



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.10 OF 2017

NAYIF AWADH SALIM..... PLAINTIFF/APPLICANT

-VS-

SALIM AWADH SALIM.....DEFENDANT/RESPONDENT

RULING

This is the Notice of Motion dated 23/1/2017. It is brought under Order 40 Rules 1, 24 and 10 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act.

It seeks orders

1. Spent

2. Spent

3. That this honourable court be pleased to issue a temporary injunction order restraining the defendant, his wife/wives and/or sons/daughters, his agents and/or contractors themselves or on their own behalf from trespassing, encroaching, invading, constructing, selling or any other way of parting with the possession of the suit property/land will known as the Mariakani Slaughter House together with its unsurveyed parcel of land pending the hearing and determination of this suit.

4. That cost be in the cause.

The grounds are in the face of the application. The main one being the said property was given to the plaintiff by his late father. That the defendants started interfering with it by constructing a house.

The application is supported by the affidavit of Nayif Awadh Salim the plaintiff/applicant herein sworn on the 23/1/2017.

The application is opposed. There is a Replying Affidavit sworn by Salim Awadh Salim the defendant herein sworn on the 6/2/2017.

There is also another affidavit sworn Arif Awadh Salim the plaintiff/applicants brother sworn on the 6/2/2017.

Before the application dated 23/1/2017 to as heard, the plaintiff/applicant filed another application dated

8/2/2017 in which he sought to have the defendant/respondent punished for contempt for disobeying the courts orders issued on 23/1/2017.

In his Supporting Affidavit to this application he states, that despite having been served the defendant went ahead with the construction. The said application is also opposed. There are grounds of opposition filed by the defendants advocate dated 1/3/2017. The defendant/respondent also gave notice of a preliminary objection to the application dated 23/1/2017.

I have considered the application dated 23/1/2017 the Supporting Affidavit and the annexures. I have also considered the affidavit in reply together with the annexures.

I have also considered the preliminary objection. I have the defendant's contention that this honourable court lacks the requisite jurisdiction to entertain the plaintiff's claim pursuant to the provisions of Section 7 of the Civil Procedure Act. He urges the court to strike out the plaintiff's suit.

The issues for determination are:

- 1. Whether or not the plaintiff/applicant has made out a prima facie case to warrant the grant of the orders sought in the application dated 23/1/2017.**
- 2. Whether the application dated 8/2/2017 is premature**
- 3. Whether the preliminary objection is merited.**

Having considered the submissions of the plaintiff and for counsel for the defendant. It is appropriate to consider the facts that have emerged and the legal principles applicable.

The principles were laid down in the precedent setting case of **GIELLA –VS- CASSAMAN BROWN (1973) EA 358**

They are first the applicant must show that he has a prima facie case with a probability of success at the trial.

Secondly normally an injunction will not be granted unless the applicant shows that damages would not be adequate remedy for injury suffered or likely to be suffered unless an injunction is granted.

Thirdly if the court is in doubt it will decided on a balance of convenience.

The plaintiff claims he was given the suit property as a gift by his late father Awadh Salim Awadh.

He relies on the affidavit sworn by the said Awadh Salim Awadh on the 24/6/2009.

I have perused the contents thereof. The deponent to states that he has appointed the plaintiff a manager of the slaughter house.

The reason of this affidavit was so that the plaintiff would be issued with a license to own a firearm given the large sums of money he was handling.

Nowhere does it state in this affidavit that the deceased is giving the plaintiff the property as a gift.

I have also perused the pleadings at the Kadhi's court Mombasa in succession case Number 95 of 2013.

I notice that the suit property is listed as among the deceased properties.

In his judgment dated 2/4/2015 the Honourable Kadhi has set out the mode of distribution of the deceased's assets. The plaintiff has not told the court whether he appealed against the said judgment. I

find that the plaintiff has failed to demonstrate what interest he has in the suit property over and above that of the other dependants.

I find that he has failed to demonstrate that he has a prima facie case with a probability of success.

The plaintiff has filed this suit merely to avoid giving account as ordered by the Kadhi's court. I find that the application dated 23/1/2017 lacks merit and the matter is dismissed. As this a dispute between family members I order each party to bear his own costs.

As to the application dated 8/2/2017 there is an affidavit sworn by Arif Awadh Salim on the 6/2/2017.

In it he depones he is the one doing the construction on the suit property. He states that he has a right to do so as he is one of the heirs of the late Awadh Salim Awadh. The application dated 8/2/2017 seeks to have the defendant/respondent be punished for disobeying the court orders dated 23/1/2017.

I will not go with the merits of the said application. I find the same to be premature and the same is struck out. Again I will order each party to bear his own costs.

I have considered the preliminary objection by the defendant. The issues raised by the plaintiff were dealt with by the judgment of the honorable Kadhi dated 2/4/2015. The suit property is listed among the late Awadh Salim Awadh's properties. The mode of distribution has been given. The plaintiff did not appeal against the said judgment. I find that filing as fresh suit in this court amounts to an abuse of the process of court. This court lacks the requisite jurisdiction to revisit the matter. I find that the preliminary objection herein merited is that the plaintiff's suit is brick out. As this s a dispute between family members I do order each party to bear his own costs.

Orders accordingly

L. KOMINGOI

JUDGE

25/4/2017

Ruling dated and delivered in open court on the 25th April 2017 in the presence of the plaintiff and the court assistant Koitamet

L. KOMINGOI

JUDGE

25/4/2017