



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 35 OF 2016

KENYA AIRPORTS AUHTORITY.....APPLICANT

=VERSUS=

1. ELIEZAR KAMAU THONG'O

2. MOHAMED S. MOHAMED

3. ADAM YUSUF ALI.....RESPONDENTS

RULING

1. The application for determination is notice of motion dated 12th October 2016 and brought under the provisions of sections 3 & 13 of the ELC Act and sections 1A, 1B & 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules, the Applicant sought orders that:

1) Spent

2) That order be granted to the Applicant to evict the Respondents, their agents, employees or assigns from the restricted area along the landing lights of Moi International Airport Mombasa on which the Respondents have trespassed and erected illegal structures

3) That the OCS – Moi International Airport Mombasa to enforce the order issued herein.

4) That costs of this application be borne by the Respondents.` `

2. The application is supported by the nine (9) grounds listed on the face of it inter alia:

a) That the Respondents have trespassed and occupied the restricted area adjacent to the landing lights for use by the Moi International Airport Mombasa.

b) The Respondents were issued with notices to vacate the land sometimes in 2014 and they challenged the notices by filing a petition.

c) The Petition was heard and judgement rendered dismissing it.

d) The Respondents have no right to occupy the restricted area for the Airport.

3. The application is also supported by the affidavit of Eng. Danson Mwangi who deposed that he is the acting general manager of Moi International Airport Mombasa. He annexed proceedings and judgement in **High Court Petition no. 42 of 2014 as ‘KAA – 2’**. He also deposed that the continued occupation of the restricted area by the Respondents endangers the safety of the users of the Airport. He therefore urged the court to allow the application and grant the orders sought.

4. The Respondents have opposed the motion by filing a replying affidavit and notice of preliminary objection. The preliminary objection document, the Respondents aver that this application is defective as the applicant ought to have come to court by filing of a plaint. Secondly that the dismissal of their petition did not translate into a positive decree requiring them to vacate the suit property. In the replying affidavit, the Respondents depose that, they are not the only persons occupying the suit property and named Doshi Iron Mongers, Multiple Hauliers and Jesus Invitation Centre Church as others occupying the area. That the applicant should not be allowed to act in a discriminatory manner contrary to articles 27, 18 & 47 of the Constitution. The Respondents also annexed letters from the Municipal Council of Mombasa granting them temporary occupation licences as far back as 1992 to use the area in dispute. They urged the court to dismiss the suit.

5. The parties filed written submissions which I have read and considered the first issue I shall deal with is whether the application is defective and that the orders of eviction cannot be granted unless a plaint is filed. The Respondent took up this point on the basis that they will be denied a right to a fair hearing as they will be unable to file their defences. They cited the cases of **JSC vs Mbalu Mufara & Another (2015) eKLR and Speaker of the National Assembly vs James Njenga Karume (1992) eKLR** to support this objection. From the pleadings filed, the Respondents have not denied the deposition by the Applicant that they were served with notices in 2014 to vacate the premises they occupy. That they challenged the said notice vide High Court Petition No.42 of 2014 which Petition was determined on its merits and the same was dismissed.

6. The Petition was challenging the notices requiring them to vacate. The prayers sought in the Petition were inter alia;

1) A declaration that the Petitioners are entitled to be given reasonable time to vacate from the unsurveyed ground that they occupy along the landing lights of the Moi International Airport Mombasa which land is adjacent to the Moi International Airport.

This prayer was dismissed. Although it does not translate into a positive decree, it means the notice that was served became effective. Were the applicant to file a plaint, in my view it would amount to res judicata as the matters in issue would be the same as the matters in issue in the Petition. The applicant not having filed a cross – petition was thus required to move the court to get orders of eviction. Such motion does not necessarily have to be commenced by a plaint as the orders sought are pursuant to issues already determined.

7. On whether the Respondents would be denied an opportunity to be heard, they have filed a replying affidavit and a notice of preliminary objection. The right to be heard is not restricted to filing of a defence or offering oral evidence but the same includes an opportunity to present your side of the story. The Respondents have been afforded this opportunity by filing their documents to oppose the application as well as filing written submissions.

8. The second issue is whether the application seeks to discriminate against them contrary to the provisions of article 27, 28 & 47 of the Constitution. I have looked at the annexure **EKT – 1** and note that, in the letter dated 25. 2. 1993, the T. O. L was granted individually subject to certain conditions inter alia; **“that the occupier undertakes to surrender the piece of land as and when requested to do so by the council at no cost/compensation paid once served a month’s notice.”** My understanding of this clause was that the Respondents having accepted the T.O.L with these conditions they cannot now raise the issue of discrimination yet their occupation was not subject to occupation by the others. It is also not demonstrated by them whether Doshi Iron mongers, Multiple Hauliers & the Church are on the premises they occupy on the same terms as them (Respondents) or otherwise. Similarly the issue of discrimination

was dealt with in the petition. At page 13 of the judgement Emukule J. stated thus “**the petition indicated particulars of discrimination but no particulars were given.**”

9. If the Respondents contention at the time they filed the petition no. 42 of 2014 was because they required to be given ample time to vacate the suit premises. Then they have had more than sufficient time from 9th December 2015 when the Petition was dismissed i. e. two years. I find no justifiable grounds raised in opposition to the grant of the orders sought. Consequently I find merit in the motion and grant the orders no. 2 & 3 of the motion. The parties shall each bear their costs of the application.

Dated and Delivered at Mombasa this 16th January 2018

A. OMOLLO

JUDGE