



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 MAKALI

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. This Ruling relates to three applications –

1. A Notice of Motion dated and filed on 6th December, 2012 by the Plaintiffs seeking a temporary stay of execution of the Court's Ruling dated 31st October, 2012.

2. A Notice of Motion dated and filed on 21st January, 2013 seeking a mandatory injunction

directing the 1st – 9th and 13th Plaintiffs to deliver vacant possession of the Houses HG 160, Bamburi Estate, HG 16 Bamburi Estate, 130D Nyali Estate, 133F Nyali Estate, 834 Miritini Estate, 130D Nyali Estate, 133F Nyali Estate, 130B Nyali Estate, HG 153 Bamburi Estate, 822 Miritini Estate, 831 Miritini Estate and 833 Miritini Estate respectively to the Defendant herein collectively “the suit houses”

and

3. The Plaintiff’s undated Notice of Motion filed on 13th March, 2013 seeking an amendment of the Plaintiff herein dated and filed on 13th August, 2010.

2. I will consider each of the applications in turn by way of background to the determination of the final application for amendment of the Plaintiff herein.

THE NOTICE OF MOTION OF 6TH DECEMBER, 2012 FOR STAY OF EXECUTION

3. This application sought a stay of the court’s Ruling dated 31st October, 2012. That Ruling was made on an application dated 13th August, 2010 by the Plaintiffs for injunction to restrain the Defendant from evicting the Plaintiffs from their houses which they had occupied by virtue of their employment contracts of service with the Defendant but which had been terminated. The court denied to grant the orders of injunction, and discharged the interim injunctive orders, but granted the Plaintiffs sixty (60) days from the date of the Ruling to secure alternative accommodation and vacate the suit premises. The court also granted to the respondent leave to apply for orders of possession of the suit houses against any of the Plaintiffs who would not have vacated the houses upon the expiration of the said sixty (60) days.

4. Notwithstanding the window of sixty (60) days granted to the Plaintiffs to vacate the suit houses, the Plaintiffs filed a Notice of Motion dated 6th December, 2012 seeking a stay of execution of the court’s Ruling of 31st October, 2012. That application was made within the sixty (60) days window, and was replied to by the Defendant through the Replying Affidavit of Angus Swedi, the Defendant’s Chief Officer, Air Navigation, Mombasa, and who under advice of counsel deponed that the application for stay of execution was incompetent because the court had no jurisdiction to grant injunctive orders under Order 42 of the Civil Procedure Rules.

5. Angus Swedi also deponed at paragraph 6(d) of the replying Affidavit that –

(a) ... (c)

(d) ... 1st, 5th and 10th Applicants are employees of the World Food Program while the 4th and 10th Applicants are employed at the Kenya Polytechnic University College in Mombasa whereas the 9th Applicant is an employee of Kenya School of Flying at Wilson Airport in Nairobi. Further the 1st Applicant works and resides in Monrovia in Liberia whereas the 5th and 10th Applicants work and reside in Lokichoggio Town and the 9th Applicant works and resides in Nairobi. Again, the 1st, 5th and 9th Applicants have instead rented over the said houses to third parties and are currently and unlawfully receiving rent therefrom.

6. This deponent also charged that there was no evidence of having filed the Appeal against the court’s Ruling of 31st October, 2012, and denied argument that the suit houses had become matrimonial houses of the Plaintiffs/Applicants by virtue of having married or resided in them for long periods of time despite earlier arguments that they stayed over awaiting their salary arrears. The deponent urged the court to do justice and reject these arguments.

7. In addition to the replying Affidavit of Angus Swedi, counsel for the Defendant/Respondent also filed on 18th March, 2013 written submissions dated 15th March, 2013 in respect of the Plaintiff’s undated

Notice of Motion of 6th December, 2012. It was counsel's submissions that the Affidavit relied entirely upon the court's Ruling delivered on 31st October, 2012, and that there were no grounds for granting any of the orders sought by the Plaintiffs and in particular that the Plaintiffs having sought the same prayers and the orders having been declined the Plaintiffs could not come back through a similar application, on a matter which had become **res judicata**.

