



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LANDS COURT**

**AT MOMBASA**

**ELC CASE NO. 219 OF 2016**

**MOHAMED NAAMAN ALY**

(As trustee of the Wakf properties of Ali Bin Mohamed Ali Muses Mohamed)

**ABDALLA MOHAMED ALY MUSES**

**ALY KHAN ALY MUSES ..... PLAINTIFFS**

**VERSUS**

**THE ISLAMIC FOUNDATION ..... DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 12<sup>th</sup> May, 2017. It is brought under Order 40 Rules 1 7 2, Order 8 Rule 3, Order 1 Rule 1, 9 and 10 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act.

2. It seeks orders;

a) That leave be granted to the Plaintiff enjoin the other trustees, namely Abdalla Mohamed Aly Muses, Aly Khan Aly Muses of Wakf properties of Ali Mohamed alias Muses Mohamed as Co-Plaintiffs to the suit.

b) That leave be granted to the Plaintiff to amend the plaint as per the draft attached hereto.

c) That on leave being granted to the Plaintiff, the draft amended plaint herein attached be deemed to be the amended plaint filed properly, with the leave of the court.

d) That the Defendant may amend defence within 14 days of the Order made.

e) Costs of the application to be provided for.

f) That in the interest of justice and mitigation of damages, the Defendants on their employees, servants or agents or any other person as acting on their behalf and upon their mandate on instructions be restrained from constructing on the property, developing the property, extending their buildings or otherwise, in any manner whatsoever interfering with title No. CR/57292/5 until the hearing and determination of this suit.

3. The grounds are on the face of the application and are listed as in paragraph a-d. I do not need to reproduce them here.

4. The application is supported by the affidavit of Aly Khan Aly Muses, one of the Plaintiffs/Applicants sworn on the 12<sup>th</sup> May 2017.

5. The application is opposed. There is a preliminary objection dated 2<sup>nd</sup> June 2017 filed by the Defendant's Advocates.

6. By consent dated 19<sup>th</sup> September 2017 the Notice of Motion was allowed in terms of prayers 1-5 save for prayer 6. The court directed that written submissions be filed in respect of prayer number 6.

**THE PLAINTIFF'S/APPLICANT'S SUBMISSIONS**

7. It is the Plaintiff's case that they are the owners of the land by virtue of the Wakf deed consecrated over the land.

8. The Defendant it illegal occupation of the land and has erected constructions and buildings thereon.

9. That the court record of 1<sup>st</sup> December 2016 shows that the Notice of Motion 11<sup>th</sup> august 2016 was dismissed for want of prosecution with no orders as to costs. The application was not argued. They have filed on the case of **Anaj Warehousing Limited –versus- National Bank of Kenya HCCC No. 311 of 2000** where it was held by Maraga J. (as he then was) that, **“A matter is res judicata when it has been heard and finally decided. And a matter is heard and finally decided” when the court which has heard it has “exercised its judicial mind on” the matter in controversy after it has heard arguments, considered it and has come to decision out.**

10. That the matter of injunction was not heard and finally decided. The application meets the threshold for grant of temporary injunctions. The Plaintiffs are trustees of the Wakf properties of Ali Bin Mohamed Alias Muses Mohamed who is the proprietor of Plot No. CR No. 57292/5.

11. That on or about March 2009 the Defendant entered into discussions with the 1<sup>st</sup> Plaintiff seeking a grant of 50 acres of land. Since the Wakf deed prohibited a lease for more than 3 years, no sale agreement could be entered into. The Defendant gained no legitimate rights over the land. Despite this the Defendants have carried on and occupied the Plaintiff's land by putting up buildings and erecting constructions.

12. The Defendant has no legal or beneficial right over the land. They have put forward the case of

**Mayungu Limited t/a Kiarie Kariuki –versus- Municipal Council of Malindi HCCC No. 13 of 2005.**

The Plaintiffs have attached a copy of the title deed and seek to protect the land for the benefit of the Wakf. That the Plaintiffs are likely to suffer irreparably if the orders of injunction are not granted.

13. The Defendants continued trespass on the land deprives the Walf and its beneficiaries of the use of the land. That the balance of convenience tilts in favour of the Plaintiffs who are the registered proprietor of the land.

#### **THE DEFENDANT/RESPONDENT'S SUBMISSIONS**

14. The Defendant is the owner of fifty (50) acres excised for Plot No. CR.57292/5 through an instrument dated 23<sup>rd</sup> March 2009. That the Defendant took possession and commenced construction of an Islamic institution.

15. The Plaintiffs have not shown that the defendant has encroached and/or constructed beyond the 50 acres. The Plaintiff's application does not meet the threshold for grant of temporary injunctions.

16. The application is premature and incompetent as no encroachment has been proved. They pray that the application be dismissed with costs.

17. I have considered the pleadings, the application, the supporting affidavit and the annexures. I have also considered the preliminary objection. I have considered the submissions of counsel and the authorities cited.

18. The issues for determination are;

i) Whether the Notice of Motion dated 12<sup>th</sup> May 2017 is res judicata.

ii) Whether the Plaintiff's application has satisfied the conditions for grant of temporary injunctions.

19. I agree with counsel for the Plaintiff's applicants counsel that the application dated 11<sup>th</sup> August 2016 was dismissed for want of prosecution. The same was not heard on its merits. The present application therefore is not res judicata.

20. The principles for grant of temporary injunctions were laid down in the precedent setting the case of\_

**Giella –versus- Cassman Brown And Company Limited (1973) EA 358.**

First the applicant must show a prima facie case with a probability of success at the trial.

Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, is should act on a balance of convenience.

21. It is not in doubt that the Plaintiffs are the owners of the land by virtue of the Wakf deed. It is the Plaintiff's case that the Defendant is in illegal occupation and has erected constructions and buildings thereon. The Plaintiffs have attached a copy of the title deed. I find that they have established a prima facie case with a probability of success at the trial.

22. I also find that they have proved that they will suffer irreparably if those orders are not granted. The Defendants continued trespass on the land deprives them of the use of the land.

23. The balance of convenience tilts in favour of the Plaintiffs who are the proprietors of the suit land as opposed to the Defendant who is only claiming fifty (50) acres.

24. I find that there is need to preserve the suit land. All in all, I find that the application is merited and I grant the orders sought namely;

a) That the Defendant, its employees, servants or agents or any other persons acting on their behalf and upon their mandate or instruction be restrained from constructing on the property, extending their buildings or otherwise in any manner whatsoever interfering with Title No. CR.57292/5 until the hearing and determination of this suit.

b) Costs of this application be in the cause.

**It is so ordered.**

**DATED, SIGNED and DELIVERED at Mombasa on the 14<sup>th</sup> day of December, 2017.**

**L. KOMINGOI**

**JUDGE**

**14/12/2017**