



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO.350 OF 2016

FADHILI ZAHNAN MOHAMED

KHADIJA ABDULRAHMAN MWINZAGU.....PLANTIFF

VERSUS

ALIYA AHRAN MOHAMED

SALEH HUSSEIN SALEH.....DEFENDANTS

RULING

1. By a Notice of Motion application dated 21st December 2016, the plaintiffs sought the following orders: -

1. THAT this application be certified urgent and service thereof be dispensed with in the first instance.

2. THAT pending the hearing of this application inter-parties this Honourable Court do give an order restraining the defendants personally or through the employees/servants and/or agents from relying on the revocation of power of attorney dated 1st July 2016.

3. THAT pending the hearing of this application inter-parties the 2nd defendant be restrained from dealing with the affairs of the Wakf of MWANAMISHI BINTI AZIZ BIN JUMA including taking possession, leasing or in any way dealing with the shop existing on plot No.MOMBASA/Block XXXVII/13 and belonging to the Wakf of the late MWANAMISHI BINTI AZIZ BIN JUMA

4. THAT pending the hearing and determination of this suit the defendants personally or through their employees, servants and/or agents be restrained from relying on the revocation of power of attorney dated 1st July 2016.

5. THAT pending the hearing and determination of this suit the 2nd defendant personally or through his employees, servants and/or agents be restrained from dealing with the affairs of the Wakf of the late MWANAMISHI BINTI AZIZ BIN JUMA including taking possession, leasing or in any way dealing with the shops existing on plot Number MOMBASA/BLOCK on the XXXVII/13.

6. THAT the costs of this application be in the cause.

2. The application is based on the grounds set out in the Notice of Motion and supported by the affidavit of KHADIJA ABDURAHMAN MWINZAGU, the 2nd plaintiff sworn on 21st November 2016. The plaintiffs aver that the 1st defendant and the plaintiffs are the beneficiaries of the Wakf and the 1st defendant is the sole trustee. The plaintiffs further aver that 1st defendant donated to them a Power of Attorney to act for her in all matters pertaining to the said property in the Business Rent Tribunal (BPRT) and indeed the plaintiffs took part in BPRT case NO.24A of 2015 filed by a tenant after the plaintiffs had levied distress for rent. The plaintiffs further states that in the Tribunal, the firm of K.A. Kasmani and Company Advocates acted for them while the tenant was represented by the firm of Obara and Obara Advocates. That during the pendency of the case at the Tribunal, their advocates received a letter from the tenant's advocates informing them that the Power of Attorney given to the plaintiffs had been revoked by the 1st defendant and that the 2nd defendant had been appointed to replace the plaintiffs. The revocation of the Power of Attorney was drawn by M/s Obara and Obara Advocates. According to the plaintiffs, the revocation is null and void, the same having been drawn by an advocate who was acting for the tenant hence there was conflict of interest. It was also the view of the plaintiffs that the revocation of the Power of Attorney was done with the sole object of defeating the existence of the BPRT Case No.24A of 2015.

According to the plaintiffs, the 1st defendant donated the Power of Attorney to the 2nd defendant who is her grandson and who has now taken over the running of the Wakf of the late MWANAMISHI BINTI AZIZ BIN JUMA in complete disregard of the wishes of the late MWANAMISHI BINTI AZIZ BIN JUMA. The plaintiffs aver that following the revocation of their Power of Attorney, the 2nd defendant, relying on the new Power of Attorney has taken over the shop vacated by the previous tenant in complete disregard of the beneficiaries. The plaintiffs are of the view that the granting of the Power of Attorney to the 2nd defendant with regard to the Wakf is unlawful as it amounts to introducing a new beneficiary/trustee through the backdoor.

