



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 34 OF 2013

SHOMARI MANGALE HAMISI.....PLAINTIFF

VERSUS

1. MWAJUMA SHOMARI SOMBO

2. SOFIA YUSUF

3. BAKARI YUSUF

4. ALI YUSUF

5. COUNTY GOVERNMENT OF MOMBASA.....DEFENDANTS

RULING

1. This ruling is in respect to the Notice of Motion dated 16th April 2016 by the plaintiff seeking orders that the defendants be ordered to remove their padlock from one room on the suit premises previously occupied by the plaintiff's tenant, in the alternative, the court do allow the plaintiff to break open and retake possession of the said room with a view to re-let it out to prevent loss of rental income. The plaintiff also seeks an order to stay proceedings and directions on service of this application and any order the court may make and issue.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Shomari Mangale Hamisi aka Hamisi Mangale Shomari, the plaintiff sworn on 6th May 2016. The plaintiff states that he is the landlord of the suit premises. That on 22nd December, 2015, a tenant by the name John Masha Upendo who was paying monthly rent of Kshs.1500/= died in the room he was occupying on **PLOT NO.2010/IV/MN**. The plaintiff avers that after the deceased's remains were removed for burial, he locked the room to secure the property left behind by the deceased.

3. The plaintiff further avers that after he had locked the said room with a padlock, the 1st and 3rd defendants added their padlock. That on 25th July, 2013, the court delivered a ruling on an injunction barring the 1st, 2nd, 3rd and 4th defendants by themselves or through their agents, servants, employees, workmen, builder, proxies or otherwise howsoever from entering upon or remaining thereat, construction or continuing to construct any form of structure on **PLOT NO.2010/IV/MN** until the hearing and determination of this suit. It is the plaintiff's contention that the 1st and 3rd defendants acted in bad faith and in breach of the injunction orders granted by the court. The plaintiff further states that he was charged in CMC Criminal Case No.682 of 2014 and wants those proceedings stayed until the determination of this suit.

4. The plaintiff also filed a supplementary affidavit sworn on 10th September 2018 in which he depones that he was acquitted in the Criminal Case No.682 of 2014 and that the office of the Director of Public Prosecution has preferred an appeal. He avers that in light of the said appeal, it is only fair that the present civil proceedings are stayed.

5. The application is opposed by the 1st, 2nd, 3rd and 4th defendants who filed a notice of preliminary objection dated 2nd September 2016 on the grounds that the applicant's case against them does not have any probability of success because the applicant is not the legal owner of the subject **PLOT NO.2010/VI/MN** and is not the landlord and/or owner of the residential house situate on the said plot. That the applicant is under trial in Mombasa Criminal Case No.682 of 2014 where he is charged with the offence of wilful and unlawful procurement of a title deed. It is their contention that the application is premature, vexatious, frivolous and a gross abuse of the due process of the court.

6. The 3rd defendant also filed a replying affidavit sworn on 24th August 2018 in which he depones inter alia, that the plaintiff fraudulently acquired title to the suit property and that the said room belongs to the defendants who are claiming the title as part of their mother's share which was fraudulently transferred without their mother's their knowledge. It is deponed that the injunction issued by the court on 25th July

2013 was issued in error since they have been living on the said land hence they could not be restrained from an act that had already happened. It is further stated that the plaintiff had never collected any rent from any of the houses and that it was the defendants late mother who collected all the rent, and that the plaintiff therefore had no basis in locking the room in contention.

7. The application was canvassed by way of written submissions which were duly filed by both parties. The applicant filed his submissions on 18th September, 2018 while the 2nd, 3rd and 4th defendants filed theirs on 11th October, 2018.

8. I have considered the application, the pleadings and affidavits on record as well as the submissions made. The orders sought by the plaintiff are in the nature of a mandatory injunction to compel the respondent to remove the padlock in the suit premises. The law as regards the principle to be applied when considering whether or not to grant a mandatory injunction is higher than that in respect of a prohibitory injunction.

9. In the case of *Locabail International Finance Ltd –v- Agro – Export & Another* (1986) 1 ALL ER 901 it was stated:

“A mandatory injunction ought not to be granted on an interlocutory 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 at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a watch on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction. ”

10. The courts have been reluctant to grant a mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for a full hearing of the entire case.

11. It is common ground that both the plaintiff and the 1st, 2nd, 3rd and 4th defendants have placed their respective padlocks on the subject room. It is apparent that both parties are claiming the suit property. Before this court, it has been established that the plaintiff had been charged with a criminal offence for obtaining registration of the title of the suit property. Of course, there is evidence that the plaintiff has been acquitted in the Criminal Case. The state has however appealed against the judgment.

12. It is also common ground that there was an injunction issued by the court. The defendants argue that the injunction issued by the court on 25th July 2013 was issued in error. I am afraid that cannot be true. As long as the court order is in force, it remains that, a court order. It can only be reviewed or set aside, through a legal process by a party who feels aggrieved by it. I note that the said order was entered by consent of the parties and it was to remain in force until the hearing and determination of the suit.

13. Having carefully considered the material before me, I am not satisfied that the plaintiff has made out a case to warrant the grant of the orders sought. The case is not unusually strong and clear as to allow me to grant the mandatory injunction prayed for. In addition, no good reason has been given why these proceedings should be stayed.

14. The upshot is that the Notice of Motion dated 16th April 2016 lacks merit and the same is hereby dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Kimani for Plaintiff/Applicant

Mrs. Nyange holding for 2nd, 3rd and 4th defendants

Ms. Mwainzi holding brief for Mohamed for 5th defendant

No appearance for 1st defendant-deceased

Yumna Court Assistant

C.K. YANO

JUDGE

24/1/19