



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 81 OF 2019**

**KHADIJA ASKEW (Suing as the administrator**

**and representative of the estate of the Late KASSIM KHAMISA).....PLAINTIFF**

**VERSUS**

**1. YUSUF MUSA KHAMISA**

**2. ABDULHAFIZ MUSA KHAMISA**

**3. MANSOOR MUSA KHAMISA**

**4. JITHIADA AGENCIES LTD**

**5. MUSA SULEIMAN.....DEFENDANTS**

**RULING**

1. By A Notice of Motion dated 8<sup>th</sup> May 2019 and brought under Order 40 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Plaintiff/Applicant seeks the following orders

**1. Spent**

**2. That pending the final disposal of this suit, the plaintiff/applicant be granted a temporary injunction barring the defendants by themselves and/or their servants, agents and/or other representatives from selling, alienating, wasting and/or in any other way disposing off the said property, i.e. MOMBASA BLOCK XVIII/243.**

**3. That pending the final disposal of this suit, the defendants, their servants, agents and/or other representatives, or anyone claiming under them be prevented from receiving any rents with regard to the said property i.e. MOMBASA BLOCK XVIII/243 and that the said rent be ordered paid into a joint interest earning account.**

**4. That pending the final disposal of this suit, the defendants, their servants, agents and/or other representatives, their tenants and/or anyone claiming under them be evicted from the said property i.e. MOMBASA BLOCK XVIII/243.**

**5. Spent**

**6. That costs of this application be provided for.**

2. The application is based on the grounds on the face of the motion and is supported by the affidavit of Khadija Khamisa Askew sworn on 8<sup>th</sup> May, 2019. It is deposed that the suit property is registered in the name of Mohammed Khamisa (deceased), a grandfather of the plaintiff. That the deceased erected a building on the suit land. The plaintiff has deposed that the deceased had two adopted sons, Essa Esmail and Kassam Esmail Khamisa. That Essa Esmail died without a child while Kassim Esmail had eleven (11) children, including the plaintiff. The plaintiff avers that the suit property should rightfully and lawfully devolve to the children of Kassam Esmail Khamisa (deceased).

3. The plaintiff has deposed that the defendants have unlawfully and illegally taken possession of the said property and have been collecting and continue collecting rent from various tenants in the said building without the consent of the plaintiff or that of her siblings. The plaintiff

stated that they have issued an eviction notice which has been ignored. It is the plaintiff's contention that they have suffered and continue to suffer great loss and damage in the form of mesne profits (rent) at the rate of Kshs.200,000 per month from January 2004 to May 2019 which comes to a total of Kshs. 36,800,000/= as well as search fees of Kshs. 10,000/=.

4. The plaintiff avers that the building is a three storey building, with the second floor being a four bedroom house and the 5<sup>th</sup> defendant and his mother occupy the whole of the second floor without paying rent, either to the plaintiff or her siblings. The plaintiff avers that the defendants', their agents, servant and/or representative, one Maimuna tried to sell the said property without their knowledge or consent and that they are reasonably apprehensive that will not be the only attempt to dispose of the suit property. The plaintiff states that the 2<sup>nd</sup> defendant and a sister to the 1<sup>st</sup> defendant offered to pay off the plaintiff and her siblings but they refused because the property was theirs. It is the plaintiff's contention that she has a prima facie case with a probability of success and that if the orders are not granted, they will suffer irreparable damage that cannot be compensated by an award of damages. The plaintiff further avers that the balance of convenience rests with her. The plaintiff has annexed copies of a Limited Grant of Letters of Administration Ad Litem in Mombasa CMCC Succession Cause No. 102 of 2019, Grant of Probate, Certificate of Title, Photographs of the said building, eviction notice and the response thereto.

5. In the opposing the application, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a replying affidavit sworn on 12<sup>th</sup> June 2019. They aver that Kassim Khamisa is not the son of the late Mohamed Khamisa but his nephew. They further aver that the initial proprietors of parcel of land MOMBASA BLOCK XVIII/243 was Mohamed Khamisa who transferred third (1/3) share of the land to one Hajrabhai Khamisa and another third (1/3) share to one Haji Sale Issak, and remained with a third share of the property. That the aforesaid proprietors then consecrated all their respective shares in the property to a Wakf whereby Mohamed Khamisa was appointed the first trustee of the said Wakf and referred to entries in the title. They aver that in view of the foregoing, the said property wholly ceased being personal property and became a trust property pursuant to the consecrations. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver that Essa Esmail and Kassam Esmail Khamisa were merely appointed as trustees and executors as per Mohamed Khamisa's will and not as beneficiaries of the said Wakf property and that the suit property was not therefore one which legible for succession as suggested by the plaintiff. They aver that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are currently the duly appointed trustees of the Wakf on the subject land and they accordingly have the legal authority to collect rent and to generally manage the suit property. They have exhibited a copy of a duly registered transfer of trustees and a copy of the title deed showing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors of the suit property in their capacities as trustees of the Wakf.

6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver that no one else has authority whatsoever to alienate the subject property or deal with the same, as it is registered in the name of the aforesaid trustees of the Wakf and termed the allegations that one Maimuna tried to sell the property as completely baseless. They state that the subject property being a Wakf property, the income therefrom is to be distributed to the beneficiaries of the Wakf and the same obligation and basic mandate of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, adding that the plaintiff has failed to collect her shares of the income from the year 2013. They aver that the suit property is Wakf property and does not belong to the plaintiff or any other individual. It is their contention that the application has failed to meet the threshold for granting orders for injunction. They further contend that the plaintiff has not been prejudiced and is only trying to intermeddle with the Wakf property. They aver that the application is lacking in basis and that the same ought to be dismissed with costs.

7. The 5<sup>th</sup> defendant also opposed the application through a replying affidavit sworn on 17<sup>th</sup> June, 2017 in which he repeats the averments made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 5<sup>th</sup> defendant avers that he is a tenant in the suit property and rightfully paying rent to the 4<sup>th</sup> defendant who is the agent of the property. He has attached copies of rent receipts. He added that he is a beneficiary of the Wakf and receives his shares from the trustees. The 5<sup>th</sup> defendant avers that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being the trustees of the Wakf, have always diligently managed the Wakf property and have been distributing the income therefrom amongst all beneficiaries. He contends that the application is without any factual or legal foundation and that the same ought to be dismissed with costs.

8. In response to the replying affidavits by the defendants, the plaintiff filed supplementary affidavit sworn on 1<sup>st</sup> July 2019 in which she inter alia denied that Mohamed Khamisa transferred any portion of the suit property. The plaintiff stated that there is no Wakf on the suit property and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have never been appointed trustees. The plaintiff denied receiving any income from the suit property before 2013.

9. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties. I have considered the application the affidavits in support and against as well as the rival submissions and the authorities cited.

10. The principles to be applied when considering an application for injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**, the applicant must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

11. Has the applicant made out a prima facie case with a probability of success? In the case of **Mrao Ltd – v- First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, a prima facie case was described as one which, "on the material presented to the court or a tribunal properly directly itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

12. In this case, the plaintiff claims to be entitled to the suit property (together with her siblings) as beneficiaries of the estate of the late Mohamed Khamisa who was the initial registered proprietor of the suit property. Whereas the plaintiff alleges that the defendants have unlawfully taken possession of the suit property, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have exhibited documentary evidence indicating that the late Mohammed Khamisa transferred a third share of the suit land to one Hajrabhai Khamisa and another third share to one Haji Saleh Issak. It is also apparent that whereas the late Mohamed Khamisa retained a third share of the property, the defendants have also shown that the three proprietors consecrated all their respective shares in the property to a Wakf where the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the current trustees. Although the plaintiff has denied the existence of the said Wakf and the its alleged trustees, at this interlocutory stage, it is not possible to resolve the issues in dispute. In my view, those are issues to be determined at the full hearing. From the evidence on record, I find that the

applicant has not established a prima facie case with a probability of success. Besides, the applicant stands to suffer no irreparable harm not a compensable in damages as the income from the suit property can be ascertained.

13. Besides the order for prohibitory injunction the applicant also seeks orders of mandatory injunction in the form of eviction of the defendants from the suit property. In the case of **Locabail International Finance Ltd –v- Agro Export & Others (1986)1 ALL ER 901** it was stated:

**“A mandatory injunction ought not to be granted on an application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court has to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for prohibitory injunction.”**

14. Taking into account the above decision and other decisions and bearing in mind the circumstances of this case and also considering that the defendants have been managing the property for a number of years, I am not satisfied that the applicant has met the test of special circumstances. In my view, the applicant’s case is not strong and clear to enable this court grant the orders sought. Further, the application also fails because the applicant by the application seeks final orders at interlocutory stage.

15. The upshot is that the Notice of Motion dated 8<sup>th</sup> May 2019 is not merited and the same is dismissed with costs to the defendants.

**DATED, SIGNED and DELIVERED at MOMBASA this 13<sup>TH</sup> day of July 2020.**

**C.K.YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant