



**Ashraf v Zahara (Environment & Land Case 41 of 2016)
[2024] KEELC 6885 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 41 OF 2016
SM KIBUNJA, J
OCTOBER 23, 2024**

BETWEEN

NOORMOHAMED JANMOHAMED ASHRAF PLAINTIFF

AND

ZAHARA JAN ASHRAF ALIAS ZAHARA POTE DEFENDANT

RULING

Notice of Motion dated 9th May 2024

1. The plaintiff filed the notice of motion dated the 9th May 2024 seeking for a quantity surveyor and land valuer appointed by the plaintiff to be granted access to Mombasa/Block/X71 and Mombasa/Block/XV11/59, the suit properties, to carry out a valuation exercise of the said properties, and for a prohibition order to be issued, and registered against the said suit properties, restraining the defendant, her servant or agents from alienating, disposing off, or transferring them to third party pending the hearing and determination of the suit. The application is premised on the ten (10) grounds on its face and is supported by the affidavit of Noormohammed Janmohammed Ashraf, plaintiff, sworn on the 9th May 2024, inter alia deposing that the Court of Appeal in Civil Appeal No 55 of 2020 ordered that the suit properties were held in trust for defendant and himself, and remitted the suit to this court to determine the value of their beneficial interest thereof, and to receive additional documents to enable it make the assessment. That the court on 30th April 2024 directed the parties to file the documents, and as he had lost vital documents during his eviction by the defendant, he need to have a quantity surveyor and valuer allowed access to the suit properties for valuation purposes.
2. The application is opposed by the defendant through her replying affidavit sworn on the 28th May 2024, in which she inter alia deposed that the application is intended to delay the determination of this suit that has gone on appeal and back; that the plaintiff has been given time to comply severally without doing so since 13th December 2023. That she has filed all the documents that show she is the absolute owner of the suit properties, while the plaintiff has not produced any to show his contribution. That



the application is a fishing expedition by the plaintiff which should not be allowed. That no grounds has been established for prohibition order to issue while she had not alienated the properties since 2016 when the litigation started.

3. The learned counsel for the plaintiff and defendant filed their submissions dated the 10th June 2024 and 24th June 2024 respectively, which the court has considered.
4. The issues for determinations by the court are as follows:
 - a. Whether the plaintiff has met the threshold for the order prohibition sought to issue.
 - b. Whether the plaintiff has made out a reasonable case for his quantity surveyor and valuer to be given access to do a valuation of the suit premises.
 - c. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, and come to the following determinations:
 - a. From the grounds on the application, affidavit evidence by the plaintiff, and the submissions by his learned counsel, the plaintiff's quest for access to the suit premises is to enable his quantity surveyor and valuer conduct a valuation thereof to use in adducing further evidence to help the court determine the value of his beneficial interest in accordance with the Court of Appeal order in Mombasa Civil Appeal No 55 of 2020; Noormohamed Janmohamed Ashraf v Zahara Jan Mohamed, the appeal. It is not disputed that the Court of Appeal indeed remitted the suit to this court with directions for the "court to receive additional evidence to enable it assess and determine the value of the beneficial interest of the appellant and the respondent over plot Nos. 59 and X/71, the suit properties. The judge will thereupon proceed to enter judgement based on those findings."
 - b. The learned counsel for the plaintiff has referred the court to sections 5, 9, and 12 of the [Evidence Act](#) chapter 80 of Laws of Kenya, to support the plaintiff's quest submitting that the valuation he seeks to be done by the two experts will be relevant to issue of beneficial value of the properties that is in issue before the court. The learned counsel for the defendant has on his part submitted that the Kenyan judicial system is adversarial and is the responsibility of the parties to adduce evidence, be cross-examined and eventually the judge write and deliver the judgement. The counsel cited the decision in the case of [Bakari Juma Diwani & 296 others v Wangui Mwangi](#) [2020] eKLR, where the applicant moved the order some documents be subjected to forensic investigations and the it was held inter alia that "By ordering forensic examination of the disputed documents, the court will, in my view, be descending into the parties' arena of availing evidence in support of their respective cases. In my view, parties must be left to present evidence in support of their respective cases." The counsel has equated the plaintiff's application to an attempt to draw the court into the litigation arena after he failed to file any documents. Having considered the parties' positions, and noting that the plaintiff is not in possession of the suit properties and may not get access to do the valuations without recourse to court as he has done, I find the order he seeks for accessing the premises does not in any way amount to the court becoming an active participant in the prosecution of his case. If the reports to be generated by the experts are to be used as evidence, they will definitely be filed and exchanged with the opposing party who will be at liberty to respond and cross-examine on their contents.
 - c. In respect to the prayer for prohibition, I take note that this suit has been pending in this court and the Court of Appeal for several years and no evidence has been tendered by the plaintiff to



suggest the defendants has by an acts manifested any intentions to deal with the suit properties in the manner alleged. The plaintiff has therefore not laid out the basis upon which the court could consider issuing such an order.

- d. On costs, section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya provides that it follows the event unless where otherwise ordered for good reasons. In this instance, though the plaintiff has succeeded in the prayer for his experts accessing the premises, the valuations reports to be generated are for his use to booster his case on the value of the beneficial interest. The plaintiff will therefore meet the costs of the application notwithstanding.
6. Flowing from the determinations set out above, the court finds that the plaintiff has partially succeeded in his application and orders as follows:
- a. That the defendant is directed to grant the quantity surveyor and land valuer appointed by the plaintiff to access Mombasa/Block/X71 and Mombasa/Block/XV11/59, the suit properties, to carry out a valuation exercise, on a date to be agreed through the respective counsel within the next thirty [30] days.
 - b. The plaintiff granted last opportunity to file and serve documents within forty-five [45] days from today and the defendant be at liberty to file and serve additional documents in response if need be, after service.
 - c. The plaintiff to meet the costs of the application notwithstanding the provision of section 27 of the *Civil Procedure Act*.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: M/s Oluoch for Gikandi

Defendant : Mr Mutugi

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