8. In any event, it was argued, there was no longer any contract of employment between the Plaintiffs/Applicants and the Defendant/Respondent, the termination of their contracts having been confirmed by the Judgment in Nairobi HCCC 1278 of 2004. The Plaintiffs/Applicants consequently have no basis for continuing to stay in the Defendants/Respondents houses.

9. It was further submitted that the Plaintiffs/Applicants were inconsistent in their arguments. Whereas initially they argued that the reason they continued to occupy the suit houses was alleged non-payment of final dues, they now contend that the suit premises are **their matrimonial houses**. This clearly shows that the Plaintiffs/Applicants will chance out any reason from the air, and making the process of law, a mockery and the court should stop it by declining to grant the orders sought, and urged the court to dismiss the application.

10. There was no counter argument or reply to the averments in the Replying Affidavit of **Angus Swedi**. However Mr. Chamwada, counsel for the Plaintiffs/Applicants, was kind enough to draw the attention of the court to the orders of "**status quo**" made on 18th December, 2012 when the court fixed the Plaintiffs' Application for hearing on 11th February, 2013.

11. However, by 11th February, 2013, the Defendant too had moved the court by its application dated and filed on 21st January, 2013 in which it sought a mandatory injunction against, and ordering the Plaintiffs to vacate the suit houses. The third Application, which is the application to **amend** the Plaint herein must depend upon the determination of the Plaintiffs' application for stay of execution and the Defendant's application for mandatory injunction.

DETERMINATION OF THE APPLICATION OF 6/12/2012 FOR STAY OF EXECUTION

12. The Notice of Motion of 6th December, 2012 is premised upon the provisions of Order 42, rule 6 of the Civil Procedure Rules 2010. Rule 6(1) provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except as the court appealed from may order for sufficient cause to. Order 6(2) provides –

"6(1) ...

(2) No order of stay of execution shall be made under sub-rule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and

(b) such security as the court orders for due performance of such decree or orders as may ultimately be binding on him has been given by the applicant."

13. There was **firstly** no evidence that the Plaintiffs/Applicants would suffer any substantial loss. There was evidence that two of the Applicants (10th and 12th) have vacated and surrendered their residential houses (nos. 131C, Nyali Estate and 845 Miritini respectively) upon service of letters after the Ruling in Nairobi HCCC No. 1278 of 2004. **Secondly**, there was evidence that the rest of the Plaintiffs/Applicants are gainfully employed after their case for reinstatement was dismissed. **Thirdly**, the Plaintiffs/Applicants have offered no security in the event the court would issue orders binding upon them severally in respect of the suit houses they each occupy or have rented to those parties, and jointly in respect of costs.

14. In the often quoted case of **BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR 417**, the Court of Appeal considered the provisions of Order 41 rule (4) (2) (now Order 42 rule 6(2)) and held –

(a) the power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;

(b) the general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge's discretion;

(c) a Judge should not refuse a stay if there are grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings;

(d) the court in exercising its discretion whether to grant and refuse an application for stay of execution will consider the special circumstances of the case and unique requirements. The special circumstances in this were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.

(e) the court in exercising its powers under Order XLI rule 4(2)(b) (now Order 42(6)(b) of the Civil Procedure Rules,, can only order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

15. In this case, the orders for which stay is sought were made on 31st October, 2012. The stay was applied for on 6th December, 2012, that is to say, some thirty six (36) days after the orders were made. Though an order of “*status quo*” was granted by the court on 1st December, 2012, that there would be no execution pending the determination of the application, no reason was adduced by the applicants why there was such inordinate delay in seeking a stay, even orally by the court on 31st October, 2012, or shortly thereafter. The application was in my view, an afterthought.

