



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU
CIVIL CASE NO.143 OF 2004

ZAINUL GALIB VELJIPLAINTIFF/RESPONDENT

VERSUS

ERI LIMITED.....DEFENDANT/APPLICANT

RULING

1. **Eri Limited**, the Defendant, filed the notice of motion dated 29th January 2013 seeking for the following three prayers;

a) **That the order of this court issued on the 27th December 2012 courtesy of the judgment delivered in KISUMU HIGH COURT CONSTITUTIONAL PETITION NO.4 OF 2012 be hereby reviewed.**

b) **That the resultant eviction of the Defendant/Applicant from the suit premise KISUMU MUNICIPALITY/BLOCK 3/92 be quashed and the applicant be restored to occupation.**

c) **That the costs of the application be awarded to the applicant."**

The application is premised on the following three grounds:

a) That the order of 27th December 2012 was premised on a judgment delivered on 21st December 2012 in relation to the application dated 5th July 2012 while no such judgment exist in **KISUMU H.C.C. Constitutional Petition No.4 of 2012.**

b) That the absence of a written, signed and pronounced judgment means new and important evidence has been found to demonstrate that the order extracted could not stand.

c) That it is in the interest of justice that the order be reviewed and the resultant eviction quashed.

The application is supported by the affidavit of **Rasik Lavji Sanghrajka**, director of the Defendant, sworn on 29th January 2013 whose deposition are as summarized herein below;

a) That the Defendant filed **Petition No.4 of 2012** to assert his right to fair hearing in relation to the court's judgment of 1st August 2011. That the Defendant the application dated 5th July 2012 to stay the execution of the decree out of the judgment of 1st August 2011 and stay orders were issued on 12th July 2012 pending the ruling on 21st December 2012.

b) That on 21st December 2012 the Hon. Judge stated in court that the petition had failed with costs to the Respondent as the petitioner had been granted fair hearing. The Hon. Judge further asked the

parties to obtain copies of the ruling from the registry.

c) That the Defendant's counsel has not been able to obtain a "**written and signed pronounced**" judgment from the registry and therefore none exists. That therefore the orders of eviction issued on 27th December 2012 was obtained unprocedurally and by deceit.

d) That the Defendant's eviction on 28th December 2012 was unprocedural as the stay orders of 12th July 2012 were in force.

2. The application was opposed by the Plaintiff, **Zanul Galib Velji**, through the replying affidavit sworn by **David Otieno**, counsel for the Plaintiff, on 4th February 2013 whose depositions are summarized as follows:

a) That the ruling was read on 21st December 2012 dismissing the application and the natural consequences was that the order of stay granted earlier pending the delivery of the ruling lapsed.

b) That the court had given an eviction order on 30th April 2012 and the extended the time for the Defendant to give vacant possession expired on 15th July 2012. That the eviction was lawfully done.

c) That the Defendant has not appealed on the ruling of 21st December 2012 or obtained an order to maintain the status quo.

d) That there was no order capable of being reviewed that was made on 27th December 2012 and that the Defendant is only after delaying the realization of the fruits of litigation by the Plaintiff.

3. The Defendant then filed two further affidavits sworn by **Rasik Lavji Sanghrajka** on 14th March 2013 and 11th February 2016 in answer to the replying affidavit and annexed a copy of the judgment delivered on 21st December 2012.

4. The application came up for hearing on the 29th February 2016 when **Mr Amondi and Otieno**, advocates for the Defendant and Plaintiff respectively, made their rival submissions summarized as follows:

a) **DEFENDANT'S COUNSEL'S SUBMISSIONS:**

i. That after the Defendant's defence got struck out through the ruling of 1st August 2011, the Defendant filed constitutional **Petition No.4 of 2012**. That he also filed an application for stay dated 5th July 2012 in the petition which was granted on 12th July 2012.

ii) That on 21st December 2012, which was during vacation, the Honourable Judge delivered a one sentence Judgment that "**The petition must fail costs to the Respondents**". The learned counsel submitted that the one sentence judgment was a contravention of **Order 21 Rules 4 and 5 of the Civil Procedure Rules**, which requires that issues to be framed and the reasons given in the judgment.

