



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.53 OF 2018**

**KHADIJA SHAFI**

**FADHILI ZAHRAN.....PLAINTIFFS**

**VERSUS**

**ALI MOHAMED ALI DARANI.....1<sup>ST</sup> DEFENDANT**

**TRUCKERS PARADISE LIMITED.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS (COAST REGISTRY).....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 9<sup>th</sup> March 2018, brought under Order 51 Rule 1 of the Civil Procedure Rules the Plaintiffs are seeking the following orders

**1. Spent**

**2. Spent**

**3. That pending the hearing and determination of this suit there be an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants personally or through their employees, servants and/or agents from alienating, disposing of, occupying or in any other way dealing with PLOT NUMBER 1182/VI/MAINLAND NORTH**

**4. The costs of this Application be paid by the Defendants.**

2. The Application is premised on the following grounds:

**i. That the house on PLOT NUMBER 1182/VI/MAINLAND NORTH (HEREINAFTER THE SUIT PROPERTY) originally belonged to the Wakf of the Late Kibibi Binti Mohamed Sheikh Al-Mombasiya (hereinafter “the Wakf”).**

**ii. That by unlawful means, the 1<sup>st</sup> Defendant purportedly entered into a lease over the Suit Property with the 2<sup>nd</sup> Defendant.**

**iii. That in a lease dated 12<sup>th</sup> of January 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants unlawfully entered into a Lease Agreement wherein the 1<sup>st</sup> Defendant purports to be the owner of the property and not a trustee.**

**iv. That the Plaintiffs had prior to this transaction placed a restriction over the suit property forbidding any dealings with it.**

**v. That despite the said restriction, the 3<sup>rd</sup> Defendant went ahead and removed the said restriction without informing or seeking the consent of the Plaintiffs and registered a lease and issued a certificate of title over the Suit Property.**

**vi. That after the unlawful lease, the 2<sup>nd</sup> Defendant demolished the Suit Property.**

vii. That by reason of the unlawful lease, the Plaintiffs have suffered great loss and damage, part of which they will quantify at a later stage and present to this Honourable court.

viii. That the 1<sup>st</sup> Defendant has taken advantage of his Trusteeship over the Wakf property to cause loss and damage to the Plaintiffs.

ix. That it is in the interest of justice to allow this Application.

3. The Application is supported by the affidavit of Khadija Shafi sworn on 9<sup>th</sup> March 2018. The Applicant's case is that they have brought this Application in their capacity as lawful beneficiaries of the Wakf of the late Kibibi Binti Mohamed Sheikh Al-Mombasiya. That the Wakf was the original owner of the Suit Property. The Applicants contend that they have a *prima facie* case as the Kadhi held that the Suit Property belongs to a Wakf and the 1<sup>st</sup> Defendant had no right to arbitrarily enter into a lease agreement over it as the 1<sup>st</sup> Defendant's claim of ownership has no merit. The Applicants have annexed a copy of the Wakf, a copy of the lease and scanned photographs of the suit property.

4. The Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 2<sup>nd</sup> Defendant filed a Preliminary Objection dated 7<sup>th</sup> June, 2018 on the following grounds:

**1. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Plaintiffs do not have the prerequisite *locus standi* to bring before this Honourable Court the present suit the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs not being the legal representatives of the Wakf of Kibibi Binti Mohamed Sheikh Al-Mombasiya (deceased).**

**2. That this Honourable Court respectively so does not have the requisite jurisdiction to deal with properties registered under Cap 109 Laws of Kenya \_ Wakf Commissioners Act Cap 109 Laws of Kenya.**

**3. That without prejudice to the foregoing paragraph (2) the Plaintiffs have not presented before this Honourable Court evidence of misappropriation of Wakf property, failure to account, otherwise criminality on the part of the 2<sup>nd</sup> Defendant so as to oust the Wakf created over PLOT NO.1182/VI/MAINLAND NORTH.**

**4. That this suit was presented by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs is a fallacy bad in law and null and void *ab initio*.**

