



Mbaabu (Suing as the administrator of the Estate of Julius Mbaabu M’Mweti - Deceased) v Wainaina & another (Environment & Land Case 108 of 2017) [2023] KEELC 20739 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 108 OF 2017
SM KIBUNJA, J
OCTOBER 18, 2023**

BETWEEN

GITONGA DANIEL MBAABU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JULIUS MBAABU M’MWETI - DECEASED) PLAINTIFF

AND

WAMBU WAINAINA 1ST DEFENDANT

EVANS M MAABI T/A MURPHY AUCTIONEERS 2ND DEFENDANT

RULING

1. The application dated the 20th September 2017 was filed by the plaintiff seeking in prayers 2, 4, 5 and 6 for *inter alia* an order restraining the 1st defendant from dealing with Mombasa/Block XV1/154, the suit premises, pending the hearing and determination of this suit; 1st defendant to reinstate the plaintiff’s tenancy on the suit premises on the same terms as before the unlawful eviction; 1st defendant be committed to civil jail for six (6) months and fined for disobeying the court orders of 27th March 2017, 30th March 2017 and 13th June 2017. Prayer 3 for mandatory injunction is incomplete, while prayers 1 and 7 are for certifying the application as urgent and costs respectively. The application is based on the eleven grounds marked (a) to (k) respectively on its face and supported by the affidavit of Gitonga Daniel Mba’abu sworn on the 20th September 2017 among others deposing that he filed the notice of motion dated the 30th March 2017 seeking for orders restraining the 1st defendant from dealing, transacting, letting, parting with possession or further dealings or transactions on the suit premises, pending the hearing and determination of the application; that the order was granted in the interim on the same date and served on the 31st March 2017; that by the time the 1st defendant was served with the order, the suit premises had been sealed with stones and metal grills; the 1st defendant filed his replying affidavit sworn on the 19th April 2017 opposing the application and *inter alia* deposing that he had already leased out the said premises to a third party; that the 1st defendant proceeded to



register a lease in favour of West Mall Supermarkets Ltd on 7th April 2017 and another in favour of Pedestal Business college on 3rd April 2017; that the registration of the leases was in contravention of the court order of 30th March 2017 that had been served on 31st March 2017; that the application dated 30th March 2017 was heard inter partes and ruling delivered on the 13th June 2017 in which mandatory injunction compelling 1st defendant to reinstate the tenancy on the same terms as before eviction and prohibition injunction against 1st defendant were issued; the orders of 13th June 2017 were served on 1st defendant and his counsel on the 3rd July 2017 but has declined to obey the same; that 1st defendant's breach of the court orders has caused the plaintiff to suffer irreparable loss and damage; that the said breach would bring about anarchy and disrepute for the court.

2. The 1st defendant opposed the application through the replying and further replying affidavits sworn by Wambu Wainaina on the 10th January 2018 and 2nd June 2022, among others deposing that the tenant to the suit premises, plaintiff's father, abandoned the premises after he was distressed for rent, and sex workers over run it that he removed them from the premises and secured it on 24th March 2017; that the events were reported in the Nation Newspaper of 28th March 2017; that he notified the Business Premises Rent Tribunal that the premises was vacant vide the letter dated 27th March 2017 and rented it to third parties through leases signed on the 28th and 29th March 2017; that the order issued in this suit was served on him on 4th April 2017 when the premises was in possession of the third parties; that the plaintiff has no locus standi to be declared a tenant on the premises as what he has obtained is Limited Grant of Letters of Administration Ad Litem and not a Grant of Letters Colligenda Bona and has no right to be reinstated to the premises; that he has at all material times been in occupation of the ground, mezzanine and part of the 1st floor of the premises and he believe the order of 27th June 2017 did not intend to injunct him from using the same; that the building has several shops with high turn over of tenants and he often advertises whenever any of them fell vacant; that he had filed a reference in BPRT NO. 4 of 2014 against the tenant, plaintiff's father, that was upheld but the tenant preferred HCCA NO. 126 of 2016, but is still pending as the plaintiff is yet to apply for substitution; that after the order of 13th June 2017 he requested the plaintiff to sign a lease so that he could take over the premises and that the court should prevail upon him to pay the current market rent.
3. The learned counsel for the plaintiff filed their written submissions dated the 22nd May 2022 and 16th May 2023 while that for the 1st defendant filed theirs dated the 15th April 2023 respectively which the court has considered.
4. The following are the issues for the court's determinations:
 - a. Whether the plaintiff has met the threshold for the orders of temporary injunction restraining 1st defendant and mandatory injunctions compelling 1st defendant to reinstate him on the premises to issue at this interlocutory stage.
 - b. Whether the orders the plaintiff alleges have been disobeyed by the 1st defendant were brought to his attention and if so, when.
 - c. Whether the plaintiff has established to the standard required that the 1st defendant has disobeyed any of the said orders and if so, what sanction to issue.
 - d. Who pays the costs of the application.
5. The court has carefully considered the grounds on the application, the affidavit evidence by the parties, submissions by the learned counsel, superior courts decisions cited and come to the following findings:



