

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO 213 OF 2019**

**MUNIR MOHAMED SKETTY.....**

**PLAINTIFF**

**VERSUS**

**MUDATHIR SOMOE BWANA..... 1<sup>ST</sup>**

**DEFENDANT**

**OMAR FARAJ alias SACHMO..... 2<sup>ND</sup>**

**DEFENDANT**

**FARUK FEISAL..... 3<sup>RD</sup>**

**DEFENDANT**

**MUSA FRANCIS..... 4<sup>TH</sup>**

**DEFENDANT**

**YUSUF IMAM..... 5<sup>TH</sup>**

**DEFENDANT**

**DAUD MAHMOUD..... 6<sup>TH</sup>**

**DEFENDANT**

**HAMZA MOHAMED..... 7<sup>TH</sup>**

**DEFENDANT**

**ABASS ALI..... 8<sup>TH</sup>**

**DEFENDANT**

**ALI DODO..... 9<sup>TH</sup>**

**DEFENDANT**

**NASSIR KETE..... 10<sup>TH</sup>**

**DEFENDANT**

**JUDGMENT**

**A. Plaintiff's case**

1. By a plaint dated 27.11.2018 and amended on 27.06.2023 the plaintiff sued the defendants seeking the following reliefs;

- a. *A permanent order of injunction restraining the defendants either by themselves, their servants, relatives, their heirs, cohorts, agents and/or employees from trespassing into, remaining on and occupying the suit property Land Title Number Mombasa/Block XVI/160 together with the 50ft wide road reserve abutting the said Land Title Number Mombasa/Block XVI/160 or any part thereof, or at all.*
- b. *A mandatory order of injunction directing the defendants to immediately upon delivery of judgment in this suit demolish any building and/or any structure falling and/or remaining on that part of the 50ft wide road reserve abutting the suit property Land Title Number Mombasa/Block XVI/160.*
- c. *The plaintiff be at liberty to immediately upon delivery of judgment in this suit demolish any building and/or any structure falling and/or remaining on that part of the 50ft wide road reserve abutting the suit property Land Title Number Mombasa/Block XVI/160, at the cost of the defendants.*
- d. *Costs of the suit and interest thereon at court rates from the date of filing suit until the date of payment in full.*

2. The plaintiff pleaded that at all material times he was the registered proprietor of Mombasa/Block XVI/160 (parcel 160) as trustee of the Wakf of Mohamed Shafii and Amina Binti Abulrehman. It was pleaded that a temporary mosque was constructed partly on parcel 160 and partly on an adjoining road reserve for the purpose of conducting Islamic prayers. It was the plaintiff's case that sometime in 2020 the defendants had, without lawful justification or excuse, forcibly taken over the operations of the mosque constructed on the portion falling within the road reserve for private and commercial purposes.
3. The plaintiff pleaded that the defendants' said actions had denied him the ability to make full use and enjoyment of parcel 160 as well as the adjoining road reserve. In particular, it was contended that the plaintiff was unable to construct a modern mosque on parcel 160 because the defendants had illegally obstructed part of the road reserve meant to serve the users of the planned mosque.

**B. Defendants' response**

4. The defendants filed a joint statement of defence dated 28.02.2020 denying liability for the plaintiff's claim. The

defendants denied the plaintiff's proprietorship of parcel 160 and denied having interfered with it. They denied that the plaintiff had participated or contributed in the construction of the temporary mosque. It was pleaded that the defendants' activities were confined to the road reserve and that they had not encroached on parcel 160 at all.

5. The defendants further pleaded that the dispute among the parties was in the nature of a boundary dispute hence the same ought to have been referred to the National Land Commission or the County Government of Mombasa for resolution. As a result, the defendants denied the jurisdiction of the court to entertain the suit and prayed for its dismissal with costs.

**C. Trial of the action**

6. At the trial hereof, the plaintiff testified on his own behalf and called one expert witness in support of his claim. The plaintiff adopted his statement and supplementary witness statement as his evidence in chief. He also produced the documents in his list and supplementary list of documents as exhibits. The plaintiff called a licensed surveyor known as E. M. Kiguru as an expert witness and closed his case.

7. On their part, the defendants called the 3<sup>rd</sup> defendant to testify on their behalf as their sole witness. He adopted his witness statement as his evidence in chief and produced the documents in the defendants' list and supplementary list of documents as exhibits. It was the defendants' case that the structure complained of fell entirely within the road reserve and that there was no encroachment on parcel 160. It was also their defence that they had a temporary occupation licence to operate from there and that the plaintiff could still access plot 160 without any challenges.

**D. Directions on submissions**

8. Upon conclusion of the trial the parties were given timelines within which to file and exchange their respective submissions. The plaintiff was granted 21 days to file and serve his submissions whereas the defendants were given 21 days upon the lapse of the plaintiff's period to do the needful. The record shows that the plaintiff filed submissions dated 28.07.2025 but the defendants' submissions were not on record by the time of preparation of the judgment.

**E. Issues for determination**

9. The court has noted that the parties did not file an agreed statement of issues for determination. In that case, the court shall frame the issues as stipulated under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, a court may frame issues from any of the following;
- a. *The allegations contained in the pleadings or in answers to interrogatories.*
  - b. *The allegations made on oath by or on behalf of the parties.*
  - c. *The contents of documents produced by the parties.*
10. The court has perused the pleadings, evidence and documents in this matter. The court is of the opinion that the following are the key issues for determination herein;
- a. *Whether the plaintiff is the registered proprietor of parcel 160.*
  - b. *Whether the defendants have wrongfully encroached upon parcel 160 or the adjacent road reserve.*
  - c. *Whether the plaintiff has proved his claim against the defendants.*
  - d. *Whether the plaintiff is entitled to the reliefs sought in the suit.*
  - e. *Who shall bear costs of the suit.*

**F. Analysis and determination**

**a) Whether the plaintiff is the registered proprietor of parcel 160**

11. Although the defendants denied knowledge of the plaintiff's proprietorship of the parcel 160, the plaintiff produced a copy of a title deed for Mombasa/Block XVI/160 showing that he was indeed registered as proprietor as a trustee of the Wakf of Mohamed Shafii and Amina Binti Abdulrehman. The court thus considers the plaintiff's proprietorship adequately proved on a balance of probabilities. The defendants temporary occupation licence was said to be in respect of an adjacent road reserved only.

**b) Whether the defendants have wrongfully encroached upon parcel 160 or the adjacent road reserve**

12. The court has considered the evidence and submissions on record. Although the plaintiff's original complaint was with respect to encroachment on both parcel 160 and the road reserve, he conceded at the trial that the defendants' activities and structures were on the road reserve only. The defendants also maintained in both their defence and their evidence at the trial that their activities were confined to the road reserve and that the plaintiff could still access parcel

160 despite the existence of their structure on the road reserve. The court is thus satisfied on the basis of the evidence on record that the defendants are operating on the road reserve only.

13. The only issue which requires determination is the legality of their structure on the road reserve adjoining the plaintiff's property. It is clear from the survey report dated 01.07.2022 by E. M. Kiguru and the Mombasa County surveyor's report dated 12.07.2009 that the defendants' temporary structure encroaches directly on a portion of the road reserve abutting parcel 160. The court takes the view that the plaintiff is entitled to enjoy and make use of the road or road reserve adjoining his property. Neither the defendants nor the County Government of Mombasa has any legal authority to obstruct or partially close such road. The defendants did not cite any legal provision entitling them to obstruct such a road reserve.
14. The court is further of the opinion that the Temporary Occupation Licence (TOL) which the defendants may have obtained from the County Government could not legally authorize them to obstruct a road reserve serving a property

owner. The County Government itself has no such authority to obstruct or partly close a road reserve without following due process, without any form of public participation, and without even according adjacent property owners a hearing. The court is thus satisfied that the defendants' encroachment on the subject road reserve is wrongful and without any legal justification or excuse.

c) **Whether the plaintiff has proved his claim against the defendants**

15. The court has found that the plaintiff is the registered proprietor of parcel 160. The court has also found that the defendants have encroached on the road reserve adjoining the said parcel without lawful justification or excuse. The 3<sup>rd</sup> defendant conceded at the trial that the structure erected on the road reserve had no approved building plans and that no development permission was granted prior to its construction. The court is thus satisfied that the plaintiff has proved his claim against the defendants on a balance of probabilities.

d) **Whether the plaintiff is entitled to the reliefs sought in the suit**

16. The court has already found and held that the plaintiff has proved his claim against the defendants to the required standard. It would, therefore, follow that the plaintiff is entitled to the reliefs sought in the suit but to the extent specified in the judgment since the defendants' encroachment is confined to the road reserve only.

**e) Who shall bear costs of the suit**

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the plaintiff shall be awarded costs to the suit.

**G. Conclusion and disposal order**

18. The upshot of the foregoing is that the court finds and holds that the plaintiff has proved his claim against the defendants on a balance of probabilities. As a consequence, judgment is

hereby entered for the plaintiff against the defendants jointly and severally in the following terms;

- a) A mandatory injunction is hereby granted directing the defendants to demolish and remove their structure falling on the 50 feet wide road reserve abutting Mombasa/Block XVI/160 within 30 days from the date hereof.***
- b) In the event of the defendants' default to comply with the above order within the stipulated period the plaintiff shall be at liberty to demolish and remove the said structure at the defendants' cost.***
- c) That upon removal of the said structure, the defendants shall be permanently restrained from remaining upon or erecting any other structure or structures on the said road reserve.***
- d) The plaintiff is hereby awarded costs of the suit to be borne by the defendants jointly and severally.***

It is so decided.

**Judgment dated and signed at Mombasa and delivered** virtually via Microsoft Teams on this **27<sup>th</sup> day of November, 2025.**

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**Y. M. ANGIMA**  
**JUDGE**

In the presence

Gillian – Court Assistant

Mr. Omondi for plaintiff

Mr. Kiprono for 1<sup>st</sup> – 11<sup>th</sup> defendants

ORIGINAL