5. The 1<sup>st</sup> Defendant filed a replying affidavit sworn by himself on 13<sup>th</sup> December, 2018. He depones that he is the trustee of the Wakf of Kibibi Binti Mohamed Bin Sheikh Al-Mombasiya and a lawful beneficiary. The 1<sup>st</sup> Defendant avers that the lease was lawfully entered into in his legal capacity as the trustee of the Wakf property and not in his personal capacity as clearly indicated in line 4 of the face of the lease instrument. He further avers that the Wakf properties are wasting, have little or no income and invaded by trespassers while the beneficiaries waste their finance to institute legal proceedings against each other rather than to legally remove the trespassers, adding that as the trustee he has the power and mandate to enter into any legal transaction for and in the best interest of the Wakf. The 1<sup>st</sup> Defendant avers that the firm of Mokaya Ogutu & Company Advocates were retained for the purpose of legal services in the said lease and ought to have diligently ensured that the procedures in obtaining consent from the Wakf Commissioners as mandated by the Wakf Commissioners Act Cap 109 Laws of Kenya, which omission is admitted to affect the validity of the lease. Relying on advice the 1<sup>st</sup> Defendant states that the 2<sup>nd</sup> Defendant as lessee ought to have obtained written consent prior to the illegal demolition of the permanent structure on the property which consent was never sought nor obtained from the 1<sup>st</sup> Defendant as the trustee of the Wakf property thereby causing great financial losses to the Wakf. The 1<sup>st</sup> Defendant avers that his actions and intentions without any malice or illegality, were in the best interest of the Wakf wherein he is also a beneficiary and equally stands to lose as much as the Plaintiffs. The 1<sup>st</sup> Defendant, further relying on advice, avers that in view of the breaches by Mokaya Ogutu & Company Advocates and the lessee, the lease is void and ought to revert to the Wakf. The 1<sup>st</sup> Defendant partially supports the Plaintiffs' Application to the extent of restraining the 2<sup>nd</sup> Defendant from occupying or dealing with the Wakf property.

6. The Application was canvassed by way of written submissions. The Plaintiffs filed their submissions dated 4<sup>th</sup> February 2019 on even date. It is the Plaintiffs' submissions *inter alia*, that they have complied with the principles laid down in the case of **Giella -v- Cassman Brown & Co. (1930) EA 358**. They submitted that the Wakf has already suffered great loss and damage by the demolition and that if the orders sought are not granted, then the Wakf shall continue to suffer great prejudice as the 2<sup>nd</sup> Defendant shall continue with demolition of the said property thereby defeating the purpose of the Wakf and may also construct new property thereon leading to new claims. The Plaintiffs' counsel cited the case of **Mrao -v- First American Bank of Kenya Limited & 2 Others (2003) KLR 125** and Paul **Gitonga Wanjau -vs- Gathuti Tea Factory Company Ltd & 2 Others (2016 eKLR)**

7. The Plaintiff urged the court to exercise its discretion and enter judgment against the Defendants. This is because of the admissions made by the 1<sup>st</sup> Defendant in his replying affidavit and the failure of the other Defendants to enter appearance and file defence on time. Further, the Plaintiffs want the court to revoke the lease agreement dated 22<sup>nd</sup> November, 2016 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and to find the Defendants liable for the loss suffered as a result of the demolition.

8. The 1<sup>st</sup> Repondent filed his written submission on 18<sup>th</sup> February, 2018 in which he reiterated that the lease was lawfully entered into by the 1<sup>st</sup> Defendant in his legal capacity as the trustee of the Wakf property and not in his personal capacity. He argued that he is the sole registered trustees of the Wakf and as such he entered into the lease agreement with the 2<sup>nd</sup> Defendant for and in the best interest of the Wakf to lease the property which had been vacant for 5 years while he continued paying rates of over Kshs.30,000 from his own funds. The 1<sup>st</sup> Defendant urged the court to issue order against the 2<sup>nd</sup> Defendant to the extent of its liability as prayed.

9. I have considered the Application, the affidavits filed both in support and in opposition as well as the Preliminary Objection raised. I have also considered the submissions filed and the authorities cited. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a *prima facie* case with a probability of success and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience.

