



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 203 OF 2019

TAHIR SHEIKH INVESTMENT LIMITED.....PLAINTIFF

- VERSUS -

BANK OF AFRICA LIMITED.....DEFENDANT

AND

ABDULMAJID MOHAMED ADAM.....INTERESTED PARTY

RULING

I. Preliminaries.

1. On 7th October 2021, when this matter came up for hearing for the hearing of the Notice of Motion Applications dated 30th July 2021 by the Plaintiff and that of the Interested Party dated 21st July, 2021 respectively only two Learned Counsels - Ms. Kiptum holding brief for Mr. Gikandi for the Plaintiff and Mr. Khalid for the Proposed interested party were in attendance. There was no appearance nor representation for the Defendant herein.

2. In the given circumstances, this Honorable Court directed that both of these applications be canvassed by way of written submissions. However, by the time this matter was set down for ruling on 15th December 2021, it was only the interested party who had filed their written submission. For that matter, therefore, I will proceed to rule on it.

II. The Interested Party's Case

3. The Interested party/ Applicant application is brought under the provision of Sections 1A, 1B, & 3A of the Civil Procedure Act, Cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. They sought the following orders.

a) THAT this Honourable court be pleased to direct Nairobi Homes (Mombasa) Limited to release to the interested party all the rental proceeds collected from the premises known as Mombasa/Block XVI/147 from 25th February 2020 up to date.

b) THAT this Honourable court be pleased to direct Nairobi Homes (Mombasa) Limited to hand over to the interested party all relevant documentation including but not limited to the tenancy agreements, statement of accounts, invoice and any/or other relative documents with respect to Mombasa/Block XVI/147.

c) THAT the costs of this application be provided for.

4. The applicant state that he acquired Mombasa/Block XVI/147 (Hereinafter referred to as "The Suit Property") during a public auction that was conducted on 18th November 2019 and was issued with a Certificate of Sale dated 19th November 2019, and is marked "AMA -3" in the Supporting Affidavit affirmed by ABULMAJID MOHAMED ADAM. After the said auction, the interested party became aware of the injunctive orders issued by court herein dated 20th November 2019, marked "AMA - 3" restraining the defendant from selling the suit property. The court gave further orders on 25th February 2020, marked "AMA - 5", barring Nairobi Homes (Mombasa) limited or any other agent from releasing any rent collected from the suit property. The plaintiff's suit was dismissed by court vide a ruling delivered on 20th July 2020 on the ground of being Res - judicata to other suits instituted by the Plaintiff.

5. After the Plaintiff suit was dismissed, the interim injunctive orders were discharged and prompting the interested party to be registered as the owner of the suit property and issued with a certificate of title dated 30th July 2020, marked "AMA - 8". The interested party then

proceeded to terminate the services of Nairobi Homes (Mombasa) limited who were the plaintiff's agent collecting rent over the suit land, in their place the interested party appointed another agency to be the sole managing agent. However, the Nairobi Homes (Mombasa) limited are still collecting rent from some tenants on the premises despite their services being terminated.

6. The firm of Khalid Salim & Co advocates had on two occasions written to Nairobi Homes (Mombasa) limited on 5th August 2020 and 21st August 2020 to inform the agency that their services were terminated and they ought to release the rent collected between February 2020 and July 2020, the letters are marked "AMA - 9" and "AMA-10". The interested party/applicant has pleaded with court to order Nairobi Homes (Mombasa) limited to release all the funds in its possession together with all the documents pertaining the tenants, to him. On the ground that as the registered owner of the suit property, the applicant has rights to the said records and income drawn from his suit property since the day he was registered as the owner.

III. The Replying Affidavit by the Plaintiff

7. The Plaintiff responded to the application with a Replying Affidavit sworn by NUREIN TAHIR SHEIKH SAID filed on 18th November 2021. The deponent stated that after the ruling of court on 20th July 2020 and struck out the Plaintiff's suit for being res judicata, there no longer exists a suit upon which any further proceedings can be continued. That the orders sought by the interested party could be granted where there is no existing suit, and that the Interested Party was proceeding from a factually incorrect standpoint that there are orders restraining Nairobi House (Mombasa) limited from releasing funds to the plaintiffs or its agents. It was also deponed that the interested party's right over the suit property is under challenge in another suit being Mombasa HCC No. 57 of 2016; Juja Coffee Exporters & 3 others - Versus - Bank of Africa Limited & 4 others, and any orders that are granted herein would be contradictory to those in the High Court. The deponent urged court to direct the interested party to file a Counter Claim in the High Court case and obtain the relief sought he seeks herein.

IV. Submissions

8. On 7th October, 2021 in the presence of all the parties, this court directed that the two applications dated 30th July 2021 by the Plaintiff and that of the Interested Party dated 21st July, 2021 respectively be canvassed by way of written submissions. As indicated above its only the Interested party who filed their written Submissions.

A. The Interested Party Written Submissions

9. The interested party filed submissions on 8th November 2021 in support of the application. Counsel submitted in brief that the interested party is the indefeasible legal and beneficial owner of the suit property having acquired the same via a sale by public auction and has since acquired a certificate of title. That the interested party has been deprived of and denied his rights to use and enjoy his property and has suffered loss and damage. Counsel submitted that the plaintiff stands to suffer no prejudice if the rent collected from the suit property from the 25th February 2020 was surrendered to the interested party.

B. The Plaintiff/Applicant's Written Submissions

10. The Plaintiff filed submissions on 18th November 2021 in opposition of the application. Counsel submitted that there is no suit up on which the application can be based upon since the suit herein was struck out by court. Counsel relied on "***Bernard Mwangi Maina & 2 others – Versus - Julius Kamau Mwangi & 4 others (2020)eKLR***" where court was clear that in the absence of the suit, there was no foundation upon which any application can be considered.

11. The Learned Counsel claimed that once the orders issued on 25th February 2020 lapsed, Nairobi homes was at liberty to utilize the funds unhindered. The Counsel interpreted the ruling of court delivered on 26th January 2021, as the court allowing the interested party to use the property but court did not release the funds to him. It was also submitted that the interested party's title to the suit property is being challenged in Mombasa HCCC 57 OF 2016, therefore court should not allow the applicant to benefit from the suit property until the case is heard and determined.

V. Analysis and Determination

12. I have read through the pleadings, written submissions, the cited authorities and the relevant provisions of law pertaining to the two Notices of Applications dated 30th July 2021 by the Plaintiff and that of the Interested Party dated 21st July, 2021 respectively. There is only one single issue that discerns determination by this court herein Whether this suit is existent or not for the orders sought by the Interested party to be dealt with and hence granted.

13. On 20th July 2020, Hon. Yano. J made a ruling with regard to the Notice of Motion dated 18th November 2019 by the Plaintiff. From the said ruling the Court found that the suit was res judicata. An order of court issued on 24th July 2020 stated that:- "***The Plaintiff's suit and Notice of Motion dated 18th November 2019 be and are hereby struck out with costs to the Defendants.***" In essence, the Plaintiffs suit is non – existence. This ruling was never set aside, reviewed nor appealed against. Fast-forward to this application, where the interested party is seeking to have the Plaintiff's former agent release rent collected and books of accounts from 25th February 2020.

14. The question that arises is whether court can hear and determine an application made after a suit has been dismissed on the ground of being res judicata. The plaintiff has submitted on this issue, counsel argues that since the orders striking out the suit has not been overturned, the applicant cannot seek substantive reliefs. Counsel submitted that the orders sought are premised on Section 22 of Civil Procedure Act, Order 14 and Order 20 of the Rules, which all contemplate the existence of a suit before the prayers can be granted.

15. Once a suit has been struck out for being res judicata, as this suit was Section 7 of the Civil Procedure Act applies, the suit cannot be heard afresh in relation to any issue brought before court, refer to Explanation 4, 5 and 6 of the Section. Section 7, does not state whether a suit ought to be struck out or dismissed, however the decision of court to find a suit res judicata is essentially judgement entered against the plaintiff. The interested party is therefore barred, as a party to a dismissed suit under Section 7 from making litigating fresh issues on the suit. The provision does not bar the interested party from bringing a fresh suit where the issues are novel between the parties.

16. The interested party herein is claiming as against Nairobi Homes (Mombasa) Limited, a body corporate that has the ability to sue and be sued in its own name, as the agents of the plaintiff in collecting rent in the suit property. The applicant ought to file a fresh suit against Nairobi Homes, as agents of the plaintiff, seek the orders sought herein before court by establishing the agency relationship between Nairobi Homes and the plaintiff. The prayers sought herein cannot be granted in this suit, which was struck out for being res judicata.

VI. Determination

17. As noted above, the issues that were between the parties herein were concluded by the order striking out the suit for res judicata. From the surrounding inferences, this court cannot reopen the matter for determination of the issues raised herein as the same was already closed. Perhaps and as suggested by the Plaintiff, the Interested Party may consider filing a Counter Claim in the pending High Court civil case over the same subject matter and obtain the relief sought he is seeking herein.

18. Additionally, this Court can neither set aside the order striking out the suit to reinstate it in order to hear the interested party. This is a dead suit on arrival as we know it. Therefore, I do hereby proceed to dismiss the Notice of Motion dated 21st July 2021 for being filed in a non existent suit the same having been struck out for being res judicata with no order as to costs.

19. IT IS SO ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumna, the Court Assistant.

Non Appearance for the Plaintiff/Applicant.

Non Appearance for the Defendant.

M/s. Iman holding brief for Khalid Salim Advocate for the Interested Party.