



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCC CASE NO. 560 OF 1998.

PASHA ENTERPRISES LTD.....APPLICANT

AND

KENYA FARMERS ASSOCIATION.....DEFENDANT/RESPONDENT

EXPARTE

KEPHA NYABERA..... PLAINTIFF

RULING

1. The application dated 23.7.13 seeks orders to issue directing the defendant/decree holder by itself, agents, employers, tenants, servants, or anybody claiming authority from it to vacate the property known as Machakos block 1/67 within seven (7) days of issuance of the order.
2. Further that, in the event that the defendant or its agents or anybody else claiming from it fails to vacate, then they be forcefully evicted by an auctioneer of the applicant's choice with the assistance of the OCS Machakos Police Station. That the costs of the eviction, be borne by the respondent/defendant.
3. The basis for these prayers is that the applicant (PASHA ENTERPRISES) is the owner of the said parcel which has arisen subsequent to consolidation of parcels no.MACHAKOS TOWN BLOCK 1/68 AND 1/67.The applicant purchased these properties at a public auction as a result of execution of a decree issued against the defendant in this matter.
4. The court issued an order declaring the public sale complete, and vesting the properties to the applicant. However the defendant has refused to surrender vacant possession of the properties.
5. In the supporting affidavit sworn by Samuel Theuri, the applicant's director, he explains that he bought the parcels at a public auction on 13th October 2009, but the defendant has deployed individuals to remain on the said parcel, thus depriving him of the vacant possession. A title document in respect of the suit property is annexed, showing the applicant as the registered owner.
6. However, this claim to ownership is disputed, and in a replying affidavit sworn by Symon K. Cherogony, the defendants managing director, he deposes that parcel no. Machakos Town block 1/67 was not created as a result of consolidating parcels no. Machakos town No.1/68 and no. 1/69, which remain in existence alongside no. 1/67 as separate and independent portions, each with its own title. It is his contention that parcel no. 1/67 and 1/68 are owned and registered in the name of County council of Machakos while no. 1/69 is in the name of Samuel Kimondo Theuri, and none of the properties is registered in the name of the applicant (Pasha enterprises)
7. The defendant claims being in occupation of the applicants property and contended that the application for eviction is misconceived, and misplaced. Further to this, a preliminary objection has been raised to the effect that this being a claim to ownership, occupation and use of land, the same should only be heard as a substantive suit by the Environment and Land Court. The defendant also points out that the vesting orders were obtained exparte and without and service on the defendant. To prove the separate and current existence of the three parcels under reference, the defendant has annexed copies of search certificates dated 25th February 2014.
8. The applicant in a supplementary affidavit, seeks to rely on a memorandum of sale and certificate of lease to justify his claims, plus the vesting order which directed the Commissioner of Lands to issue a lease in respect of the said parcels, and the Deputy Registrar had been ordered to execute the transfer documents.
9. The court heard the application and the preliminary objection raised, simultaneously. Mr. Karanja, on behalf of the applicant submitted that in a consent filed in the year 2012, between the plaintiff and the defendant, the defendant acknowledged that the suit land was sold at a public auction in the course of recovery of a debt. He points out that this is a fact which does not need to be proved, and

for the defence to now say the property does not belong to the applicant is dishonest. He argues that the purchaser was not a party to the suit, and there would have been no other basis for him paying that sum of Kshs. 9million.

While acknowledging the information in the search documents, Counsel contends that, at the time of the sale, lease certificates had not been issued, but a consent was entered into that the Commissioner of Lands do issue the certificate of lease to the purchaser directly. Further consent allowed the Deputy Registrar to sign transfer documents in respect of the two parcels.

10. Mrs. Magana, on behalf of the defendant submits that what applicant is seeking is vacant possession of the property on the basis of being a purchaser yet the records of the sale show that only property i.e no. 1/67 was sold, and there is no basis for claiming the other two parcels. She has referred to consent order dated 4th December 2012, which she says clearly referred to one property i.e Machakos Municipality Block 1/67 and that is why the lease certificate is issued in respect of that same parcel. She points out that since there is an obvious discrepancy regarding who is the registered owner of the two parcels, the same raises a substantive issue which cannot be dealt with by way of an affidavit, or an application, especially because Machakos County Council will remain the registered owners of the property (and will be deprived of the same if the prayers are granted) are not enjoined in this suit. She urges the court to find that this is a substantive matter which should only be dealt with in a substantive suit.

11. Mrs. Magana acknowledges that there does not exist another search dated 6th May 2014 in respect of parcel block 1/67 in the names of Pasha Enterprises Limited and opines that since all the searches presented emanate from the two land registries, there is a possibility that the property has two different registers or green card OR the search certificate is a forgery. Counsel also concedes that a consent was recorded between the plaintiff and the defendant on 4th December 2012 but . points out that it was not the decree holder who sold the property - this was a forced sale and the consent alone cannot be sufficient to give title where none exists. She suggests that there may have been an error and the judgment debtor probably thought it had title on the property, when it did not.

Counsel also submits that the issues in this matter relate to land. And should be handled by the Environment and Land Court which has jurisdiction. The issues here are very simple:-

- a). Is the applicant seeking orders relating to one property or three parcels.
- b). Does this court has jurisdiction to deal with this matter.

12. From the annexures presented, it would seem that there still exists three parcels i.e no. 1/67,1/68 and 1/69. The sale refers to property no. 1/67 and it is not clear under what process no.1/68 consolidated to form one unit, and have one title issued. If the orders sought were to issue, there would still be a problem because the applicant will be expecting vacant possession of two parcels, yet the record shows just one parcel while no. 1/68 remains in the name of Machakos County Council.

13. However, even if we were to go over that hurdle, there still remains the issue of the sanctity of that public auction, in view of the fact that there does not appear to be any evidence demonstrating that the defendant ever owned the property which was sold at the auction. I say this because the search certificate shows the owner of the property as Machakos County Council, who is not a party to this suit. This means that were orders to be issued, the Machakos County Council will be condemned unheard. It would have been prudent to enjoin the Council as a party to this suit, just as way to wrap up any loose ends.

Then there is the issue regarding jurisdiction - after all the real contention here is who owns, who should occupy and use the said parcel.

Article 162 (2) of the Constitution provides as follows:-

- a).
- b). The environment and the use and occupation of, and title to, land

14. Although reference has been made to section 34 of the Civil Procedure Rules . I am in agreement with Mrs. Magana that the same does not apply, as that provision makes reference to parties to the suit. The applicant was not a party to. the suit. He came in as a late entrant, after conclusion of the suit, he was a purchaser. The applicant's entrance into the matter introduced issues relating to title and possession which I think fall within the docket of the Environment and Land court. Due to these observations, I decline to grant the order for .vacant possession and/or eviction, and that application is dismissed. Further, I hold and find that the preliminary objection raised herein has merit to the extent that;

- a). With regard to jurisdiction, this matter should be dealt with by the Environment and Land court Judge.
- b). The matters raised are of such substantive nature and affect the rights of a third party who is not a participant in this proceedings,
 - i. That it would be improper to issue such orders.
 - ii. The nature of the orders sought cannot be determined through affidavits by a simple affidavit. They are substantive, as to merit a substantive suit being filed, involving all the affected parties.

The notice of motion dated 23rd July 2013 is thus dismissed with costs to the defendant/respondent.

Dated, Signed and written at Bungoma this 19th day of December 2014.

H. A.OMONDI

JUDGE

Delivered and dated this 4th day of February 2015.