



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 282 OF 2010

1. WILLIAM T.ABIRA
2. WILLIS M. MURIGU
3. PAUL NGAO MAKALU
4. KENNETH MUKHAYA
5. PETER N. MWANGELA
6. NYAPINDA DAVID
7. JEFF GUANTAI
8. LAZARUS OBUNGU
9. MATHENDU KAVITA
10. MUHANGANI JOEL
11. RICHARD M. NJUGUNA
12. WILSON KARANJA
13. MARTIN K'OBONYO.....PLAINTIFFS

-VERSUS-

KENYA CIVIL AVIATION AUTHORITY.....DEFENDANT

RULING

1. The Defendant filed a **Notice of Motion** application dated **13th April, 2021** under the provisions of **Sections 1A, 1B and 3A** all of the **Civil Procedure Act** and **Order 40** of the **Civil Procedure Rules Cap 21 Laws of Kenya** and all enabling provisions of the Law. The Defendant/Applicant seeks for the following orders:-

a) Spent;

b) That this Honourable Court do issue an order directing the officers Commanding Changamwe Police Station, Nyali Police Station and Bamburi Police Station to provide police officers to accompany the court Bailiff during the execution of the order of this Honourable Court in this case for security purposes and to ensure law and order is maintained.

c) That the costs of this application be provided for.

2. The grounds on which the application is based are on its face and further on the **Supporting Affidavit** sworn by **Polycarp Kuchio Tindi**, the **Defendant's Chief Legal Officer**. The gist of the Defendant's case is that the *Plaintiffs instituted the suit herein in the year 2010 seeking*

inter alia to set aside eviction orders issued against them on the 3rd August, 2010, as well as an injunction to restrain the Defendant from evicting them pursuant to notices issued to the Plaintiffs on 3rd August, 2010.

3. Contemporaneous with the **Plaint**, the Plaintiff's herein filed a **Notice of Motion** application dated 13th August, 2010 seeking to restrain the Defendant from evicting them from the houses they occupied by virtue of their contracts of services which had been terminated. Those orders were declined by this court and vide a **Ruling** delivered by this court on 31st October, 2012 directed the Plaintiffs to vacate the houses within 60 days of that Ruling. However, the Plaintiffs were dissatisfied with the court's Ruling and subsequently filed a **Notice of Appeal** but according to the Defendant the Appeal has never been pursued up to date.

4. It is on that state of affairs that the Defendant filed an application dated 21st November, 2013 seeking orders of mandatory injunctions directing the Plaintiffs to vacate the premises. However, before that application had been filed, the Plaintiffs had filed two other applications, in first application they sought orders for stay pending an intended Appeal while on the other application they sought to amend their **Plaint**.

5. The three applications were heard concurrently and the court delivered a **joint Ruling** on 8th June, 2016 thereby dismissing the Plaintiffs' application but allowed the application by the Defendant. The Plaintiffs were again ordered to vacate the premises within 30 days of the Ruling.

6. None of those directions were adhered to and instead, the Plaintiff filed yet another application on 27th June, 2016 seeking the court to review the **Ruling** delivered on 8th June, 2016. I do confirm that that application was argued before me and vide a **Ruling** dated 20th May, 2020, the application was dismissed having not found any tangible reason advanced to warrant the grant of orders for review.

7. Further, the Defendant further avers that after the Ruling delivered on 20th May, 2020, they wrote to the Plaintiffs' advocate seeking to be granted vacant possession but the letter was not responded to. According to the Defendant, the Plaintiffs' conduct reveals that they are not willing to vacate the premises and since an order for mandatory injunction had already been granted, it is reasonable that the court grants the orders sought. The Defendant is also apprehensive that chaos might arise during the execution of the eviction orders and there is therefore, need to have the Plaintiff evicted with security provided by the police to maintain peace and order.

8. The application is opposed by the Plaintiffs through the **Grounds of Opposition** dated 19th April, 2021 which are as follows:-

1) That the Defendant's Application dated 13th April, 2021 is NON-STARTER and incompetent to warrant granting of order sought as the order attached to affidavit of POLYCARP KUCHIO TINDI sworn on 29th March, 2021 marked as anenxture PK – 5 is totally vague, ambiguous and does not at all support the instant application in terms of prayer (b) sought thereof.