16. Though the general principle is that a stay would be granted, apart from the question of delay, referred to above, there may be special circumstances of the case and unique requirements. The special circumstances and unique requirements of this case are that –

(1) the Plaintiffs/Applicants were former employees of the Respondent. For one reason or another they were laid off. They sued their employer, the Defendant in Nairobi HCCC No. 1278 of 2004 in which they sought reinstatement to their former positions and orders were declined,

(2) the Plaintiffs/Applicants occupied the suit premises as employees of the Defendant.

(3) having ceased to be such employees, their occupation of the suit premises is contrary to their terms of employment on the policy of the Defendant,

(4) the Defendant would require the suit houses for accommodation of its other or current employees,

(5) the Ruling against which the Plaintiff/Applicants seek a stay was delivered on 31st October, 2012. The Plaintiffs/Applicant's counsel filed a Notice of Appeal dated 5th November, 2012 (which was prompt) enough but has never taken any steps to either apply for typed and certified proceedings or filed any record of Appeal. It is now over three (3) years and 5 months since the Notice of Appeal was filed. The only plausible reason for such delay is merely that there is no more will to move the Court of Appeal,

(6) the delay in prosecuting the application of 6th December, 2012, a period of over three years (36

months) is inexplicable,

(7) the Plaintiffs/Applicants have offered no security in the event of the orders binding upon them being made,

(8) lastly, the Plaintiffs/Applicants have brought no evidence of substantial or other loss as they have no legal or equitable interest in the suit houses.

17. For those reasons, I find and hold that there is no merit in the Plaintiffs/Applicants Notice of Motion dated and filed on 6th December, 2012, and I dismiss the same with costs to the Defendants/Respondents.

THE NOTICE OF MOTION FILED ON 13/03/2015 TO AMEND THE PLAINT

18. Order 8 rule 3 of the Civil Procedure Rules 2010, grants the court at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, to allow any party to amend his pleadings. The general rule that leave to amend is granted if it is necessary to determine the real question in dispute between the parties. According to the decision in **PHILLIPS HARRISON & CROSFIELD LIMITED VS. KASSAM [1982] KLR 459**, leave to amend should be freely granted if the amendment can be made without injustice which cannot be compensated by way of costs, being occasioned.

19. The general rule is that amendments should be allowed if the court is satisfied that –

- (a) the party applying is not acting mala fides**
- (b) the amendments will not cause some injury to the other side which cannot be compensated by costs;**
- (c) the amendment is not a device to abuse the court process;**
- (d) the amendment is necessary for the purpose of determining the real question in controversy between the parties and avoid a multiplicity of suits;**
- (e) and the amendment will not alter the character of the suit.**

(2) Amendments after the statutory period cannot be claimed as of right, but is within the discretion of the court;

(3) Late amendments may be done, but the applicant must show why the application is made late and must satisfy the court that the delay is not deliberate'

(4) In exercise of the court's direction the following factors must be considered –

- (a) whether the amendment sought embodies a legally valid claim or defence;**
- (b) the reasons why the subject matter of the amendment was not included in the original pleading or offered sooner;**
- (c) delay or disruption of judicial administration;**

and

(d) the extent to which the amendment departs from the original claim or tends to complicate the issue.

(5) in this case the defendant took three years to apply for an amendment of the Plaintiff,

which amendment would cause more confusion to the claim;

(6) the power to strike out a pleading is a discretionary power to be exercised along sound judicial principles;

(7) the power to strike out pleadings for disclosing no reasonable cause of action should be invoked only in absolutely clear cases and exercised with extreme caution;

(8) the court has inherent as well as a statutory duty to strikeout a pleading which is an abuse of the process of the court. However, it is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases;

(9) the proposed amendment in this case has been shown to be one taken in bad faith, intended to be an abuse of legal rules of procedure likely to be unduly prejudicial.

20. The orders sought in this suit are for the setting aside of the eviction orders, and injunction against the Defendant and/or its servants and/or its employees from evicting the Plaintiffs/Applicants from the suit houses. This suit was filed against the backdrop of Nairobi HCCC No. 1278 of 2004 seeking orders against the Plaintiffs' dismissal and reinstatement. That suit was dismissed on 7th November, 2005. The Plaintiffs and/or some of them were Plaintiffs in that suit. Instead of seeking orders of stay in that suit they chose to file a fresh suit, being the suit herein, in this court (Mombasa).

