



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 29 OF 2016

1. AMEL SAHEB
2. SHAIKH ASGERALI SADIQALI NOORBHAI
3. SHAIKH SHABBIR BHAI SHALKH BURHANUDDIN BURHANI
4. MULLA ASGERALI RAJABALI BHARMAL
5. YAHAYA MULLA FAKHRUDIN GULAMHUSAIN.....PLAINTIFFS

ALL SUING AS THE NOMINEES APPOINTED BY HIS HOLINESS

DR. MUFADDAL SAIFUDDIN WHO IS THE TRUSTEE OF DAWAT-E HUDIYAH(KENYA)

REGISTERED TRUSTEE FOR AND ON BEHALF OF THE BOHRA COMMUNITY IN LAMU

VERSUS

MOHAMED ALI MOHAMED.....DEFENDANT

JUDGMENT

1. By a Plaint filed herein on 18th February 2016, the five Plaintiffs pray for the following:-

i) Vacant possession of the suit property;

ii) A permanent injunction restraining the defendant from carrying out construction on the suit property or dealing with the same in any manner;

iii) General damages for denial of the use of the property; and

iv) Any other orders that this Court may deem fit to grant.

2. The said prayers are premised on the Plaintiff's contention that land title number Lamu/Block 1/628(the suit property) is registered in the name of the late Sahnabai Binti Ebrahjee and was consecrated as Wakf property for the benefits of the Bohra Community of Lamu by the deceased. It is the Plaintiff's case that they have been appointed by the head of the Dawood Bohra Community to be members of the Anjuman- e- Vajihi (Lamu) Bohra Community to look after the welfare and the properties of the Bohra Community in Lamu.

3. The Plaintiffs aver that at all times material to this suit, they had leased the suit property to one Shabbir Ismail Ibrahimjee. Without the Plaintiff's knowledge or consent the said Shabbir Ismail Ibrahimjee created a sub-lease and leased out part of the suit property to the Defendant Mohamed Ali Mohamed who then began to carryout constructions thereon.

4. The Plaintiffs state that despite their protests that the Defendant had no right to occupy the property and/or to carryout construction thereon, the Defendant has continued with the same thereby necessitating this suit.

5. The matter proceeded to formal proof whereupon the Plaintiffs called one witness in support of their case.

6. PW1- Shaikh Asgerali Sadiquli Noorbhai(the 2nd Plaintiff) told this Court that the Plaintiffs are all representatives of the Bohra Community in Lamu. It was his testimony that Land title No. Lamu/Block 1/628 which is registered in the name of Sakinabhai Binti Ebrahjee (now deceased) was consecrated by the deceased as Wakf property for the benefit of the Bohra Community of Lamu and is hence a trust property.

7. PW1 further told the Court that the Community let the property to one Shabbir Ismail Ibrahimjee in consideration of rent payable on a monthly basis. Without the Plaintiff's knowledge, authority or consent, the said Shabbir Ismail Ibrahimjee proceeded to sub-let the property to the Defendant. The Plaintiffs only became aware of the existence of the sub-lease when the Defendant began to carry out some construction on the suit property.

8. PW1 further told the Court that the said Shabbir Ismail Ibrahimjee eventually relinquished the tenancy subsisting between himself and the Plaintiffs by issuing the Plaintiff with a notice dated 22nd February 2009. The notice termed the Handing Over of Property Notice (Pexh 7) provided that the property would revert back to the Plaintiffs with effect from 31st December 2009 and the tenant was to be responsible for any transaction he engaged in with third parties during the subsistence of the tenancy.

9. It was PW1's evidence that subsequent to the notice period, the tenancy was extinguished and the said Shabbir Ismail is no longer in occupation of the property and does not hold any interest therein. The Defendant however remains in occupation under the guise of an agreement they had with the said Shabbir Ismail.

10. PW1 told the Court that the Defendant continues to effect developments on the property without the Plaintiffs' authority and it is only fair that he be removed from the land.

11. I have considered the Plaintiff's case and the evidence placed before me by PW1. It was the Plaintiffs case that the subject property is a Wakf property which was consecrated as such by the late Sakinabhai Binti Ebrahmjee with the beneficiaries being the Lamu Bohra Community. In proof of this contention PW1 produced a title deed for the said parcel of land (pexh 2) and a Wakf deed (Pexh 3).

12. It is apparent from the exhibits placed before me that the Plaintiffs leased the property to one Shabbir Ismail Ebrahmjee. Later on, the Plaintiffs noticed some construction work going on in the leased property and when they enquired as to what was happening, they came to learn that the said Shabbir had without their knowledge or consent sub-let the property to the Defendant who then commenced the construction.

13. In order to protect their interests, the Plaintiffs raised objections with the then Municipal Council of Lamu who by a letter dated 28th January 2009(Pexh 4) ordered a stop to the construction. However, later on by another letter dated 17th May 2010(pexh 5) the Council allowed the construction to proceed noting that the dispute should be resolved in Court.

14. The Defendant did not take part in these proceedings but remains on the suitland on the basis that the same was leased to him by Shabbir. As per the Handing Over Property Notice dated 22nd February 2009(Pexh 7) the said Shabbir relinquished any interest he may have had on the land effective 31st December 2009.

15. The Plaintiffs averred before this Court that they have never consented to or authorized the sub-lease that the Defendants executed with the said Shabbir and therefore allowing him (the Defendant) to enter the land. In my view even if the Defendant's entry into the suit property was regular, his occupation was solely dependent on the tenancy agreement that the said Shabbir had with the Plaintiffs. Since the main tenant has vacated the premises and terminated the tenancy, the Defendant has no basis to continue occupying the same.

16. The Plaintiffs have demonstrated that they are the registered proprietors of the land. The rights of a registered proprietor are well enunciated in the law. One of the main rights enjoyed by such a proprietor is to have possession of the parcel of land to the exclusion of all others. That being so, I find the Defendant's continuous occupation of the Plaintiffs land without the Plaintiffs consent a violation of that right.

17. From the documents placed before me it is evident that the Defendant constructed a hotel which he runs on the suit premises. He does not pay any rent to the Plaintiffs. From receipts of rent payments that were made available herein, it is evident that as at the year 2008, the said Shabbir was paying a sum of Kshs 7,200/- per month for the use of the Plaintiff's Plot. In the circumstances, I think the Plaintiff is entitled to an award of general damages for the period that they have been denied the use of their land.

18. In the circumstances and being satisfied that the Plaintiffs have proved their case on a balance of probabilities, I hereby allow the suit in the following terms:-

i) The Defendant to hand over vacant possession of the suit property within 30 days of the date hereof and in default the Court Bailiff to proceed to evict him forthwith.

ii) A permanent injunction is hereby issued restraining the Defendant from carrying on any further construction on the suit property or dealing with the same in any manner whatsoever.

iii) The Defendant shall pay the sum of Kshs 5 Million to the Plaintiffs being general damages for the loss of use of the suit property.

iv) The Plaintiff shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 28th day of September, 2018.

J.O. OLOLA

JUDGE