2) That the Applicant cannot execute order dated 8th June, 2016 and issued by Deputy Registrar on 16th June 2016 as there is a serious omission on order during extraction and does not describe suit premises requiring Plaintiffs to give vacant possession.

3) That for the application dated 13th April, 2021 to stand, amendment of order issued on 16th June, 2016 must be effected fast.

4) That the application is defective in terms of prayer (b) as an order to give security must be specified and described in prayers and this Honourable Court cannot be used to aid indolence litigant or frame orders to litigants.

5) That application by Defendant is brought in mala fide as there is Appeal pending vide the Ruling of this Honourable Court dated 16th March, 2021 which the Applicant has failed to disclose in order pre-empt and or hoodwink the court.

6) That the application is an abuse of court and we pray the same be dismissed with costs.

9. The application was canvassed by way of oral submissions on 20th April, 2021 with the learned Senior Counsel **Dr. Khaminwa** appearing for the Plaintiffs while **M/s Jadi** appeared for the Defendant/Applicant.

10. **M/s Jadi** reiterated the grounds of the **Supporting Affidavit** which have clearly been captured above and dismissed the Plaintiffs' allegation that there is a pending Appeal in relation to the dispute herein.

11. On the other hand, **Dr. Khaminwa** submitted that the Plaintiffs are ex-employees of Civil Aviation Authority and a **Judgment** was granted in their favour for Kshs.400,000,000/= after the court considered that they had been wrongly dismissed from their employment. He stated that the said sum has never been settled to-date and the Plaintiffs continue to occupy those houses by virtue of having been employees of the Defendant.

12. The learned Senior Counsel further submitted that if the Plaintiffs are evicted at the verge of the ongoing pandemic, they are likely to be exposed to the adverse effects of Corona virus. In his view, the prior court orders did not state with specificity the particulars of premises they should be evicted from and it would be defeating justice to execute an ambiguous order. He added that our National laws read together with the International laws do not allow mass evictions and this court should not accede to the Defendant's requests.

13. In response, **M/s Jadi** opposed the submissions that the plaintiffs will be affected by Corona virus by stating that the Plaintiffs were ordered to vacate the premises **since 2012** and **Covid-19** is a recent issue.

Analysis and Determination

14. Having set out the respective parties' positions as above, I find no reason to decline this application. The issue as to whether the Plaintiffs should vacate the suit houses is one that has been considered by two other Judges who handled this matter before me.

15. Hon. Justice Edward M. Muriithi in his **Ruling** delivered on **31st October, 2012** considered almost the same grounds as advanced by the Plaintiffs in the instant application and in his finding held that the Plaintiffs by virtue of their employment with the Defendant could not contest the ownership of the houses and were therefore prohibited from denying the Defendant's title to the land.

16. The learned Judge also correctly found that the Plaintiff's right to occupy the suit houses was extinguished by the termination of their contracts of service. Further, I reiterate that a similar finding was reached by the **High Court in Misc. Application No.2478 of 2004** which suit involved the same parties herein. Nonetheless, Justice Muriithi directed the Plaintiffs to vacate the suit houses within a period of sixty (60) days as from the **31st of October, 2012**.

17. It is also worth noting that similar orders were granted by Hon. Justice Emukule (as he then was) in his **Ruling** delivered on **8th June, 2016**. He granted a mandatory injunction directing the Plaintiffs to vacate the Defendant's suit houses within thirty (30) days of the Ruling and in default, the Defendants were at liberty to evict the Plaintiffs. It is these orders which the Defendants now seeks to execute.

18. In the Ruling of this Court delivered on **20th May, 2020**, the court was not convinced that the state of affairs which prevailed at the time the above two Rulings were delivered had not been changed. In other words, there had not been reversal on Appeal and there were no grounds on which to declare the Plaintiffs should not be evicted. The issue advanced by the learned Senior Counsel on whether the Plaintiffs should continue being occupants of the suit houses has been dealt with in the former Rulings and is therefore *res-judicata*. Within the concept of horizontal stare decisis, this court is called upon to promote certainty, consistency and uniformity in its decisions.

19. The application is therefore allowed as presented since it only seeks the supervision of the police and provision of adequate security during the execution of the order for mandatory injunction directing the Plaintiffs to vacate the suit houses.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 30TH DAY OF APRIL 2021.

D. O. CHEPKWONY

JUDGE