



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL CASE NO. 76 OF 2015

DUNCAN NDURACHA.....PLAINTIFF

-VERSUS-

FUAD M. MOHAMMED.....1ST DEFENDANT

MARIAM MOHAMMED.....2ND DEFENDANT

SENIOR RESIDENT MAGISTRATE'S COURT MOMBASA.....3RD DEFENDANT

RULING

1. By a notice of motion dated 20/4/15 and filed in Court on 23rd April 2015, the plaintiff/Applicant asked for the following orders ;

1) Spent

2) That the Honourable Court be pleased to order the eviction of the defendant from premises known as L.R No. MN/1/3966 Mombasa, pending the hearing and determination of this suit.

3) That in the alternative to prayer 2 hereof, and in lieu of the said eviction, the Honourable Court be pleased to order the defendant to be paying to the plaintiff a monthly sum of Kshs.120,000.00 as mesne profits for the defendant's occupation of land parcel L.R. No. MN/1/3966, Mombasa, pending the hearing and determination of this suit.

4) That the Honourable Court be pleased to order that the sums held in a joint account with N.I.C. Bank Ltd. Account No. 1001218278 in the names of Kyalo & Associates and Masore Nyang'au & Co. Advocates, as a condition of stay of execution granted in Court of Appeal Civil Application No. NAI 24 of 2011 (UR 17/2011), to continue being so held pending the hearing and determination of this suit.

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

2. The motion is supported by several grounds listed on the face of it and on the affidavit of Duncan Nduracha. The Applicant pleads that he is currently the registered owner of L. R No MN/1/3966 with a house in it occupied by the Defendant. He states that he purchased the suit property in November 2010 and it would greatly prejudice him if the defendant is allowed to continue staying on the land without paying anything.
3. The Application is opposed by the 1st Respondent. He deposes that the Applicant has obtained the ownership of the suit property through fraudulent means and in breach of a Court order. He also deposed that there are several cases pending relating to the suit property to wit ; Mombasa CMCC 2127 of 2010, HCC Misc Civil Application No 447 of 2010, civil appeal No 2013 of 2011 and CMCC No 3088 of 2010. The 1st Respondent deposed that in light of the pending cases, This application ought not to have been filed. He avers that there are serious triable issues and this application is an abuse of the Court process.
4. The parties then filed written submissions which I have read and considered while writing this ruling. To begin with, prayer 4 of the motion is overtaken by events. The Court of Appeal in Nairobi civil application No 24 of 2011 reached a decision that the monies held in the joint accounts of counsels on record be released to the present Respondent. There is nothing more for me to determine.
5. That leaves me with prayer 2 and 3 to determine. In prayer 2 the Applicant is seeking eviction orders pending hearing and determination of the suit. The Applicant submits that the applicant has met the principles set out in the case of *Giella vs Cassman Brown Ltd* (1973) EA 358 as he has shown that he is the registered owner of the suit parcel having bought the same from National Bank of Kenya. He submits that the defendant has not annexed any order to his replying affidavit stopping the sale.
6. The principles in *Giella's* case deal with grant of temporary injunctive orders. The prayer for eviction can be inferred to be prayer for mandatory injunction. However no basis has been laid by the Applicant why this Court should give mandatory order sought. The Applicant did also not pray for striking out the defence. It is title law and procedure that parties are bound by their pleadings. The issue of the Applicant being an innocent purchaser for value without notice is a matter to be established by evidence and cannot be determined summarily.
7. The 1st Respondent also annexed pleadings from various suits relating to the same subject. This means that although the plaintiff has title, it is not one of the clear cases where a mandatory order or summary judgement can or should be granted. Prayer 2 thus fails and is dismissed.
8. The Applicant made an alternative prayer for an order that the Respondent be directed to pay him a monthly sum of Kshs 120,000 as mesne profits. Mesne profits is contained in prayer (c) of the plaint. The application is premised under the provisions of order 36 on summary judgement. Besides this prayer, there are other pending prayers for determination e.g prayer for a claim of mesne profits for Kshs 5,280,000= and general damages for trespass . The summary judgement sought will thus not determine this suit as it will still proceed to hearing.
9. It is not in dispute that the defendant/Respondent has not been a tenant of the Applicant. The rent payable is therefore not fixed and can only be assessed. There is no valuation report that was annexed to form a basis that the rent payable for the premises should be pegged at Kshs 120,000 per month. This is a triable issue as it requires proof of how much rent is payable for the premises if at all and from when it became payable.
10. Our jurisprudence has laid down as a principle that where this any single triable issue, the matter ought to go to full hearing – see **Provincial Insurance Co. of E.A vs Lenny M. Kivuti**. In this instance, the issue of how much money should be paid as monthly profits has not been assessed and will have to be determined through a full trial. Secondly there are other prayers pending and the order sought will only partially determine the suit. It is important that all the prayers are determined together once and for all. This will give both parties a chance to present their case and exercise their right to be heard.
11. In conclusion, I find that no basis has been made for prayer 2 and 3 to be granted. The application is hereby dismissed with costs to the 1st Respondent.

Ruling dated and delivered at Mombasa this 11th day of March 2016

A. OMOLLO

JUDGE