



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NO. 197 OF 2020

ABDULWAHAB AHMED MAJID.....PLAINTIFF

VERSUS

SISTERS FOR JUSTICE N.G.O.....1ST DEFENDANT

NAILA ABDALLA MOHAMED.....2ND DEFENDANT

ATHMAN MWINYSHEE.....3RD DEFENDANT

ANTHARI ALL.....4TH DEFENDANT

RULING

1. The plaintiff's application is dated 27th October 2020 and seeks temporary injunction against the defendants prohibiting them from using the suit property and denying the plaintiff quiet enjoyment and exclusive use of the suit property. The plaintiff further seeks orders that the OCS Mjambere Police Station to be tasked with enforcing those orders.

2. The application is premised on the grounds on the face of the application and further supported by the affidavit of Abdulwahab Ahmed Majid. The plaintiff stated that on 29th July 1931 a Wakf (trust) was created by Mwanayumbe daughter of Ali Bin Khamis El Mandry over Plot No. 59/11/MN, the suit property which measures approximately 9.40 acres. He stated that the said Wakf was donated to Amina Binti Said and Mwanamkuu Binti. The plaintiff further stated that he inherited the Wakf from his late mother Mwanamkuu Banti Said. He stated that on 15th June 1998 he became a registered trustee to the Wakf together with Said Mohamed Rashid to manage the Wakf on behalf of the children of the donees.

3. The applicant stated inter alia that about ½ acre of the suit property remains undeveloped and makes up a football pitch used by the 3rd defendant. He further stated that the pitch consists of 9 undeveloped plots which 6 of them are already licensed to third parties and only 3 of the plots measuring 40 by 80 feet remain vacant. The applicant/deponent stated that the defendants have orchestrated activities on the suit property with the view of scaring away the plaintiff and his son. That the defendants have held thereon protests, dances, football activities and political rallies. He contended that there are other grounds that the defendants/respondents would use other than the pitch which include; Bilima Grounds, Khadija Grounds and Frere Town Grounds, KG Unit and Mtopanga school grounds which are all free and charge no entry fee.

4. Athuman Mwinyishee Njanje filed a replying affidavit on 11th December 2020 on behalf of the 1st, 2nd and 4th defendants in response to the application. He stated that the suit property in question has always been used as a football field since the 1970s by the residents of Mwandoni area. He further stated that he is a stranger to the Wakf as outlined by the plaintiff and affirmed the constitutional right of the residents of Mwandoni to use the football pitch. He deponed that the defendants cannot use the other grounds as suggested by the plaintiff/applicant since they are used by residents in those areas. That it would also raise security and social issues among the residents of the different areas.

5. Naila Abdalla Mohamed filed a replying affidavit on 15th December 2020 on behalf of herself as the 2nd defendant/respondent and the 1st defendant as its executive director. She deponed that the Kishada Football grounds has been used for the training of the local football team Kishada Football Club by the youth residents of Mwandoni area. She further deponed that there has been no claim either by the plaintiff or any other person over the use of the grounds by the residents of Mwandoni. She stated that she organized the football competition for the youth of Mwandoni after being approached by their parents as a way to nurture talent and keep the youth away from drug abuse and criminal activities. She deponed that the grounds suggested by the plaintiff as alternative to the suit property were not only far away but were used by the residents in those areas. She further deponed that the residents of Mwandoni have acquired an equitable interest on the suit property and due to public interest they are protected by the law until the counterclaim is heard and determined.

6. On 16th December 2020, the court directed that the application be disposed of by way of written submissions.

7. The plaintiff filed his submissions on 16th February 2021 in support of the application. Counsel for the plaintiff submitted that the suit property belongs to the family of the trustee of the Wakf Abdulwahab Ahmed Majid. Counsel submitted that the plaintiff has proprietary rights over the suit property to the exclusion of all others in affirmation of his right to property. Counsel contended that the suit property belongs to a Wakf and thus cannot be alienated, transferred or sold. That it solely belongs to the Wakf to be managed by the trustees for the benefit of the beneficiaries. Counsel argued that the suit property though used by the public as a football pitch remains private property. Counsel argued that the registered trustee of the Wakf has a right to allow access and deny access to the suit property. Counsel refuted claims that the suit property is public land to be used as a football pitch terming it as misguided assumptions by the defendants. Counsel urged court to issue the orders as prayed for the defendants to keep off the suit property for the use and benefit of the beneficiaries of the Wakf.

8. The 1st and 2nd defendants filed their submissions on 3rd March 2021. Counsel for the 1st and 2nd defendants submitted that the defendants hold an overriding interest over the suit property as per Section 28 (b) of the Land Registration Act 2012. Counsel further submitted that in the 1st and 2nd defendants counter claim, they claim that the suit property should be acquired by the County Government of Mombasa as per the 4th Schedule of the Constitution for sports, cultural activities and facilities. Counsel urged court to dismiss the application since eviction cannot be carried out until an alternative land is identified and acquired for that purpose.

9. The 3rd and 4th defendants filed their submissions on 24th March 2021. Counsel for the 3rd and 4th defendants submitted that the suit property has always been used as a football pitch since time immemorial and there has been no court order or any recognized authority stopping the use. Counsel submitted that by virtue of its use, the suit property is public land as it has always been used for football training and tournaments without interruptions. Counsel urged court to disallow the application in the interest of justice.

10. I have considered the application, the responses as well as the submissions filed herein.

11. The applicant herein seeks orders of temporary injunction to prohibit the defendants and any other person acting on their behalf from occupying and using the suit property. Though the applicant has not indicated under which Order of the Civil Procedure Rules that this application is brought under, the Court makes reference to Order 40 Rule 1 of the Civil Procedure Rules 2010 that provides for cases in which temporary injunction may be granted by court.

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

(a) 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

(b) 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. In the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR**, the court stated the following:-

“In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.

In the celebrated case of Giella Vs Cassman Brown and Co. Ltd {1973} EA 358 the Court set out the principles for Interlocutory Injunctions. These principles are:-

- i. The Plaintiff must establish that he has a prima facie case with high chances of success.**
- ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.**
- iii. If the court is in doubt, it will decide on a balance of convenience.**

The above principles were authoritatively captured in the famous Canadian case of R. J. R. Macdonald Vs. Canada (Attorney General) {1994} 1 S.C.R. 311 where the three part test of granting an injunction were established as follows:-

- a) Is there a serious issue to be tried?;**
- b) Will the applicant suffer irreparable harm if the injunction is not granted?;**
- c) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").**

Also of useful guidance in the application before me is the criteria considered in granting an injunction laid down in the decision in American Cyanamid Co. vs Ethicom Limited {1975} A AER 504 which established the test in the English courts in deciding if an injunction should be granted. This test was followed in Ireland in the case of Camus Oil vs The Minister of Energy {1983} 1 IR 88. The test has three elements:-

- a) there must be a serious/fair issue to be tried,**
- b) damages are not an adequate remedy,**
- c) the balance of convenience lies in favour of granting or refusing the application.”**

13. Taking the above authorities into consideration as well as Order 40 Rule 1, the court will turn into the facts of the case to consider whether the applicant is warranted to be granted an order of temporary injunction. The first issue for the court to consider is whether there is a serious issue to be determined at trial that would necessitate the court to issue orders to conserve the subject matter. The court finds that there is a triable issue before court, the applicant has annexed a Certificate of Title dated 5th October 2016, as well as a Certificate of Postal Search dated 9th March 2018. Both documents certify that the applicant is the trustee of the Wakf and the registered proprietor of the suit property. The court will take the title document produced by the applicant as prima facie evidence that the applicant is the registered owner of the suit property.

14. The applicant has to demonstrate to the court that if the temporary injunction orders are not granted, the damage that he is likely to suffer cannot be adequately compensated by damages of monetary value. The applicant has stated that the suit property is solely for the benefit of the beneficiaries of the Wakf, who are the children of Amina Binti Said and Mwanamkuu Binti Said, the donees of the Wakf. The applicant has stated that the 2nd defendant had stopped to use the suit property as a football pitch for a year before recently resuming activities on it. He avers that the use of the suit property as a football pitch has denied the plaintiff its benefits. However the defendants have argued that the suit property has been used as a football pitch by the residents of Mwandoni since time immemorial with no interruptions. The respondents maintained that the suit property qualifies as public land to be acquired by the County Government of Mombasa for use by the residents of Mwandoni. Indeed, the 1st and 2nd defendants have raised a counterclaim over the suit property.

15. In my view, the applicant allowed the residents of Mwandoni to use the suit property as a football pitch without interruption. More to that, the applicant has not established any attempts he made as the trustee to the Wakf to cordon off the suit property from use by the public. From the facts and evidence before court, it is evident that the suit property has been used for quite sometime by the public for recreational activities that are geared towards bettering the youth. The applicant has not demonstrated to court the grave injury that would be caused to the Wakf if the orders sought are not granted. In my opinion, any damages that the applicant is likely to suffer can be well compensated by an award of damages when the matter is heard and determined.

16. The last issue for determination is which party is likely to suffer the greater harm from granting or refusing the remedy pending a decision on the merits? In this instance suit, the defendant's use of the suit property is indeed denying the applicant from using the suit property for the benefit of the Wakf. However greater harm will be suffered by the youthful residents of Mwandoni, who will not be able to access the football pitch. The 2nd defendant stated in her replying affidavit that the football competition organized in the suit property has helped the youth spend their spare time nurturing their talents and staying away from crime and drug abuse.

17. In view of the sentiments expressed by the 1st and 2nd defendants and in the absence of compelling reasons from the applicant, the court is not persuaded to exercise its discretion. I therefore find no merit in the plaintiff's application dated 27th October 2020 and same is dismissed with no order as to costs.

18. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 22nd day of July, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE