



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC 157 OF 2017**

**MOMBASA CEMENT LIMITED.....PLAINTIFF**

**- VS -**

**SALIM MASOUD ABDALLA & 2 OTHERS.....DEFENDANT**

**RULING**

1. The application for consideration is the notice of motion dated 5<sup>th</sup> July 2017 in which the Applicants, Mbaruk Abdalla Suleiman, Mohamed Khamis Omar, Mohamed Suleiman Ali, Swabir Masoud Abdalla, Suleiman Rashid Abdalla and Nassir Masoud Abdalla seek to be enjoined in the said suit as interested parties acting on their own behalf and on behalf of other members of the Mazrui Community (Development and Welfare) WAKF Lands Trust. The application is brought under Order 40 rules 10 (2) and 14, Order 51 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. The application is based on the grounds:

**i. That the interested parties are the new, duly elected trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust and also members of the Mazrui Community.**

**ii. That a lawful election was held on 7<sup>th</sup> May 2017 when the then Trustees were replaced by the Defendants.**

**iii. That there are attempts to frustrate the operations of the new Board of Trustee by the plaintiff and others which is all part of an unlawful plan to present the Trust from being represented in ongoing proceedings in this case wherein Mombasa Cement Limited, in collusion with Mohamed Suleiman Nassor a former Trustee of the said Trust, and others, is trying to enforce an illegal lease and through it the illegal occupation of and illegal mining activities on the Mazrui land.**

**iv. That the said illegal lease is strenuously opposed, not just by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein, but also by the majority of members of the said trust.**

**v. That the said illegal lease is also a direct affront to the express provisions of the Community Land Act, 2016 and other express provisions of statute.**

3. There is also filed in support of the application an affidavit by Mbaruk Abdalla Suliman, the 1<sup>st</sup> proposed interested party/Applicant sworn on 5<sup>th</sup> July 2017 in which he deposes, inter alia, that he is a

member of the Mazrui and Shaksy followers of Salim Bin Khamis (“the Mazrui”) who were at all material times the owners of Title number L.R. 4236 held in Trust for the members by the trustees through a trust, namely, the Mazrui Community (Development and Welfare) Wakf Lands Trust. That on 7<sup>th</sup> May 2017, the proposed interested parties were elected to be the new trustees of the said trust in place of one Mohamed Suleiman Nassor and the five defendants herein.

He has annexed a list of 116 other members of the Trust who he alleges have authorized them to act on their behalf in relation to the dispute with the plaintiff herein. He further deposes that the endeavours by the Plaintiff herein to claim entitlement to and the continued occupation and exploitation of the suit land is illegal and the land, being community land within the meaning contained in the Community Land Act, 2016, no lease in relation thereto can be made or registered without the approval of the majority of members of the Community.

The applicants therefore pray to be enjoined to the suit so that their objections to the plaintiff’s claim can be heard. The applicants aver that they seek to be enjoined to the suit not as trustees of the Mazrui Community (Development and Welfare) Wakf Trust, but as beneficiaries of the Islamic Wakf established by their ancestor pursuant to which the said land was registered as land held in Trust, and also as members of the Mazrui Community (Development and Welfare) WAKF Lands Trust.

4. The application is supported by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants but opposed by the plaintiff through a replying affidavit sworn by Akram Mohamed on 20<sup>th</sup> July 2017. The plaintiff avers inter alia, that the application is fatally defective as the applicants have invoked wrong provisions of the law. It is also deposed that there exists an order of injunction issued by the High Court in HCCC. NO. 55 of 2017 barring and restraining the proposed interested parties from claiming under themselves, acting or in any way dealing and/or holding themselves and or taking up office as trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust and allowing the applicants to be enjoined in this suit would amount to conflict with the order already issued by the High Court. That the applicants have not met the threshold that suffices for a party to be enjoined as interested party to a suit.

5. The application is also opposed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who filed replying affidavits dated 24<sup>th</sup> July 2017. They depone that they have been Trustees of the Board of Trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust since 2013 and that the said Wakf is the bona fide registered owner of the suit land. They have exhibited a copy of the Registered Trust Deed dated 7<sup>th</sup> February 2006 which authorizes the trustees of the Wakf to enter into lease agreements with third parties and that in exercise of the powers donated to them as trustees, they duly executed an agreement to lease in favour of the plaintiff over the suit property, and that the Plaintiff duly paid the Wakf and took possession.

6. The parties filed written submissions through their respective advocates in which they mainly outlined their respective facts as contained in the affidavits.

7. I have carefully considered the arguments advanced by the rival parties in this matter and the relevant laws as well as the authorities cited.

Order 1 Rule 3 of the Civil Procedure Rules provides that:

***“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”***

8. In the plaint dated 4<sup>th</sup> May 2017, and amended on 6<sup>th</sup> June 2017, the plaintiff has sued the five defendants as the recognized trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust and representatives of the Mazrui and Shaksi descendants/followers of Sheikh Rashid bin Salim bin Khamis Mazrui who are the legal and beneficial owners of the suit property.

The plaintiff alleges that by an agreement to lease and a subsequent lease, the defendants, in accordance with and pursuant to the powers granted to the trustees under the Trust Deed leased to the plaintiff 1000 acres of the suit property and in accordance with the terms of the lease, the plaintiff paid the consideration in full and further made payments in advance for 2017 to 2021 and is therefore entitled to quiet possession of the suit property.

From the pleadings, there is no dispute that the suit land is the property of the Mazrui and Shaksi descendants/followers of Sheikh Rashid bin Salim bin Khamis Mazrui (the community).

In their application, the applicants seem to bring in issues that relate to who are or who are not the rightful trustee of the said Mazrui Community (Development and Welfare) Walf Lands Trust. Although the applicants allege that they seek to be enjoined to the suit not as trustees but as beneficiaries of the said Wakf, their first ground in support of the application contradicts this assertion. Parties are bound by their pleadings.

The applicants are categorical that they are the new, duly elected trustees. In my view, those are matters for determination in HCCC NO. 55 of 2017. From the plaint and amended plaint, the complaint relates to the actions the alleged trustees of the Wakf property. I am aware that the court has wide discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court was necessary to enable the court effectually and completely adjudicate upon the matter and settle all questions in the suit. I do not however think that in the present suit, and from the pleadings filed that the applicants would be necessary parties to be enjoined.

The cause of action by plaintiff relates to a contract entered into with the trustees and the plaintiff has named the defendants as the persons who have infringed or attempted to infringe its right. The applicants could rightly have an interest in the suit property as beneficiaries but their claim if any lies in another court and not this court, and certainly not in this suit.

9. I am persuaded by the holding in the case of Joseph Leboo & 2 others –V-Director Kenya Forest Services & Anor [2013] eKLR where Munya, J stated and was held that:

***“Courts needed to exercise caution before making any order for a person to be joined as a defendant were the application for that joinder did not emanate from the plaintiff. The choice of whom to sue was that of the plaintiff and there could be cogent reasons why a litigant had opted not to sue some other persons. Even in the absence of any reason, the choice to sue had to be left to the litigants and was not to be disturbed without the presence of compelling reasons....”***

It was further held that:

***“Where there was an application for a person to be joined as a defendant and the plaintiff objected to such joinder, the court had to be cautious before making an order for such joinder. It had to be clear that the remedy sought by the plaintiff in the proceedings was to be directed against the party sought to be enjoined, or that the remedy the plaintiff sought could not be granted or the proceedings could not be properly conducted without the person sought to be enjoined being a party....”***

10. Even though the applicants have demonstrated that they may have an interest in the subject matter, I am not persuaded that the cause of action in this case requires them to be enjoined as parties. Consequently, I find no merit in the notice of motion dated 5<sup>th</sup> July, 2017 and the same is hereby dismissed. Each party to bear their own costs.

**Dated signed and delivered at Mombasa this 16<sup>th</sup> day of January 2018.**

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**C. YANO**

**JUDGE**