the suit property. The applicants are not claiming any ownership of the land and I therefore see no basis why they should be defendants in this suit as they have applied. If they feel that they have information that they can present, then either of the parties can list them as witnesses. The mere fact that they have some information does not mean that they should be parties otherwise all witnesses would require to be parties even where they have no claim over what is in dispute. I think that the applicants can only serve well as interested parties, for their lease is contingent upon which party succeeds at trial. They may also wish to have some orders/directions on what should be done with their lease or possession of the premises while this suit is pending. I am only therefore persuaded to order that the applicants be enjoined as interested parties and not substantive defendants. Their participation in the suit, for the moment, will be limited to the application for injunction and their further participation will be as this court may further direct. I am careful in saying this so that future participation of the applicants does not interfere with the hearing of the suit or subject the contesting parties to unnecessary hardship by being burdened with an additional party.

7. I make no orders as to the costs of this application.

8. Orders accordingly.

DATED AND DELIVERED THIS 16TH DAY OF JUNE 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA