



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 157 OF 2017

MOMBASA CEMENT LIMITEDPLAINTIFF

-VERSUS-

SALIM MASOUD ABDALLA1ST DEFENDANT

KHALFAN ABDALLA 2ND DEFENDANT

RASHID MOHAMED SALIM3RD DEFENDANT

AHMED MOHAMED SULEIMAN..... 4TH DEFENDANT

SALIM AL-AMIN SULEIMAN5TH DEFENDANT

RULING

1. There are three applications for determination. The first application is by the plaintiff, dated 4th May 2017, and amended with leave of court on 6th June 2017 (hereinafter, 'the first application'). The second application is dated 24th May 2017, and it was filed by the 1st and 2nd defendants (hereinafter, 'the second application'). The last application is dated 30th July 2018, and it was filed by the advocate for the 1st defendant (hereinafter, 'the third application')

2. Before determining the applications, it is important to understand the background of the suit to put matters into context. This suit was instituted by a plaint dated 4th May 2017 and amended on 6th June 2017. It is the case of the plaintiff that by an agreement to lease, and subsequent lease, the 3rd-5th defendants leased to the plaintiff 1000 acres of land under certificate of ownership No. 409 dated 6 April 2014 issued under the Land Titles Act delineated on plan number 5441 (now referred to as plot number 4236 Kilifi Folio No. LT 23 Folio No. 290 File 3352 (hereinafter, 'the suit property'). It is pleaded that the defendants who are trustees to the Board of Trustees of Mazrui Community (Development Welfare) Wakf Land Trust (hereinafter, 'the Trust') have persistently written demand letters to the plaintiff, and to the Wakf commission to the effect that the plaintiff vacates the suit property, which has resulted in apprehension, and inability of the plaintiff to have quiet and peaceful enjoyment of the suit property. The plaintiff has claimed to have suffered loss and damage, and for these reasons, the plaintiff prays for judgment against the defendants for *inter alia*, a declaration that the plaintiff is entitled to exclusive right of possession of the leased suit property, and permanent injunction.

3. Now back to the subject of this ruling. In the first application, the plaintiff is seeking for the following orders:- (slightly paraphrased)

a. Spent

b. That a temporary injunction be issued to restrain the defendants, whether themselves, their servants or agents or elected members or members or otherwise from alienating, disposing off, transferring, charging or in any other way dealing with suit property or otherwise interfering with the plaintiff's quiet and peaceful possession of the said land pending the hearing of the application inter partes.

c. That a temporary injunction be issued to restrain the defendants, whether themselves, their servants or agents or elected members or members or otherwise from alienating, disposing off, transferring, charging or in any other way dealing with suit property or otherwise interfering with the plaintiff's quiet and peaceful possession of the said land pending the hearing of this application.

d. That the orders granted herein be registered against the title to the property comprising suit property to ensure that no

further transactions are registered in respect of the said title pending the hearing and determination of this suit.

e. That a temporary injunction be issued to restrain the defendants whether by themselves, their servants or agents or elected members or members or otherwise from alienating, disposing off, transferring, charging or in any other manner interfering with the plaintiff's quiet and peaceful possession of suit property pending the hearing and determination of the suit filed herewith.

f. That a temporary injunction be issued against any trustee, elected member, member agent, or servant of the trustee of the Mazrui Community (Development and Welfare) Wakf Land Trust from interfering with agreements made by the Board of Trustees of Mazrui Community (Development and Welfare) Wakf Land Trusts and Mombasa Cement Limited pending the hearing and determination of the suit filed herewith.

g. That the cost of this application be provided for.

h. That any other or further orders that this honorable court do issue as it may deem necessary and expedient in the interest of justice.

4. The application is based on the grounds on the face of the Motion, and supported by the affidavit of Akram Mohamed, the Human Resource Manager of the plaintiff. Briefly, it is deposed that the plaintiff is and has been actively been in possession of the suit property since December 2009 having entered into a binding lease agreement with the Trust. Mr. Mohamed deposed that the lease was made on a willing lessor, willing lessee basis with regards to the Wakf Commission Act, and the Land Control Act. He further deposed that the lease was made pursuant to the powers granted to the trustees under the Trust Deed constituting the Trust. The plaintiff claimed to have paid Kshs. 100,000,000 for the standard premium and rent which stands to be lost if the lease is interfered with. Mr. Mohamed deposed that the plaintiff has made investments on the lease property, and the property is vital and critical to the plaintiff's business. It is deposed that the defendants have now demanded that the plaintiff immediately vacates the property in absolute disregard to the terms of the lease. The plaintiff claims that unless restrained by an order of this court, the defendants will move to take possession of the property or deal with the suit property to the plaintiff's detriment.

5. The application has been opposed by the 1st and 2nd defendants, vide the 1st defendant's replying affidavit. He deposed that after being served with the application herein, he sought comments from the chairman of the Trust at that time, Mr. Salim Al-Amin Mazrui, the 5th defendant. Mr. Mazrui swore an affidavit dated 19 May 2017 which is part of the annexures in this replying Affidavit. Briefly, Mr. Mazrui denied signing the alleged lease. However he stated that he is aware of the agreement to lease made in the year 2009, which was signed by only four of the six trustees. He deposed that the agreement to lease did not obtain the approval of the entire Trust, and hence it was rendered un-enforceable, and it could not bind the Trust. Mr. Mazrui further deposed that the purported lease is a forgery. Mr. Mazrui deposed that despite the agreement to lease being incomplete, the plaintiff took possession of the suit property, and started mining activities.

6. Mr. Salim Masoud in his replying affidavit shared the same sentiments as Mr. Mazrui. He deposed that the alleged lease dated 30th March 2014 did not exist in the records of the Trust, hence it is a forgery. He deposed that the Trust only executes leases under its corporate seal, duly affixed by the trustees, and whose particulars including photographs are clearly evidence in such a document. Mr. Salim Masoud deposed that the trustees did not collectively and as duly mandated by the law, authorize the receipt from the plaintiff of payment of alleged advance rent or mineral-concession fees for five years. He deposed that neither he, the 2nd defendant nor Mr. Mazrui are aware of the sketch plan for the alleged 1000 acres to the plaintiff. He deposed that there is no justification at all for the injunction being sought. He deposed that the defendants are the ones entitled to the injunction against the plaintiff from continuously destroying the suit property.

7. The 1st and 2nd defendants further in opposing the application filed a notice of preliminary objection. They claimed that the plaintiff's claim against the 3rd defendant and the joinder of the 3rd defendant to the suit is not sustainable in law, and therefore the orders sought in the application herein are also not legally sustainable. They further claimed that the ex-parte orders obtained on 5th May 2017 are a nullity and of no legal effect whatsoever.

8. The 3rd defendant put in a response to the application vide his replying affidavit. Mr. Rashid Mohamed deposed that the Wakf has a registered Trust Deed that authorizes its Trustees to enter into the Lease Agreement with third parties in trust for the Wakf. He deposed that in exercise of the said powers donated to him as a trustee, he duly executed the agreement to lease, and subsequent lease of the suit property. Mr. Rashid Mohamed deposed that the plaintiff has since paid the Trust the amount of monies as evidenced by the plaintiff. Mr. Rashid Mohamed deposed that he confirms and affirms that the Wakf entered into an agreement of lease, and subsequently leased the suit property.

9. The 4th defendant, Mr. Ahmed Mohamed, responded to the application vide his replying affidavit. He reiterated the contents of the 3rd defendant's replying affidavit in verbatim.

10. The second application by the 1st and 2nd defendant sought the following orders:- (slightly paraphrased)

a. Spent

b. That the order of injunction issued ex-parte by this court, against the defendants to the suit, on the 4th May 2017, be and is hereby discharged.

c. That pending the hearing of this application inter-partes, a temporary order of injunction do issue, ex-parte in the first instance and for a maximum period not exceeding fourteen days, and thereafter for such period as this court may dictate, restraining the plaintiff, whether acting through its directors, or shareholders, or through its servants or agents, from

conducting mining operations on portions of the suit property herein that are occupied by the plaintiff unless and until the plaintiff;-

i. Furnishes evidence, to the satisfaction of the court, that it finds at the commencement of the said mining operations, comply, and/or has continued to comply, with the mandatory provisions of the physical Planning Act (1996) in relation to applying for and obtaining development permission, as stipulated under the said Act.

ii. Furnishes evidence, to the satisfaction of the court, that it has complied with the provisions of the said Physical Planning Act in relation to applying for and obtaining change-of-user, to mining user, from the current agricultural user, as stipulated under the said Act.

iii. Furnishes evidence to the satisfaction of the court, that it has complied with the mandatory provisions of the Land Control Act in relation to applying for and obtaining land control board consent for the mining activity it is undertaking on portions of the suit land herein.

iv. Furnishes evidence to the satisfaction of the court that it has complied with the mandatory provisions of the Environmental Management and Coordination Act (2009) in relation to:-

a. Applying for and obtaining an environment impact assessment license;

b. Conducting the mandatory environmental impact assessment (incorporating the mandatory public participation) in relation to the mining activity that it is undertaking; and

c. Conducting periodic environmental impact assessment, as required by law, since it commenced mining activities in the year 2009.

v. Furnish evidence, to the satisfaction of the court, that it did apply for and did obtain the mandatory consent of the Wakf Commissioners, pursuant to the Wakf Commission Act, for the said purported lease, and the mining undertaking.

d. That a permanent injunction do issue, pending the hearing and determination of the suit, restraining the plaintiff from commencing or continuing with mining activity on any portion of the suit land, until it applies for and obtains-

i. A lawful, binding and registrable lease duly executed under seal by the trustees of the Trust; for a specified, surveyed, and legally ascertainable portion of the suit property;

ii. The requisite approvals, permits, licenses, or consents issued pursuant to the Physical Planning Act, the Land Control Act, the Wakf Commissioners Act, the Water Act, the Mining Act, the Environmental Management and Coordination Act in regard to the said mining operations.

e. That pending the hearing and determination of the suit herein, the plaintiff be restrained, by a permanent order of injunction from:-

i. In any manner whatsoever as against the defendants, placing any reliance upon, and/or undertaking any activity on any portion of the suit land in reliance upon, the disputed lease allegedly executed by the plaintiff and some former members of the Trust as the same is tainted with illegality; and

ii. Continuing to carry out the illegal mining activities on portions of the suit land herein

f. That the cost of this application be borne by the plaintiff.

11. The application is based on the grounds on the face of the Motion, and supported by the affidavit of the 1st defendant. Briefly, it is deposed that on the basis of an illegal, null, void and unenforceable agreement to lease purportedly dated 2009, the plaintiff did enter into and took possession of a portion of the suit property. Mr. Salim Masoud claimed that the plaintiff undertook illegal mining activities despite the objections of the Trust. He further claimed that the mining activities have caused, and continued to cause, destruction to the physical and aesthetic of the environments, and also diminution in the value of the suit property. He averred that the plaintiff continues to undertake the mining activities illegally without the requisite statutory approvals, consents, licenses, or permits, and to the detriment of the defendants and the Islamic Trust or Wakf that set aside the land for use for the said beneficiaries. He deposed that the plaintiff has violated the expressed statutory provisions of the Land Control Act, the Physical Planning Act, the Environmental Management and Coordination Act, and the Wakf Commission Act. It is further averred that until the plaintiff is restrained by an order of injunction, from continuing with the said illegal mining activities, it will continue to destroy the suit property, thereby occasioning irreparable loss and damage to the applicants, and also to the general body of the said beneficiaries of the Wakf. Mr. Salim Masoud claimed that the plaintiff obtained an ex-parte order of injunction on 5th May 2017 through misstatement of, concealment of material facts, and without full disclosure of pertinent facts to the court.

12. The plaintiff through its Human Resource Manager, Akram Mohamed opposed the application vide a replying affidavit. Mr. Mohamed deposed that the injunctive relief sought therein are conditional on the plaintiff satisfying the court of the lawfulness of the mining operations being carried out on the suit property. He deposed that the plaintiff's mining operations are lawful as per the agreement to lease, the lease and the relevant applicable law. Mr. Mohamed deposed that this application is an attempt to shift the burden of proof to the plaintiff when it is in fact the duty of the defendants. He deposed that the plaintiff has been in active possession of the suit property since December 2009 and has

been conducting mining operations on the suit property, and no report or complaint has been made to the relevant authorities under the respective laws alleging illegality of the mining operations as misrepresented by the defendants. He deposed that under the law described by the 1st and 2nd defendants, the respective authorities are clothed with enforcement powers in the discharge of their respective mandates. Further to this, Mr. Mohamed deposed that no proof has been put forward by the 1st and 2nd defendants of the failure of duty by the relevant authorities under the respective laws in order to justify intervention by this court. He deposed that this application seeks to obtain orders on behalf of the respective statutory authorities whereas no appearance has been entered on their behalf. Mr. Mohamed deposed that the plaintiff possesses the Environmental Impact Assessment License from the National Environmental Management Authority. He also deposed that the application seeks for a permanent order of injunction, which orders cannot be granted at this interlocutory stage in the proceedings. He further deposed that no proof has been tendered for the alleged destruction of the suit property. Mr. Mohamed deposed that the ex-parte orders granted on 5th May 2017 were properly issued after full disclosure of material facts, and further to this, the 1st and 2nd defendants have not demonstrated with any particularity whatsoever the alleged material misstatements or concealment of facts. He deposed that the 1st and 2nd defendants have not demonstrated that they have a prima facie case with a probability of success, nor that they suffer irreparable injury should the orders sought fail to be granted. Mr. Mohamed further deposed that this application is an afterthought and an abuse of the court process, and that the 1st and 2nd defendants have never sought to bar the plaintiff from occupying and using the leased property since December 2009 with full knowledge of what kind of business the plaintiff is involved in.

13. The 3rd defendant opposed the application vide his replying affidavit. Mr. Rashid Mohammed deposed that in exercise of the powers donated to him as a trustee of the Wakf Commission, he together with other trustees duly executed an agreement to lease, and subsequent lease of the suit property, where the plaintiff was allowed to take possession and conduct mining projects. He deposed that the plaintiff has paid the Wakf the monies as evidenced in the first application.

14. The 4th defendant opposed the application vide his replying affidavit. He reiterated the contents of the 3rd defendants replying affidavit in verbatim.

15. The third application is by counsel for the 1st and 2nd defendants. He sought the following orders:

a. Spent

b. That this Honourable Court do issue an order staying proceedings in this matter until the personal and legal representative of the deceased is identified and duly appointed in accordance with the law.

c. That the cost for this application be in the cause.

16. The application is based on the grounds on the face of the Motion, and the supporting affidavit of Peter Muhoro Kimani, the advocate for the 1st and 2nd defendants. Briefly, he deposed that 1st and 2nd defendants' application had been fixed for hearing on 31st July 2018, and under circumstances which are not clear, it has been deferred to 2nd October 2018. Mr. Kimani deposed that the un-procedural deferment ignored the fact that the 1st and 2nd defendants seek to stay ongoing proceedings pending determination of the case in the Court of Appeal. He further deposed that the 1st defendant died on 13th July 2018, and proceedings cannot legally continue as his application is pending determination, and his counterclaim cannot proceed before a personal and legal representative has been appointed.

17. Counsel for the 3rd and 4th defendants Joseph Karanja Kanyi swore an affidavit in opposition to the application. He deposed that since the 1st defendant has died, it is very doubtful how his advocates still purports to be receiving instructions from him. He further deposed that this application is an abuse of the court process since there is a similar application dated 9th July 2018 seeking similar orders.

ANALYSIS AND DETERMINATION

18. I have considered the applications herein and the rival affidavits made. In both the first and the second application, the plaintiff and the 1st and 2nd defendants are seeking orders for inter alia temporary injunction. The plaintiff is praying for these orders to restrict the defendants from dealing with the land in any way that may interfere with its mining business, while the 1st and 2nd defendants seek similar injunctive orders barring the plaintiff from its mining operations on the suit land pending the determination of this suit.

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

“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.”

20. To put further emphasis on Order 40 aforementioned, the principles to be applied when considering an application for temporary injunction are well settled. In the famous case of Giella –v- Cassman Brown & Co (1973) EA 358 the applicant must show the he has a prima facie case with a probability of success; that he stands to suffer irreparable damage not compensable by damages; and if the court is in

doubt, it will decide the matter on a balance of convenience.

21. The first condition is that an applicant must show that he has a prima facie case with a probability of success. It is the case of the plaintiff that there is a valid agreement to lease, and lease. Further to this, the plaintiff has been in possession of the suit land since December 2009, while remitting rent to the Trust. The 3rd and 4th defendants have confirmed in their replying affidavit that the Trust received Kshs. 100,000,000 from the plaintiff. The 3rd and 4th defendant further averred that the agreement to lease and the lease is enforceable, and the plaintiff had the right to take possession of the suit land. On the other hand, in the second application, the 1st-3rd defendants claim that there is no valid agreement to lease because it was not signed by all the trustees. They also claim that the lease is a forgery and with that, the plaintiff should not be conducting mining operations.

22. The second condition is that the applicant should prove that they stand to suffer irreparable damage not compensable by damages. The plaintiff in the first application claims that it has developed the suit property, and the mining operations are the core of its business. The plaintiff further stated that it has paid to the Trust Kshs. 100,000,000 for the standard premium and rent which stands to be lost if the lease is interfered with. In the second application, the 1st and 2nd defendants have claimed that if the mining operations persist, the suit property stands to be forever damaged, defaced, and the value of the land will decrease.

23. The interest of the defendants over the suit property need to be protected in the same equal measures as those of the plaintiff pending hearing and determination of the suit. In this case, the plaintiff has been in possession since 2009. Given the above position, it follows that the plaintiff has established a prima facie case with a probability of success. The plaintiff certainly stands to suffer irreparable loss if the defendants proceed to take possession of the suit property. To me it is irrelevant at the moment that the agreement to lease and lease might or might not be enforceable. In my view, the best orders to grant in the circumstances of this case is for maintenance of status quo pending hearing and determination of this suit. Until the matter is determined, the parties ought not to interfere with the plaintiff's possession of the suit property. Even if I was to consider the balance of convenience the same tilts towards maintaining the status quo until the suit is heard and determined. Moreover, some of the defendants are in support of the plaintiff's position.

24. As for the second application, the 1st and 2nd defendants based their application on the validity of the agreement to lease and lease. These are matters that cannot be determined at this interlocutory stage.

25. The plaintiff in the first application also prayed for orders that the lease be registered against the title. In the second application the 1st and 2nd defendants prayed for a number of permanent injunctive orders. Before this court, it has been established that the plaintiff is in possession of the suit property, and there are mining operations being undertaken by the plaintiff based on their claim of having a valid lease. In the case of case of Olive Mwhiki Mugenda & Another –v- Okiya Omtata Okoiti & 4 Others (2016)eKLR, the Court of Appeal held as follows:-

“Applying the decisions of this court in Vivo Energy Kenya Limited –V- Maloba Petrol Station Limited and 3 Others (2015) eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms –v- Naftali Ogola (2019) eKLR it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage....”

26. In my considered view, there is nothing to justify the issuance of final orders at an interlocutory stage. The question of whether there is a valid agreement to lease and lease is a matter for determination at the full hearing.

27. The 1st and 2nd defendant had also raised a preliminary objection dated 25th May 2017 claiming that the plaintiff claim against the 3rd defendant is not sustainable in law. The 3rd defendant at the time of filing the preliminary objection was the Trust. The plaint was later amended by leave of court, where the plaintiff amended the 3rd defendant and enjoined the 4th and 5th defendants. That being said, the preliminary objection herein stands spent.

28. In the third application, all orders sought are spent. However, counsel to the 1st defendant brought to the court's attention that the 1st defendant died on 13th July 2018. Order 24 Rule 4 provides for the procedure in cases where one of the defendants dies. It is drawn as follows:-

4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

29. The 1st defendant having died on 13th July 2018, the suit abated by 12th July 2019. The suit having been a land matter survived the defendant's death, that is to say, the cause of action continued to have a legal existence after the death of the defendant. The general rule is that suits and actions must be prosecuted by and against living parties. Since the deceased person cannot be a party to a legal proceeding the effect of the death is to suspend the action as to the deceased until the legal representative is substituted as a party. Unless and until such substitution is made within one year or by extension/leave of the Court, any further proceedings in the case are void as to the deceased.

30. For these reasons, I make the following orders:

- a. The first application by the plaintiff dated 6th June 2017 is allowed.**
- b. The second application by the 1st and 2nd defendant dated 24th May 2017 is hereby dismissed.**
- c. The third application dated 30th July 2018 is hereby dismissed, and the suit against the 1st defendant stands abated.**
- d. Each party to bear its own costs**

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF JULY 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

Amanya holding brief for Onyony for the plaintiff

Mango for the 3rd and 4th defendant

Akanga holding brief for the 1st and 2nd defendants

C.K. YANO