



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 130 OF 2017

MWANANYOTA KOMBO MNYOMBWE

ASHA MWIJUMA MNYOMBWE...PLAINTIFFS/APPLICANTS

VERSUS

BRIDGE INTERNATIONAL ACADEMY LTD

HAMISI MWIJUMA.....DEFENDANTS/RESPONDENTS

RULING

1. This is the Notice of Motion dated 11/4/2017. It is brought under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Section 24(a), 26, 36(i) of the Land Requisition Act 2012 Order 40 Rules 1 and 8, Order 52 Rule 1 of the Civil Procedure Rules 2010, Section 56 of the Land Act 2012, Section 4(3) and 26 of the Environment and Land Court Act and all other relevant provisions of the law.

2. It seeks orders that;

a. That the Honourable Court be pleased to issue a temporary injunction restraining the 2nd Defendant/Defendant herein either by himself, his agents employees, assigns and/or servants from disposing, intermeddling, selling, leasing and/or otherwise dealing with all that parcel of land known as Plot No. MSA/MS/BLOCK II/98 situated in Mtongwe and measuring approximately 0.70 acres (hereinafter referred to as "the suit property"). Pending hearing and determination of this application and suit.

b. That the Honourable Court be pleased to issue a temporary injunction restraining the 1st Defendant/Respondent herein either by itself, directors, employees, agents, assigns and/or servants from paying any further amounts in terms of rent to the 2nd Defendant/Respondent with respect to the suit property pending hearing and determination of this application and suit.

c. That this Honourable Court issues an order of eviction of the 1st Defendant from the suit property.

d. That this Honourable Court be pleased to direct the land Registrar Mombasa to issue a provisional title deed of land known as Plot No. MSA/MS/BLOCK II/98 situated in Mtongwe and measuring approximately 0.70 acres to the Applicants and in the name of the Applicants without gazettelement.

e. That costs of this application be awarded to the Plaintiffs/Applicants.

3. The grounds are on the face of the application and are listed as paragraph 1-7. I do not need to reproduce them here.

4. The application is supported by the affidavit of Mwananyota Kombo Mnyombwe, the 1st Plaintiff/Applicant herein sworn on the 11/4/2017.

5. Upon being served the 1st Defendant filed a memorandum of appearance through Mr. Mungai Victor Kimani Advocate on the 10/7/2017.

6. The 1st Defendant also filed a statement of defence dated 24/7/2017 and preliminary objection dated 24/7/2017.

7. On the 26/7/2017, the court directed that eh preliminary objection be heard first. It also directed that the same be disposed by way of written submissions. Both counsels filed written submissions and a date for ruling was given.

8. It is the 1st Defendant's contention that Section 7 of the Civil Procedure Act prohibits institution of multiple suits by parties litigating over the same subject matter.

9. That the Plaintiffs have filed a suit before the Kadhis Court being Succession Cause No. 122 of 2016. They have relied on the cases of;

i. Hoystead And Others –versus- Taxation Commissioner (1925) All ER RE 56 AT P6.

ii. Henderson –versus- Henderson (1848) HARE 100, 115.

iii. POP IN (KENYA) Limited And 3 Others –versus- Habib Bank AG Zurich

10. Further that in both suits the Plaintiffs are litigating about Plot No. MSA/MS/BLOCK II/98 situated at Mtongwe and measuring approximately 0.70 acres.

They have also relied on the cases of;

Margret Mumbi Kagiri –versus- Kagiri Wamairwe (2007) eKLR Aviation & Airport Services Workers Union (K) –versus- Kenya Airports Authority And Another (2014) eKLR.

11. That the Plaintiff's suit is a gross abuse of the process of this court.

12. It is the Plaintiff's case that the issues before the Kadhis Court were different from those in the present suit.

That Article 170 of the Constitution creates a Kadhis Court as a Subordinate Court and Sub-article (5) provides that the jurisdiction of the Kadhis Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance.

13. That the Plaintiffs have filed an appeal from the Kadhis Court being High Court Civil Appeal No. 23 of 2016 seeking to set aside the judgment of the Kadhis Court.

14. That the 1st Defendant was not a party to proceedings at the Kadhis Court hence the present suit cannot be said to be res judicata.

15. Section 13 of the Environment and Land Court Act provides, that the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) of the Constitution of Kenya.

16. That Plaintiffs did not have any other avenue of seeking the orders herein. They pray that the preliminary objection be dismissed with costs to the Plaintiffs.

17. That this suit is proper before court and not an abuse of the court process. They have relied on the case of ;

HMM –versus- KJD

Mombasa HC Civil Appeal No. 15 of 2013.

18. I have considered the written submissions of both counsels in respect of the preliminary objection. I have also considered the authorities cited.

19. Section 7 of the Civil Procedure Act, provides that,

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in the former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

20. Article 170 (5) of the Constitution of Kenya 2010 provides that

“The jurisdiction of Kadhis Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess Muslim religion and submit to the jurisdiction of the Kadhis Courts.”

21. From the foregoing I make the following observations;

The 1st Defendant was not a party to the proceedings in the Kadhis Court Succession Cause No. 122 of 2014 and High Court Civil Appeal No. 23 of 2016.

22. The Plaintiff's main prayers in the Kadhis Court was a determination of the heirs and their shares according to Islamic Law.

23. The Plaintiffs have filed an appeal against the judgment of the Honourable Principal Kadhi being the High Court Civil Appeal No. 23 of 2016. The same is pending. It has not been determined. In the instant suit the issues are in accordance with Article 162(2) of the Constitution of Kenya 2010.

24. The Plaintiffs are seeking injunctive reliefs which could not be granted in the Kadhis Court.

I find the preliminary objection herein misconceived and the same is dismissed with costs to the Plaintiffs.

It is so ordered.

Dated, Signed and Delivered at Mombasa on the 6th day of December, 2017.

L. KOMINGOI

JUDGE

6/12/2017

Mr. Shimaka : I pray for directions on the application dated 11th April 2017.

Court : The Notice of Motion dated 11th April 2017 be heard on 23rd January, 2018.

L. KOMINGOI

JUDGE