3. In response to the application, the 1st and 2nd respondents filed their respective replying affidavits both sworn on 7th December 2106. In her affidavit, the 1st defendant avers that she is the trustee of the Wakf of Mwanamishi Binti Aziz Bin Juma and that she donated a Limited Power of Attorney dated 18th May 2009 to the plaintiffs for the purposes of representing her in the case at the Tribunal and not for any other purpose. The 1st defendant further avers that through a General Power of Attorney dated 22nd November 2014, she granted the 2nd defendant general powers to act on her behalf and to conduct her matters. She stated further that she revoked the Limited Powers of Attorney granted to the plaintiffs on 1st July 2016 and that was within her right. She confirmed giving instructions to the firm of Obara and Obara Advocates to draw the revocation. The 1st defendant denied that the 2nd defendant has threatened to take over the shop as alleged by the plaintiffs and that the 2nd defendant has no interest in the shop other than to manage the same on her behalf. On his part, the 2nd defendant reiterated the averments made by the 1st defendant and added that his role is to assist the 1st defendant whose age is advanced, in running and managing her affairs. He stated that he has no interest and no intention to take over the shop in the suit premises. Both defendants aver that the plaintiffs' fears have no basis and prayed that the application be dismissed.

4. In his submissions, counsel for the plaintiff reiterated the averments in the affidavit in support of the application and added that the General Power of Attorney given by the 1st defendant to the 2nd defendant could not allow the running of the trust affairs as that could amount to appointing another trustee. The learned counsel submitted that the power enjoyed by the 1st defendant was delegated power which cannot again be delegated by the delegate. On his part, counsel for the defendants submitted that the 1st defendant had the power to donate and revoke the power of attorney.

5. I have carefully considered the application herein, the rival submissions and authorities cited by both counsels. The main issue that I have to determine is whether the plaintiffs have satisfied the conditions for grant of interlocutory injunction.

6. Both parties are in agreement that the 1st defendant is the trustee of the Wakf of Mwanamishi Binti Aziz Bin Juma and both plaintiffs and the 1st defendants are beneficiaries of the said Wakf whose property include plot No.MOMBASA/Block XXXVII/1. The 1st defendant had donated Power of Attorney to the plaintiffs to act in a case in the Business Premises Rent Tribunal which was over rent over the said property. However, along the way the 1st defendant revoked that Power of Attorney and gave the 2nd defendant power to manage her affairs, including the Wakf property. This action together with the fact that the revocation was done by an advocate who was acting for their opponent in the Tribunal has made the plaintiffs read some mischief in the whole exercise. The plaintiffs averred that the 2nd defendant is a grandson to the 1st defendant. This fact was not rebutted by the defendants. The plaintiffs who are beneficiaries to the Wakf have been sidelined in the running and management of the Wakf property. The 1st defendant has not come out clearly as to why she opted for the 2nd defendant instead of the plaintiffs who have an interest in the Wakf.

7. Applying the principles set out in the Case of **GIELLA –VS- CASSMAN BROWN (1973)EA 358** and for the reasons above, I find that the plaintiffs have established on a balance of probability a prima facie case against the defendants. On whether or not the plaintiffs would suffer irreparable damages if the orders sought are not granted, in **WAITHKA –VS- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION (2001)KLR**, the court held that even where damages would be an adequate remedy, an injunction can issue where the opponent has acted in a high handed and oppressive manner. Applying this principle to the facts of this case, it is clear that it is one of those cases falling within the exceptional rule of damages not being adequate compensation, not because the resultant injury to the plaintiff will be irreparable, but because of the peculiar nature of the case, the quarrel being over Wakf property in which the plaintiffs and the 1st defendants are beneficiaries while the 2nd defendant who is now to manage the property is not a beneficiary. On the issue of balance of convenience, it is my view that the same tilts in favour of the plaintiffs as failure to grant an interlocutory injunction pending hearing of the main suit would be tantamount to this court sanctioning the legitimacy of the action taken by the 1st defendant before the same is determined in a full trial.

8. For the reasons advanced, I grant prayers (4) and (5) of the Notice of Motion. Costs shall be in the cause.

Orders accordingly.

Delivered, dated and signed at Mombasa this 30th day of March, 2017.

C. YANO

JUDGE