



**Khator & another v Ahmed & 2 others (Environment & Land Case  
23 of 2013) [2023] KEELC 22115 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22115 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 23 OF 2013  
SM KIBUNJA, J  
DECEMBER 13, 2023**

**BETWEEN**

**RISHARD ABDULREHMAN KHATOR AKA RISHAD ABDULREHMAN  
KHATOR ..... 1<sup>ST</sup> PLAINTIFF**

**ALI BWANA BWANAADI (AS ADMINISTRATOR OF THE ESTATE OF TIMA  
AND FATUMA CHILDREN OF ALI BASHIR- DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**IDHA MARIE AHMED ..... 1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR, COAST ..... 2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated the 12<sup>th</sup> October 2022 was filed by the plaintiffs and seeks for the replying affidavit sworn, dated and filed on the 23<sup>rd</sup> March 2022 to be struck out for being oppressive, irrelevant and failure to contain facts that the deponent is able to prove on his own knowledge, and assessed costs. The application is based on the eight (8) grounds on its face marked (a) to (h) and supported by the affidavit of Rishad Abdulrehman Khator, 1<sup>st</sup> plaintiff, sworn on the 12<sup>th</sup> October 2022, inter alia deposing that the affidavit was replying to an imaginary application; that it was introducing a valuation report dated 24<sup>th</sup> February 2022 by Amazon Valuers Ltd who are not accountants, auditors or land surveyors, and it was oppressive and irrelevant to the pending application for leave to appeal.
2. The application is opposed by the 1<sup>st</sup> defendant through the replying affidavit sworn by Idha Marie Ahmed on the 1<sup>st</sup> November 2022 in which it is deposed that the replying affidavit of 23<sup>rd</sup> March 2022 was in compliance with the orders of 16<sup>th</sup> February 2022 to account to the Deputy Registrar for the rent collected in respect of the suit properties; that the valuation thereon is to guide the court in making



its decision in apportioning any rental income; that the application is not oppressive to the plaintiff and the issue of accounts is subject of the application dated the 1<sup>st</sup> March 2022 that is pending.

3. The learned counsel for the plaintiff and 1<sup>st</sup> defendant filed their submissions dated the 13<sup>th</sup> February 2023 and 29<sup>th</sup> June 2023 respectively which the court has considered.
4. The issues for determination by the court are as follows:
  - a. Whether the impugned replying affidavit was filed in compliance with the directions of 16<sup>th</sup> February 2022.
  - b. Whether the contents of the replying affidavit are verifiable by the deponent.
  - c. Whether the replying affidavit is oppressive to the plaintiff and irrelevant.
  - d. Whether the replying affidavit should be struck out.
  - e. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
  - a. That vide the judgement dated 22<sup>nd</sup> October 2019 and delivered on the 31<sup>st</sup> October 2019, the court at paragraph 29 held as follows:

“29. In conclusion, I find the plaintiffs’ case proved to the extent that the 1<sup>st</sup> defendant was irregularly registered as the owner of the entire suit land. Consequently, I enter judgement for the plaintiffs as follows:

- a. A declaration and[sic] is hereby made that the 2/3 undivided share of plot 1738 of section V1 Mainland North be registered in the name of the plaintiffs for the benefit of the heirs of the estates they represent and could thus not be sold or dealt with by any other person without the concurrence of the plaintiffs.
- b. A declaration is given that the transfer of plot 1738 of section V1 Mainland North made and registered in favour of the 1<sup>st</sup> defendant is null, void and legally ineffectual and that the 1<sup>st</sup> defendant is a trespasser upon a portion measuring 2/3<sup>rd</sup> of plot 1738 of section V1 Mainland North; and an order of eviction of the 1<sup>st</sup> defendant from this portion do issue.
- c. An order for an account or inquiry as to income accruing to the 1<sup>st</sup> defendant with directions that the 1<sup>st</sup> defendant pays over to the plaintiffs a 2/3 pro-rata share of all income accruing from the continued use of the suit property from July 1, 2012 until surrender of the vacant possession.
- d. A permanent injunction barring the 1<sup>st</sup> defendant by himself- or through his agents, servants, employees and hirelings from entering or remaining on the 2/3<sup>rd</sup> portion



of plot 1738 of section V1 Mainland North and that he does restore the said portion to the state it was in at his own expense.

