



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 399 OF 2017

ALIAKBER AMIRUDDIN CHAKERA.....PLAINTIFF/APPLICANT

-VERSUS-

ASITBHAI T. HUSEEIN.....1ST DEFENDANT/RESPONDENT

HASHAM TARMOHAMED HUSSEIN....2ND DEFENDANT/RESPONDENT

HUSSEIN TARMOHAMED DOSANI.....3RD DEFENDANT/RESPONDENT

TOROPHY AUCTIONEERS.....4TH DEFENDANT/RESPONDENT

RULING

1. For determination is the notice of motion dated 3rd November 2017 brought under the provisions of Order 40 of the Civil Procedure Rules. The plaintiff/applicant is seeking for orders that:

1. Spent

2. Spent

3. Pending the hearing and determination of this suit, the Defendants/Respondents by themselves, their agents, servants and/or employees be restrained from alienating, selling, charging, leasing, transferring, wasting, disposing or in any other way dealing with the parcel of land known as: MOMBASA/BLOCK XV/147.

4. The costs of this application be paid for by the Respondents.

2. The applicant avers that he is one of the bonafide shareholders of the suit plot which had been advertised for sale by the 4th defendant on 4th November 2017. That the applicant has not been a party to the legal issues between the defendants. The applicant deposed that he did not understand why and how the suit property was advertised for auction. He therefore urged the Court to grant the orders sought.

3. The 4th defendant via a replying affidavit sworn on 7th November 2017, confirmed receiving instructions to sell sometimes in April 2017 and proceeded to advertise the suit property for sale. Thereafter a temporary stay of sale was issued. She said that she is an agent of a disclosed principal thus wrongly sued. According to the 4th defendant, the appeal No 10 of 2014 having been dismissed, the execution process is valid and lawful.

4. The 3rd defendant is indicated as deceased. The 2nd defendant in opposing the application filed a lengthy replying affidavit dated 20th November 2017. He began by discussing the case between his siblings that proceeded before the Kadhi's Court and whose decision was later upheld in HCCA No 10 of 2014. In regard to the present motion, the 2nd defendant deposed that it is an abuse of the Court process because the applicant herein had filed objection proceedings in Kadhi's Court case No 1'A' of 2007; Hasham Tarmohamed Hussein & Another vs Asitbhai T. Hussein.

5. The 2nd defendant also stated that this suit does not disclose any prima facie case to warrant the granting of the orders sought. The 2nd defendant also deposed that they have not been receiving rent from the premises inspite of their father having a shareholding in the suit property. That the applicant has abandoned the objection proceedings and instead filed the current suit.

6. Parties filed written submissions which discussed mostly what had taken place in the suit before the Kadhi's Court and the subsequent appeal. What I note from the pleadings filed by both sides, it is not disputed that the suit plot MSA/BLOCK XV/147 is jointly owned by the plaintiff and the defendant's family. It is also not in dispute that the 2nd defendant instructed the 4th defendant to sell it by public auction.

7. From the judgment of the Kadhi in case No 1'A' of 2007 and that the Learned Justice Thande in HCCA No 10 of 2014, it was held that the defendants' family owned 1/3 share in the suit title. This is further confirmed by names appearing on the title deed and the postal search annexed in support and opposition to the application. The 2nd defendant other than blaming the applicant for not paying them a share of the rental income did not tell this Court why he advertised the entire suit property for sale when their share is comprised of 1/3 of the property.

8. The copy of the advertisement annexed to the affidavit in support of the motion described the property to be sold as "all that plot title No. MSA/BLOCK XV/147 situated in Majengo Mombasa County registered in the names of:

1. Mohamed Mehbood Tarmohamed

2. Asitbahai Tarmohamed Hussein

3. Ahakbar Amirruddin Chakera

4. Amirrudin Akberali Chakera

5. Ahmed Batchu Dekla

9. The applicant stated that he was not consulted before the sale and or advertisement was commenced. The 2nd defendant cannot sell other peoples share without their consent. To me the lack of consent is itself prima facie evidence that the applicant's suit has a probability of succeeding. If the 2nd defendant is unhappy with the manner the rental income is being expended, he can appropriately move the Court. Non-payment of rental income cannot bestow upon him the right to dispose off the interest of the other shareholders.

10. In regard to the issue of abuse of Court process, I note that the application dated 31st July 2017 was filed in Kadhi's Court Civil case No 1'A' of 2007. The applicant stated in that motion that they were not parties to that succession case. There is a clear finding of the Judge delivered on 3rd March 2017 which spelt out the interest of the Respondent. In my view, the current dispute should be ventilated in this claim as what was before the Kadhi was in regard to the distribution of the estate of one of the registered owners. Filing an objection in that cause would serve no purpose as the Kadhi lacks jurisdiction to hear and determine a dispute over ownership of land. I find the current dispute as different from the previous proceedings thus the applicant is not guilty of any abuse of the Court process.

11. In conclusion, I am satisfied the application dated 3rd November 2017 is merited. Consequently I do confirm the temporary orders of injunction in terms of prayer 3 of the motion. The costs of the motion are ordered in the cause.

Dated, signed & delivered at Mombasa this 7th March 2019

A. OMOLLO

JUDGE