



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 298 OF 2016

ABDULHAKIM SHEIKH BAJUNY (Suing in his own capacity

As sectional property owner & as administrator of the

Of SHEIKH MOHAMED UMURU (Deceased).....PLAINTIFF

-VERSUS-

SHAMSA SHEIKH MOHAMED.....1ST DEFENDANT

LUAY SALIM ALI.....2ND DEFENDANT

FADHILA UWEZO ABUBAKAR SALIM.....3RD DEFENDANT

AND

**COUNTY GOVERNMENT OF MOMBASA, DEPARTMENT OF LANDS PLANNING &
HOUSING.....INTERESTED PARTY**

RULING

1. For determination is the notice of motion dated 14.10.2016 brought under the provisions of Order 40 of the Civil Procedure Rules and Section 1A, 2A & 3A of the Act. In this motion, the applicant prays for orders that: -

1. Spent

2. Pending the hearing and determination of this suit, the defendants by themselves, their servants and/or agents or otherwise howsoever be restrained from construction (of 3rd & 4th floor) on ½ share of property known as: MSA/BLOCK XLII/62 (hereinafter referred to as “the suit property”) that they are currently under construction.

3. Pending the hearing and determination of this suit, the defendants be compelled to open the main door way to the roof top of the suit property to give access to the tenants living in the suit property (1st & 2nd floor) who have all their water tanks, clothing lines and all other essentials at the said roof top of the suit property.

4. Costs of this Application be provided for.

2. The application is premised on several grounds listed on the face of it inter alia that the building can only accommodate 2 floors above the ground floor. That sometimes in June 2016 the defendants without consent of the heirs of the estate began construction of the 2 additional floors. This forced the plaintiff to complain to the authorities who then called upon the defendants to stop their action.
3. The application is also supported by the affidavit of Abdulkhikim Sheikh M. Bajuny which reiterated the contents of the grounds. The applicant deposed that the 1st defendant presented a photocopy of a fake plan that confirms that they are building 2 more floors contrary to the by – laws and notwithstanding the strength of the foundation of the suit property. The applicant continued that upon receipt of the demand from the government authorities, the defendants decided to lock the stair case doors of access to the roof top where the water tank, cloth lines and other necessities exist thereby frustrating the applicant’s tenants rights. The plaintiff pleads that if the actions of the defendants are not stopped, they will continue with the illegalities thus causing irreparable harm to the users of the suit property and its environs.
4. The application is opposed by the defendants through a replying affidavit sworn by the 2nd defendant on 2nd November 2016. The 2nd defendant admits that the suit property comprises the estate of Sheikh Mohamed Umuru – deceased. The respondents accuse the applicant of unilaterally conducting the affairs of the estate. The 2nd respondent deposes that both the applicant and the 3rd defendant were given permission to construct way back in 2003. The letter referred to was not annexed.
5. The defendants denied taking any construction works in the recent past. That the building has no 4th floor as alleged and that they ceased constructions after the applicant took their building plans without their approvals and or consent and refused to return them. The 2nd defendant denies that their plans are fake and deposed further that the National Construction Authority visited the site and confirmed there was no sign of construction being done. Although no such evidence was shown to the Court.
6. Instead the respondents are blaming the plaintiff of creating a false scenario that the suit property stands to collapse any time thus posing danger to residents. They have also denied sealing/or blocking any portion of the building. Lastly that no tenant has threatened to leave the suit premises. They urged the Court to dismiss the application with costs as it is an abuse of the Court process.
7. The parties rendered oral submissions which I have read and considered. The principles to be considered before granting injunction are well settled in the renowned case of **Giella vs Cassman Brown** i.e. an applicant must show that he has a prima facie case or he/she is likely to suffer irreparable loss if the orders are not granted and when in doubt, in whose favour the balance of convenience tilts. The advocates herein submitted generally without laying a basis for either of the principles. The applicant accuses the respondents of wanting to build two additional floors without approval and his consent and which he deposes poses dangers to tenants/residents given the strength of the building. That as a result some tenants have started moving out. In support of this averment, he annexed photographs of the building and the so called fake plans.
8. The Respondents have denied carrying out any construction in the recent past and have denied the existence of a fourth floor. The non – existence of the 4th floor is confirmed by photographs annexed by the applicant which shows that the building only has 3 floors. Before filing this application, the applicant lodged a complaint with the county government of Mombasa and the National Construction Authority vide his letter dated 28.7.2016. The county government responded vide its letter dated 3.8.2016 which directed the 3rd defendant to stop all works until he availed all the approved structural and architectural plans and a structural integrity report from a registered engineer within 14 days. Besides this letter, there is no expert report annexed by the applicant to explain and or verify the contention that the additional 3rd floor poses a risk to the building and its residents. He is merely speculating as he did not say he has any professional background to back his complaint. Secondly the photographs do not show any ongoing constructions whether stopped as a result of the letter issued by the county government or the defendants voluntarily based on their claim that their plans were taken. In the circumstances it was premature for the applicant to have brought this application. There is no evidence of uniminent danger that the Court order was intended to preserve as regards the provisions of Order 40.

9. Further the defendants denied blocking any access. A look at the second picture shows cloth lines on the balconies of the 1st and 2nd floor with clothes hanged. It is therefore not true the deposition that the roof – top was being used for such accessories. There is also no proof of a likelihood of irreparable loss that is likely to be suffered in the event he order is not granted. This suit appears to be a result of disharmony existing among the family members & their failure to reach a consent if any on development of the property. The application in my view has not met principles to warrant the granting of an injunctive relief. However the parties herein should try and resolve their differences and reach a consensus before undertaking any future construction works on the suit property. In effect let the statusquo be maintained pending the hearing & determination of this suit. Otherwise I find the present application as premature and lacking in merit. Accordingly the same is dismissed with an order that each of the parties should bear their respective costs.

Dated, signed & delivered at Mombasa this 25th day of May 2017

A. OMOLLO

JUDGE