21. The Ruling of 31st October, 2012 therefore summarily determined this case, and there being no stay orders of either the proceedings or of the orders in the said Ruling, there is no substratum upon which to base or allow an amendment of the Plaint herein. The orders sought in the suit herein were the setting aside of the eviction orders and an injunction against the Defendant and/or its servants and/or its employees from evicting the Plaintiffs/Applicants from the suit houses.

22. The suit herein having been filed against the orders of dismissal of Nairobi HCCC No. 1278 of 2004 and application, not a fresh suit, ought to have been filed, in the Nairobi Case, and not fresh suit in Mombasa, and essentially seeking consequential reliefs between the same or some of the Plaintiff and the Defendant in the Nairobi case. This was nothing less than abuse of the court process, and courts do not allow abuse of their process.

23. In the circumstance, the application for amendment of the same Plaint is no more than perpetuating the same abuse of the court's process. It should not be allowed.

24. The undated Notice of Motion filed on 13th March, 2015 is therefore dismissed with costs to the Defendant.

THE DEFENDANT'S APPLICATION DATED 21/01/2013 FOR MANDATORY INJUNCTION

25. As noted earlier at the beginning of this Ruling, the Application seeks a mandatory injunction and is brought under the provisions of Section 10 of the Judicature Act (Cap 8, Laws of Kenya), the High Court (Practice and Procedure) Rules. Sections 1A, 1B, 3A of the Civil Procedure Act (Cap 21, Laws of Kenya) and Order 51, rules (1), (3) and (10) of the Civil Procedure Rules, and all enabling provisions of law.

26. The beginning of the consideration of this prayer is to define a mandatory injunction as against the temporary or interlocutory injunction which is made to restrain a party for a limited period, from doing what he could or would otherwise do if it were not for the injunction. On the other hand a mandatory injunction is a final, and not a temporary order. A mandatory injunction is a positive order that commands or orders an affirmative action, a mandate to a specified conduct. Unlike the restraining, negative injunctive order provided for under Order 40 of the Civil Procedure Rules, the mandatory injunction is issued at the discretion of the court. Because of the finality of its nature, it is issued in exceptional circumstances, where no other remedy could be as efficacious.

27. In this regard therefore, the court in exercising its discretion must consider what exceptional ground exist to justify the grant of a mandatory injunction. The court will take into account the fact that it dismissed the Plaintiffs' application against the Defendant which the Plaintiffs filed after service of the eviction notices by the Defendant. The court will consider that it gave the Plaintiffs' sixty (60) days from 31st October, 2012, to vacate their respective dwelling houses, and hand over vacant possession thereof to the Defendant but have, save the 10th and 12th Plaintiffs herein, refused, ignored and/or neglected to obey those orders.

28. The suit houses, are institutional properties, which are reserved for the employees of the Defendant, and having ceased to be employees of the Defendant, and the court having so adjudicated in its Ruling in Nairobi HCCC No. 1278 of 2004, and the court in its Ruling of 31st October, 2012, the Plaintiffs have no legal grounds to continue clinging onto the Defendant's suit houses.

29. The application of 21st January, 2013 is premised *inter alia* upon the provisions of Section 1A, 1B and 3A of the Civil Procedure Act. I set out **in extenso** those provisions to ascertain their full **intent** and meaning –

“S1A(1) the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;

(2) the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);

(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

30. Section 1B provides -

“S1B(1) For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims –

a. the just determination of proceedings;

b. the efficient disposal of the business of the court;

c. the efficient use of the available judicial and administrative resources;

e. the timely disposal of the proceedings, and all the proceedings in the court, at a cost affordable by the respective parties; and

e. the use of suitable technology.”