iii) That the Defendant was expecting a ruling and not a judgment as the petition had not been substantially heard. That the Plaintiff then extracted an eviction order on 27th December 2012 that was based on the judgment. That it is that order that the Defendant seeks to be reviewed as there existed no ruling that was written, signed and pronounced on the application dated 5th July 2012 on record.

iv) That the court file was not available after the judgment of 21st December 2012 was delivered and the Defendant could not access a copy of the judgment and the correspondence to the Deputy Registrar went unanswered.

v) That the extracted order of 27th December 2012 was procured fraudulently and the Defendant should be restored back into the premises.

vi) That after failing to get a copy of the judgment, the Defendant applied for the copy of handwritten judgment, but the Deputy Registrar responded that there was no handwritten judgment on record. That as the copy of the judgment in existence has alterations, the plaintiff cannot be allowed to benefit from it.

vii) That the replying affidavit sworn on 4th February 2013 by Plaintiff's counsel should be expunged as it contained contested issues contrary to **Order 19 of the Civil Procedure Rules**. That a counsel may swear an affidavit in an interlocutory application but as the application before this court is for final orders, then the replying affidavit should be expunged.

viii) The Learned counsel referred extensively to some of the 24 authorities appearing in the Defendant's list of authorities dated 22nd February 2016, which the court has taken note of.

b) **PLAINTIFF'S COUNSEL'S SUBMISSIONS:**

i) That the Plaintiff had filed this suit to recover the suit property after buying it from a financial institution to whom, it had been charged by the Defendant. That the Defendant filed a defence with a counter claim and enjoined the financial institution as the 1st Defendant in the counterclaim.

ii) That the defence and counterclaim filed by the Defendant against the financial institution and the Plaintiff were struck out at different times on application. That thereafter the Defendant filed **Court of Appeal Civil Application No.209 of 2011** for stay orders which was dismissed.

iii) That the Defendant filed **Petition number 4 of 2012** with an application claiming that he was not accorded a fair hearing in this case which was determined through an application. That the court dismissed the petition and to date there has been no appeal filed.

iv) That the Defendant had filed an application dated 10th May 2012 in respect of the orders of 30th April 2012 seeking for extension of time to move from the suit property so as to look for an alternative premises. That a consent was entered on 4th June 2012 before the Deputy Registrar extending the time to vacate for the Defendant to 15th July 2012. That the consent of 4th June 2012 is still in force as it has not been varied, reviewed or set aside.

v) That instead of complying with the consent in (iv) above, the Defendant filed **Petition No.4 of 2012** only ten days to the date he was to vacate and obtained stay orders. The court set the 18th October 2012 as the ruling date but come that date, the ruling was not ready and was later delivered on 21st December 2012 in presence of counsel for the Defendant and **Mr Omondi**, holding brief for Plaintiff's counsel. That the ruling delivered is the one the Defendant's counsel is referring to as a one sentence judgment claiming that was contrary to **Order 21 of Civil Procedure Rules**.

vi. That the ruling or judgment was delivered in open court in the presence of parties counsel in **Petition No.4 of 2012** and not this suit. That a copy of that ruling is attached to the Defendant's further affidavit and contains issues for determination and the Hon. Judge findings on them and therefore do not contravene **Order 21 of Civil Procedure Rules** as alleged.

vii) That the court's ruling of 21st December 2012 was that the court had no jurisdiction to entertain the prayers sought and had to terminate the proceedings at that stage. That the Defendant's application before this court is tantamount to appealing on the order of 21st December 2012 in **Petition No.4 of 2012** which is not sustainable.

viii) That the absence of a handwritten ruling does not vitiate the orders of the court as a court can generate a typed ruling or judgment without a handwritten copy which is in accordance with **Section 1B of Civil Procedure Act** that allows the use of suitable technology

ix) That though the Defendant seeks for review of the orders of 27th December 2012, there is no order that was made on that date. That the copy of the order annexed and marked "**RNS 3**" refers to the order

of 30th April 2012 and extracted on 27th December 2012. That the order of 30th April 2012 had allowed eviction after 14 days, and was extracted after the stay orders issued in **Petition No.4 of 2012** had lapsed after the dismissal of the Petition on 21st December 2012.

x) That there is no evidence that this file has ever gone missing and that the correspondence Defendant's counsel had done to the Deputy registrar was about other complaints about the file and judgment in **Petition No.4 of 2012** and not the order issued on 27th December 2012 in this file.

xi) That prayer 2 of the application is incapable of being granted as the defence and counterclaim he had filed were dismissed and his subsequent application in **Petition No.4 of 2012** and the Court of Appeal have been unsuccessful. That the outstanding matter is the determination of mesne profits as the Defendant had been in the premises forcefully since 2003.

xii) That the replying affidavit was sworn by the Plaintiff's counsel as the issue raised were in the knowledge of the counsel and not the client and that the Defendant has not been prejudiced in any way by having the replying affidavit deponed by the counsel. That the application before the court is an interlocutory application as the main suit on mesne profits is still pending.

5. That the main issues for the courts determination are as follows:

a) Whether the defendant has established the existence of new and important matter of evidence that was not within his knowledge to allow the court to review the order sought.

b) Whether there exists a written, signed and pronounced judgment of 21st December 2012 in **Kisumu HC Petition No.4 of 2012** and its relation to the order issued on 27th December 2012 sought to be reviewed.

c) Which party pays the costs.

6. The court has considered the grounds on the application, the affidavit evidence filed, the rival submissions by both counsels and come to the following determinations;

a) That after closure of the pleadings relating to the plaint dated 8th October 2004 and counterclaim dated 24th November 2004, the Plaintiff filed the Chamber Summons application dated 2nd September 2010 seeking for among others, the striking out of the Defendant's defence and counterclaim both dated 24th November 2004. That the application was heard and in the ruling delivered by Nambuye J, as she then was, on 1st August 2011, the defence and counterclaim filed by the Defendant against the Plaintiff's claim were struck out, with costs. The court also allowed the Plaintiff to set down the case for formal proof in respect of prayers (b) and (c), which are about general damages and mesne profits respectively. There has been no successful appeal in respect of the court's ruling of 1st August 2011. That prayer (a) in the plaint dated 8th October 2004 for vacant possession had been granted under that ruling and was awaiting the Plaintiff to move the court for execution, through extraction of a decree.

b. That the court's ruling dated 29th September 2011 shows that the parties counsel settled the terms of the decree to include among others that " **The Plaintiff shall have vacant possession of the suit property in L.R. No. KISUMU MUNICIPALITY/ BLOCK 3/92**". The court further awarded the Plaintiff the costs of the struck out defence and counterclaim in the same ruling.

c. That the Defendant then filed the notice of motion dated 10th may 2012 , after the court's order of 30th April 2012 giving him 14 days to vacate seeking for extension of the time within which to give vacant possession by two months. The parties counsel appeared before the Deputy Registrar on 4h June 2012 and a consent was recorded that the time for the Defendant, as the Judgment Debtor, was to vacate the suit premises had been extended to 15th July 2012.

d. That before the date to give vacant possession could arrive, the Defendant filed **Constitutional Petition No.4 of 2012** on the 2nd July 2012 seeking for a declaration that the proceedings in this case were inconsistent with the constitutionally guaranteed right to a fair hearing under **Article**

50(1) and (4) and Article 160 (1) of the Constitution of Kenya. The Defendant, as the petitioner sought for two main prayers of a declaration that this court had breached his constitutional right to fair hearing by refusing to accept his filed defence and counterclaim and that there be a stay of execution of the decree in this case.

e) That the record for the constitutional **Petition No.4 of 2012** was not availed to this court, but from the evidence affidavits by the parties, submissions by counsel and the courts perusal of the judgment dated and delivered on 21st December 2012, and annexed to the Defendant's further affidavit sworn on 14th March 2013, it appears that prayer (b) of stay of execution of the decree issued pursuant to the orders of eviction of 30th April 2012 and extended by consent on 4th June 2012 to 15th July 2012 was issued on 12th July 2012 pending the court's ruling on the petition.

f) That the court dealing with the **Constitution Petition No.4 of 2012** delivered its ruling on 21st December 2012. That the copy annexed to the Defendant's further affidavit referred to above shows clearly that three issues were identified for determination at page 4. It also shows that the court analysed the facts and the applicable law and pronounced itself on the three listed issues. The following are extracts of the relevant portions of the judgment in relation to some of the issues;

(1) **Fair Hearing**

" That nothing in the procedure followed therein amounts to denial of a right to fair hearingThe only recourse which the parties had if dissatisfied by the same (ruling) was an appeal to the Court of Appeal, which was also duly exercised . What is evident herein is the petitioner's attempt at Re-litigating what has already been dealt with by a court of competent jurisdiction by canvassing the same as a constitutional issue.....This petition seems to seek circumventing the doctrine of Res judicata by giving a constitutional face when it is evident that the parties were granted a fair hearing in both the High Court and Court of Appeal."

(2) **Jurisdiction**

"..... does this court have jurisdiction to hear this petition? Absolutely not. Doing so will be tantamount to this court sitting on appeal over a decision of a court of competent jurisdiction and further the court of Appeal (which was the highest court as at that time). This court has already found that there is no constitutional issue herein but merely an attempt to give his case a " cosmetic face -lift by baptizing it as a Constitutional issue." Thus there being no Constitutional issues raised,this court must down its tools as was stated in the case of the owners of Motor Vessel " Lilian S " -v- Caltex Oil Kenya (1989) KLR 1

The court analyzed the findings in several other decided cases and made final finding as follows:

" For the aforesaid reasons this Petition must fail, the respondents shall have the costs"

The ruling or judgment delivered on 21st December 2012 is **NOT** in contravention of **Order 21 of the Civil Procedure Rules**.

g) That a court of Law pronounces its decision and findings through orders, rulings and judgments from which decrees are therefore extracted and issued for compliance and or execution. The copy of the decision annexed to the further affidavit of **Rasik Lavji Sanghrajka** sworn on 14th March 2013 is in the view of this court in compliance, both in form and substance, with the requirements of **Order 21 of Civil procedure Rules** and being a decision of a court with parallel jurisdiction to this court, is not amenable to be challenged in this court.The forum challenge is the Court of Appeal and the court has been informed that no appeal has been filed since 21st December 2012.

h) That ones the petition was dismissed with costs on 21st December 2012, the orders of 12th July 2012 issued in the petition pending the ruling automatically lapsed with the dismissal order. The Defendant did not take steps to have the consent order of 4th June 2012, giving him up to 15th July 2012

to vacate from the premises, extended after the dismissal of the petition and the automatic lapsing of the stay orders therein on 21st December 2012. The Plaintiff was therefore entitled as he did, to seek for the eviction orders in terms of the court orders of 30th April 2012 and extended by consent on 4th June 2012.

I) The Defendant has not complied with the requirement of **Order 45 Rules 1 of the Civil Procedure Rules** as there are no new facts disclosed to enable the court review the eviction order extracted and issued on 27th December 2012. The order was extracted and issued in accordance with the procedures of the court.

j) That the notice of motion dated 29th January 2013 is an interlocutory application and the court finds no prejudice was occasioned to the Defendant by having the replying affidavit sworn by the counsel on record for the Plaintiff. The affidavits do not contain contentious issues.

k) That the absence of a handwritten ruling or judgment does not vitiate the legality of a typed ruling or judgment that has been dated, signed and delivered by the court. The use of technology ensures the attainment of the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of the disputes before the court is attained as the parties will readily access typed copies soon after delivery of the ruling or judgment.

5. That in view of the foregoing findings the application dated 29th January 2013 has no merit and is dismissed with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2016

In presence of;

Plaintiff/Respondent Absent

Defendant/Applicant Present

Counsel Mr Kowino for Amondi for Defendant/Applicant

Mr Otieno for Plaintiff/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2017

27/4/2014 AT 12.05 PM

S.M. Kibunja J.

Oyugi court assistant

Parties absent

Mr Kowino for Amondi for Defendant/Applicant

Mr Otieno for the Plaintiff/Respondent

Court: Ruling delivered and dated in open court in presence of Mr Kowino for Amondi for Defendant/Applicant and Mr Otieno for Plaintiff/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2017

Court: Rasik Lavji Sanghaikaya (Defendant) present as he walks in as the ruling is read.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2017

Mr Kowino. Mr. Amondi prays for leave to appeal.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2017

Mr Otieno: No objection.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2017

Order: Leave to appeal granted. Copies of proceedings and ruling be provided to the parties upon usual payment.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2017