



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ORIGINATING SUMMONS NO. 61 02016

IN THE MATTER OF: ORIGINATING SUMMONS BY ASHA A. MIRAN AND MOHAMED A. MIRANI

AND

IN THE MATTER OF: THE WAKF OF ABDURAHMANN MIRAN

AND

IN THE MATTER OF: PLOT NUMBER 39 SECTION XXVIII M.I.

JUDGEMENT

1. The applicants moved this Court by way of originating summons seeking for orders that ;

1. That first instance, service is dispensed with and this application is placed before the Judge ex-parte at the earliest opportunity to obviate grave mischief;

2. Mr. Arif Ali Mohamed, is joined in these proceedings as an ‘Interested Party’ on the grounds that he is the holder of power of attorney donated by Fawzia Tahir, the holder of lease for a term of 999 years in respect of Land Reference No. 1149 Sub-division No. 39 of Section XXVIII Mombasa Island, and is thus a necessary party who ought to be heard before the Court pronounces itself with regard to the issues raised by the applicants herein;

3. Directions as to amendment and service of Court process, the originating summons and any other Court papers are given, to enable the interested party to participate in these proceedings;

4. Directions on filing of an affidavit in reply by Arif Ali Mohamed are given;

2. The application is supported by the affidavit of Asha Miran and Mohamed Miran who deposed that they are the grand children of Abdulrahman Bin Miran – Deceased. The late Abdulrahman was registered a trustee to the Wakf property on 28.12.64. The applicant deposes that upon his demise no trustees are yet to be appointed. They also do not know the contents and or terms of the Wakf delf.

3. On the premises are buildings occupied and the applicants deposed they do not know who is receiving the rents. The applicants further depose that the rates are in arrears since 2014. They are asking this Court to grant them an order to deal with the property to secure the trust property from being sold.

4. The summons is opposed by Arif Ali who deposed that there is a dispute in the administration of the suit property between one Shamsa Miran Abdulrahman and the applicants in succession cause No 93 of 2015. He deposed that the grant issued to the applicants was stayed. Mr Arif deposed that the suit property generates funds to pay utilities and the problem is the administration and authority of the conflicting parties. That the applicants are using this case to stamp their authority in spite of the stay order.

5. The summons was also opposed by Jatinkumar C. Shah named as one of the Respondents. He deposed that he is a tenant in the suit premises paying rent to the Rent Restriction Tribunal since 1993. Prior to this, he deposed he was paying rent to Shamsa Miran. Therefore it is not true that he is paying rent to an unknown landlord. He deposed further that Abdulrahman – deceased died in 1976 and it is clear his death did not prevent land rates from being paid out from 1976 – 2013. Consequently there is no basis for this application. He however agreed to abide by any order this Court shall grant.

6. Order 37 of the civil procedure rules sets out who may take out summons and in respect of what matters.

Order 37 (1) (d) directing payment into Court any money in the hands of trustees or administrators

(g) Determination of any question arising directly out of the administration of the estate or trust.

Order 37 (2) allow any a person named in (1) above to apply for and obtain the order for administration of the personal estate of a deceased person or the administration of a trust.

7. In this instant, the applicants already obtained letters of administration in High Court Succession Cause No 93 of 2015. The grant issued to them has been challenged in the same cause. Would this Court have jurisdiction to grant them an order to administer the trust as intended by the originating summons?

8. In the case of **Kibutiri vs Kibutiri (1983) IKAR 60**, the Court held that disputes which raised complex issues of fact were not appropriate to be decided upon affidavits or on an originating summons. In this instance, it is clear that there is a conflict as to who should administer the Wakf property. This issue is likely to be resolved by the Family Court in the succession cause once administrators of the deceased trustee is appointed. Therefore it was inappropriate for the applicants to move this Court by way of an originating summons while being aware of the pending proceedings on revocation of a grant.

9. In my view, even if they want to secure the property of the trust, the family Court has powers to grant such orders. Consequently I hold that this originating summons should have been filed within the cause No 93 of 2015 and not as an independent suit. Further I hold that I have no jurisdiction to appoint an administrator of a trust where the estate of the previous trustee who is deceased is in issue.

10. In conclusion, I do make a finding that the orders sought in this summons cannot be granted by this Court. I strike the same out for want of jurisdiction with costs to the Respondents.

Dated and delivered at Mombasa this 3rd day of February 2017

A. OMOLLO

JUDGE

In the presence of:

Mr Koitamet – Court Assistant

Hassan for Plaintiff

Nyange holding brief for Ondego for 1st Respondent

No appearance for Interested Party