- e. The 2<sup>nd</sup> defendant be directed to expunge from the register of plot section[sic] 1738 of section V1 Mainland North any entry made in favour of the 1<sup>st</sup> defendant as sole owner and to cancel any parallel register. The 1<sup>st</sup> defendant is however entitled to be registered as the owner of 1/6<sup>th</sup> share of the land subject to terms of their refund agreement being concluded as between the 1<sup>st</sup> defendant and Rukiya binti Soud.
- f. Costs of the suit awarded to the plaintiffs.”

There have been other applications made and rulings delivered since. Among the applications is the one dated the 12<sup>th</sup> February 2021 that was determined through the ruling delivered on the 16<sup>th</sup> February 2022 in which the court directed at paragraph 14 inter alia as follows:

“... I will thus allow prayer (i) of the application. I direct the respondent to file a complete and accurate statement of rent account with an affidavit of verification for the rent received from 1<sup>st</sup> July 2012 to date. This be done within the next 14 days. After filing, the parties to appear before the Deputy Registrar for verification of the accounts. Upon verification, 2/3rds of the amount verified be paid to the applicant within 14 days failing which execution to issue. Any future rents also to be shared in the same ratio of 1/6<sup>th</sup>, 1/6<sup>th</sup>, and 2/3rds.”

The 1<sup>st</sup> defendant has deposed that the replying affidavit sworn and filed on the 23<sup>rd</sup> March 2022, that the plaintiff seek to be struck out, was filed in compliance with the above court’s edict of the 16<sup>th</sup> February 2022.

- b. The plaintiff has sought for the striking out of the said affidavit for the reasons inter alia that it was filed outside the time directed and without time being extended. The 1<sup>st</sup> defendant has conceded that he filed the affidavit outside the 14 days given in the order of 16<sup>th</sup> February 2022. Should the affidavit be struck merely because it was filed outside the time given? If that is done, will the verification exercise before the Deputy Registrar proceed and if so on what base datum? Does the fact that the affidavit is headed otherwise than accounts verification affidavit or some other term akin to that mean the contents therein have no relevance, at least to the deponent, in the intended exercise? These and related questions are matters that the parties, with the assistance of their counsel, should discuss with a view of coming up with the way forward or address the Deputy Registrar on, for a determination on what contents of the impugned affidavit may or may not be considered or would be relevant in the accounts’ verification.
- c. It is important that the parties be reminded of the court’s observation in the ruling of 16<sup>th</sup> February 2022 that no special directions under Rule 17 of Order 21 of the Civil Procedure Rules on the mode of taking accounts or inquiry had been set in the judgement delivered on the 31<sup>st</sup> October 2019. The parties should prepare for the verification exercise before the Deputy Registrar, who may give them further directions as appropriate including hearing them and thereafter coming up with an award/decision, to be included in the final decree in terms of Rule 13(2) of Order 21 of the Civil Procedure Rules.



- d. That for the above reasons, I find the application by the plaintiff is premature and likely to derail and further delay the verification of accounts exercise before the Deputy Registrar that was ordered on the 16<sup>th</sup> February 2022.
  - e. That even though under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs should follow events unless otherwise and for good cause ordered, I find it will help foster understand in this matter if each party bears their own costs in the application.
6. In view of the foregoing, and in consideration of the courts overriding objectives to facilitate the just, expeditious and efficient resolution on the remaining issue of accounts in this matter, the court finds and orders as follows:
- a. That the application was prematurely filed and prosecuted before the wrong forum and therefore is hereby struck out with no order as to costs.
  - b. That the parties proceed to appear before the Deputy Registrar on a date to be set herein after as per the order of 16<sup>th</sup> February 2022.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED ON THIS 13<sup>TH</sup> DAY OF DECEMBER 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA**