31. The Plaintiff's claim against the Defendant herein dates back to the Originating Summons dated 23rd September, 2004, and filed on 24th September, 2004, (being Nairobi HC Miscellaneous Application No. 1278 of 2004) in which the Plaintiffs and others totalling 67 Plaintiffs led by Rufus Njuguna, sued the Attorney-General and 2 others, including the Defendant herein. The Plaintiffs' suit which included a claim for reinstatement to employment with the Defendant was dismissed in a Ruling delivered on 7th November, 2005 by Emukule J. Their claims for payment of salaries and orders against deprivation of property were declined.

32. Though Notice of Appeal was filed against no appeal was filed against that Ruling. The plaintiffs' however filed a fresh suit in Mombasa (being this case) in which they claimed *inter alia* that the eviction

notices issued by the Defendant against them dated 3rd August, 2010 be set aside and an injunction to issue restraining the Defendant from evicting the Plaintiffs from the living quarters by notices dated 3rd August, 2010. The suit was summarily dismissed by Muriithi J in his Ruling delivered on 31st October, 2012.

33. I wish to observe that the suit herein was filed after nearly four years (according to my calculation, after 4 years and 9 months). That was an inordinate delay, and I also observe that the application ought to have been made in the matter of HCC No. 1278 of 2004. They say so in their submissions of 31st October, 2011. But that be as it may be, the suit was summarily dismissed in the Ruling of 31st October, 2012. Despite a Notice dated 5th November, 2012, and filed on 6th November, 2012, against the said Ruling, no such appeal was filed.

34. With that background, the prosecution by the Plaintiffs of purported claims which have been adjudicated upon is neither just, expeditious nor proportionate to the judicial time that has been engaged on this one issue. The Plaintiffs have certainly not assisted the court as it is indeed their duty and duty of their counsel under Section 1B(1) of the Civil Procedure Act, in achieving the said overriding objective set out in Section 1A of the said Act. The Plaintiffs have certainly not assisted the court in the timely disposal of the proceeding herein at a cost affordable. They filed one application after another seeking the same injunctive remedies, to wit, the Chamber Summons of 13th August, 2010; the Amended Plaint of 15th September, 2010, the Notice of Motion dated 6th December, 2012, (being the subject of this Ruling), the Notice of Motion dated 9th February, 2013 (being also the subject of this Ruling), the undated Notice of Motion filed on 13th March, 2015 to amend the Plaint (being also subject of this Ruling). All this can be termed in one phrase, **abuse of the court process** by bringing all manner of proceedings so as to continue being in unlawful possession and occupation of the Defendant's houses. The Plaintiffs totally disrespect the Rulings of the court in HCCC No. 1278 of 2004 delivered in Nairobi on 7th November, 2005, and the Ruling herein delivered on 31st October, 2012. They are determined to continue by every subterfuge in the civil procedure to continue with multiple applications without any intention of bringing it to conclusion. In effect the Plaintiffs are re-litigating issues already decided upon. It is all an abuse of the process of court.

35. For those reasons, I allow the Defendant's Notice of Motion dated and filed on 21st January, 2013 and there shall issue a mandatory injunction directed at each of the Plaintiffs to vacate the Defendant's suit houses within thirty (30) days of the date hereof. In default the Defendants and each of them shall be evicted from the suit premises by virtue of these orders.

36. In summary –

- (1) the Plaintiffs' Notice of Motion dated 6th December, 2012 seeking a temporary stay of execution of the court's Ruling of 31st October, 2012 is dismissed with costs.
- (2) The Plaintiffs' undated Notice of Motion filed on 13th March, 2013 seeking an amendment of the Plaint dated and filed on 13th August, 2013 is dismissed with costs.
- (3) The Defendant's Notice of Motion dated and filed on 21st January, 2013 for mandatory injunction is allowed to be executed within thirty (30) days of the Ruling herein.

37. Since the law stipulates that costs follow the event, the Defendants shall have the costs in all the application covered by this Ruling.

38. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 8th day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Gathuku holding brief Dr. Khaminwa for Applicants

Miss Jadi for Respondent

Mr. Silas Kaunda Court Assistant