- a. The record confirms that the plaintiff commenced this proceedings through the plaint dated the 30th March 2017 that was filed contemporaneously with the notice of motion of even date filed on that very date. It has not been disputed that an interim order was granted certifying the application as urgent and “restraining the defendants by themselves, their agents and or servants from in any way whatsoever and howsoever dealing, and or transacting and or letting and or parting with possession or in any further dealings, transactions relating to Block Mombasa XV1/154” pending the inter partes hearing of the application. The order was extracted and issued on the 31st March 2017. The plaintiff alleges that it was served on the 1st defendant on the 31st March 2017 while the latter claims he was served with it on 4th April 2017. The affidavit of service by Alex Phillip Nzuki sworn on the 7th April 2017 that the plaintiff has attached as evidence of service confirms that the documents he had received on 31st March 2017 as detailed in paragraph 2 were served upon 2nd defendant on that same date. At paragraph 4 of the same affidavit the deponent indicated that “on 4th March 2017 at about 10.20 am I proceeded to Saga City Stores where 1st defendant, Mr. Wambu Wainaina has an office of rent collecting. On arrival I served him with copies of application, order and pleadings....” Remembering that the suit had not been filed, and order had not been granted until 30th March 2017, then there is no way the process server would have served the order on 4th March 2017. I will take that the process server meant to depose that he served the 1st defendant on the 4th April 2017 and not 4th March 2017. That would agree with the date the 1st defendant has deposed that he was indeed served, and the court therefore find the 1st defendant was served with the order on 4th April 2017 and not 31st March 2017. That no complaints on complying with the interim court order appear to have been lodged even after it was served until the instant application dated 20th September 2017 that was filed after the inter partes hearing of the application and ruling thereof. The court is of the view that the plaintiff had abandoned the need to enforce the interim order and instead waited for the final order and no determination will be made in respect of the order of 30th March 2017.
- b. The record further confirms that the application dated the 30th March 2017 was heard inter partes and allowed on the 13th June 2017. The order extracted thereof issued on the 27th June 2017 that the plaintiff has attached has the following orders:
1. Pending the hearing and determination of this suit, a prohibitory order be and is hereby issued restraining the defendants by themselves, their agents and or servants from in any way whatsoever and howsoever dealing and or transacting or letting and or parting with possession or in any further dealings/transactions relating to Plot No. Block Mombasa XV1/154.
 2. Pending the hearing and determination of this suit, a mandatory injunction do and is hereby issued compelling the 1st defendant to reinstate the plaintiff’s tenancy on the tenancy premises Plot No. Block Mombasa XV1/154 on the same terms as before the unlawful and illegal eviction carried out on the 27th March 2017.
 3. Each party to bear their respective costs.”

The plaintiff has attached the affidavit of service by Alex Phillip Nzuki sworn on the 12th July 2017 and he deposes at paragraph 3 that he served the 1st defendant with a copy of the of the said order on the 3rd July 2017. That has not been disputed by the 1st Defendant.



- c. The record confirms that the application dated the 19th July 2017 seeking for the review of the above order and the restraining of both the plaintiff and defendants from interfering with the quiet and peaceful occupation of the suit premises by Affected Parties was dismissed vide the court's ruling dated the 20th September 2018. On record are copies of the Notice of Appeal dated the 24th and 28th September 2018, but there is no information presented on the status of the appeals thereof. The notice of motion for injunction order pending appeal dated the 5th October 2018 was dismissed through the ruling dated the 19th May 2021. The record further shows that when the application dated 20th September 2017 came up on the 8th June 2017, parties were granted time to negotiate settlement upon request by their counsel. No settlement appears to have been realised as after two mentions to record settlement without materialising, counsel moved the court to proceed with the application. The court will take it that parties had mutually agreed to suspend the need to give effect to the order of 13th June 2017 during the period they were engaged in out of court negotiations.
 - d. That from the affidavit evidence tendered by both the plaintiff and 1st defendant, there has been no compliance with the orders of 13th June 2017 even though the 1st defendant has been aware of the same from 3rd July 2017. That the subsequent applications by the Affected Parties that took time to be processed and ruled upon and the documented settlement attempts by the parties may be taken by the court as reasonable interventions or predicaments that may have prevented the 1st defendant from effectively complying with the court edicts in the said order. However, the moment the settlement negotiations failed, the 1st defendant became under duty to comply with the orders of 13th June 2017 to the letter, until and unless the order had been set aside, reviewed or successfully appealed against. The reservations and recommendations expressed by the 1st defendant in his depositions are not enough to excuse him from his duty and obligations under the court orders of 13th June 2017 that was issued on the 27th June 2017 and served upon him on the 3rd July 2017. The issues of whether or not there existed a valid tenancy relationship between the plaintiff and 1st defendant and offer of a lease at the current market rent are matters best ventilated through the hearing of the main suit, and do not mean the court order already issued is of no effect. The court is therefore satisfied that plaintiff has not only proved that the order of 13th June 2017 was issued and served upon the 1st defendant, but also that the 1st defendant has disobeyed the said orders and should be cited for contempt of court and punished as sought in prayers 5 and 6 of the notice of motion.
 - e. That in respect of prayers 2 and 4 for mandatory injunction, similar orders have already been issued on the 13th June 2017, and are still in force. It will be a futile exercise to issue an order that has already been issued a second time.
 - f. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya that costs follow events unless otherwise ordered for good cause, the 1st defendant will meet the plaintiff's costs in the application.
6. From the foregoing, the court finds and orders as follows:
- a. That 1st defendant is hereby found to be in contempt of court for disobeying the court order of the 13th June 2017, and is hereby fined Kshs.500,000 [five hundred thousand] as per prayer 6 to be paid in fourteen [14] days. In default warrant of arrest be issued and upon arrest he be committed to serve six (6) months imprisonment.



b. The 1st defendant is ordered to ensure full compliance with the orders of 13th June 2017 in thirty [30] days and in default warrant of arrest be issued for him, and upon arrest he be committed to civil jail for six [6] months as per prayer 6, upon the plaintiff paying his subsistence allowance.

c. 1st defendant to meet the plaintiff's costs in the application.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 18TH DAY OF OCTOBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

