



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC CASE NO. 9 OF 2013**

MASJID KAIRAS (MOSQUE)

ALI MOHAMED SHEE

NAJIM BAKARI & OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

MUNICIPAL COUNCIL OF MSA

THUREYA BAKARI

SIBILI BAKARI

SAADA AMRAN BAKARI.....DEFENDANTS/RESPONDENTS

**RULING**

1. In the application dated 29<sup>th</sup> October 2015, the 23 Plaintiffs moved the Court under section 1A, 1B, 3, 3A and 63 (c) of the Civil Procedure Act and Order 36 and 40 of the Civil Procedure Rules. They sought the following orders;

a) **Spent**

b) **That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents, their employees, Agents, Servants or any other person howsoever be restrained from advertising entering, selling or in any other way dealing with the premises occupied by the Plaintiffs/Applicants on plot No. 76 Section II Mainland pending hearing and determination of the suit or further orders of the Court.**

c) **That the Court does make/issue orders as it deems expedient as the contingencies may warrant to meet the ends of justice.**

d) **Costs of the application be provided for**

2. The Application is supported by the grounds on the face of it and the affidavit sworn by Ali Mohamed Shee and the annexures thereto. The applicants aver and it is not denied that they are in occupation of a portion of the suit land. They state that they have been paying monies for ground rents to the

beneficiaries of the deceased estate. In return the beneficiaries are supposed to pay rates to the 1<sup>st</sup> defendant which they have failed to do.

3. The applicants contend that the 4<sup>th</sup> Respondent has instructed auctioneers who have served them with proclamation of distraint of moveable property and due to advertise and sell their properties standing on plot No 76/II/MN which action will cause them irreparable loss. The applicants urged the Court to grant the orders sought.

4. The 1<sup>st</sup> defendant did not oppose the application as the orders are not directed against it but it supported the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's preliminary objection that the suit is *void ab initio* for want of letters of administration of the estate of Yunis Bakari – deceased. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that there is no one yet appointed to administer the estate of Yunis Bakari – deceased who is the registered owner of the suit property. Therefore according to them, this suit contravenes the provision of the Law of Succession Act Cap 160. They argue that the applicants ought to have cited the Respondents to take out letters of administration first and therefore this suit is premature.

5. The 4<sup>th</sup> defendant on her part through her replying affidavit denied that the properties of the applicants before Court have been proclaimed. She deposed that these applicants are paying their rates but not as agreed. She also deposes that the parties whose properties have been proclaimed are 15 in number according to the list annexed as 'A' in the replying affidavit. She urged the Court to dismiss this motion to enable her recover the debts due to the estate.

6. From their pleadings, the 2<sup>nd</sup> – 4<sup>th</sup> defendants/Respondents have admitted that the Applicants have been making payments of the ground rents. The 4<sup>th</sup> Respondent deposed that she has no problems with the Applicants who are before Court as regards payments. Although the 4<sup>th</sup> Respondent denied proclaiming the applicants goods, some of the Applicants names are included in her list for instance applicant No 11 Ali Omar Tua appears at No 3 in the list. Applicant No 16 appears in the 4<sup>th</sup> Respondent's list at No 12. Further the proclamations which were taken out on instructions from the 4<sup>th</sup> Respondent does include the Applicants names. It is therefore untrue for the 4<sup>th</sup> Respondent to deny that she has no claim against the Applicants to warrant them filing this suit.

7. Secondly the 2<sup>nd</sup> Respondent submitted that the suit is a nullity as no letters of administration have been taken in respect of her father's estate. That the Applicants cannot force them to subdivide their father's property. This is the correct legal position. However from the copies of the agreements filed by the Applicants, part of the said agreements were done by the 2<sup>nd</sup> Respondent. This makes the Applicants to have a cause of action against her personally although letters of administration may not have been issued in respect of the registered owner of the land.

8. In sum, I find the Applicants have established a prima facie case as indeed the Applicants have demonstrated that their property was due to be auctioned by 4<sup>th</sup> Respondent. It is important to preserve the Applicants' property during the pendency of this case by granting the orders sought. The Applicants prayed for an order to specifically apply to the area they occupy. This means that the 4<sup>th</sup> Respondent was not restrained from collecting rents due from persons who are not parties to this suit as she claimed.

9. Consequently I do grant prayer (b) of the motion pending determination of the suit. The Applicants shall continue paying rent into the Court until the 2<sup>nd</sup> – 4<sup>th</sup> Respondents shall have agreed on who should receive rent. Further, this suit does not bar the 2<sup>nd</sup> – 4<sup>th</sup> Respondents from taking out letters of administration as the order only restrains them from selling or interfering the Applicants' development on certain portions of the land.

10. The costs of the motion to be borne by each of the parties.

**Ruling dated and delivered at Mombasa this 5<sup>th</sup> day of May 2016**

**A. OMOLLO**

**JUDGE**