10. In the present case, the dispute is over the property known as **PLOT N.1182(ORIGINAL NUMBER 1125/2) OF SECTION VI MAINLAND NORTH** which was registered in the name of the Wakf of the late Kibibi Binti Mohamed Bin Sheikh Al-Mombasiya. The Plaintiff and the 1<sup>st</sup> Defendant are beneficiaries of the Wakf. The 1<sup>st</sup> Defendant is also a trustee of the said Wakf. From the evidence on record, it is not disputed that the 1<sup>st</sup> Defendant leased the Suit Property to the 2<sup>nd</sup> Defendant. It is the Plaintiff's contention that the said lease was entered into without their knowledge and/or consent as beneficiaries of the Wakf. The 1<sup>st</sup> Defendant on his part contends that he leased out the Suit Property to the 2<sup>nd</sup> Defendant in his capacity as the trustee of the Wakf. Both the Plaintiff and the 1<sup>st</sup> Defendant are in agreement that the 2<sup>nd</sup> Defendant went ahead and demolished the Suit Property. It is the Plaintiff's contention that the said demolition was illegal and has resulted in loss and damage on their part. The 1<sup>st</sup> Defendant also agreed with the Plaintiff on the demolition carried out by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant contends that the said demolition was carried out by the 2<sup>nd</sup> Defendant without the knowledge and/or consent of the 1<sup>st</sup> Defendant or the Wakf. For this reason, the 1<sup>st</sup> Defendant supports that an injunctive order should be issued against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant has not disputed the facts as stated by the Plaintiff and the 1<sup>st</sup> Defendant. In particular, the 2<sup>nd</sup> Defendant failed to explain the reason for the demolition and whether or not there was consent from the beneficiaries, the trustee or the Wakf.

11. In the case of **Mrao-vs- First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, it was held that:

**“A prima facie case in a civil Application included but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter? ”**

12. From the material presented to this court, it is my view that the Plaintiff has demonstrated that they have a right over the suit property. They have also shown that their right has apparently been infringed by the demolition which was done without their knowledge or consent.

13. The facts as pleaded by the Plaintiff have not been disputed by the Defendants. As a matter of fact, the 1<sup>st</sup> Defendant supports the Application, albeit against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant has not denied demolishing a permanent structure on the suit property without the knowledge or consent of the Plaintiff and the 1<sup>st</sup> Defendant. In the Application, the Plaintiff is seeking an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from alienating, disposing of, occupying or in any other way dealing with the suit property. There is no dispute that the 2<sup>nd</sup> Defendant is already in occupation pursuant to the lease agreement entered into between it and the 1<sup>st</sup> Defendant. It is my view that at this interlocutory stage, the said lease agreement cannot be revoked as submitted by the Plaintiff. The issue of the legality or otherwise of the said lease will have to await the main trial. Moreover, there was no prayer in the Application for summary judgment. The Plaintiff has only raised the issue in their submissions. The court will not grant such an order at this stage when there is no Application made and the matter considered on merit upon hearing both parties.

14. The crucial issue for determination is whether the Plaintiff should be granted the orders sought given the circumstances of this case. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of the court that the Plaintiff has established a *prima facie* case with a probability of success. As regards irreparable damage, I take the view that should the Suit Property be alienated, the Plaintiff will have suffered loss which may not be quantified in damages. Already there is evidence that some permanent structure on the suit property had been demolished without the Plaintiff's knowledge or consent. The 1<sup>st</sup> Defendant has also stated that that was done without his knowledge or consent. If further demolition is undertaken, the status quo of the suit property will certainly change and the Plaintiff may suffer irreparable damage or loss. The balance of convenience, if I had doubt in the matter, would tilt in favour of the Plaintiff in order to safeguard the subject matter of the suit pending hearing and determination.

15. Arising from all the above, I find merit in the Application. Accordingly, I grant the order for temporary injunction against the Defendants restraining them from demolishing, alienating, disposing of, constructing or developing the suit property pending hearing and determination of the suit. The 2<sup>nd</sup> Defendant is already in occupation pursuant to the lease entered into between it and the 1<sup>st</sup> Defendant. Granting an order restraining them from occupying will amount to a mandatory injunction or eviction which has not been sought or proved. Therefore the issue of occupation will have to await the outcome or earlier determination of the suit. Costs of the Application are awarded to the Plaintiff.

It is so ordered.

**Delivered, signed and dated at Mombasa this 28<sup>th</sup> March, 2019.**

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**C. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Hamid holding brief Hamza for Plaintiff

Egunza for 2<sup>nd</sup> Defendant

Wachenje holding brief Nararin 1<sup>st</sup> Defendant

Mwandeje for 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Esther Court Assistant

**C.K. YANO**

**JUDGE**