



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 23 OF 2013**

**RISHARD ABDULREHMAN KHATOR & ANOTHER.....PLAINTIFFS**

**VERSUS**

**IDHA MARIE AHMED & 2 OTHERS.....DEFENDANTS**

**RULING**

*(Application seeking orders for the 1<sup>st</sup> defendant to be present rent accounts; parties having had a dispute over ownership of property which the court held was held in common in some shares; judgment also providing that the 1<sup>st</sup> defendant do present an account of rent received from the year 2012; application opposed on grounds inter alia that the property has not been partitioned; property held in undivided shares; issue of partition not arising in respect of share of the rent proceeds; in any event, the order for accounts was given in the judgment and must be given effect; application allowed)*

1. The application before me is that dated 12 February 2021 filed by the plaintiffs. The application is said to be brought pursuant inter alia to the provisions of Order 20 Rule 49 and seeks the following orders :-

*(i) The 1<sup>st</sup> defendant is ordered to file with the Deputy Registrar of the ELC Court at Mombasa a complete and accurate statement of rent account, with an affidavit in verification for the period between 1.7.2017 until vacant possession;*

*(ii) The Deputy Registrar takes accounts on the 1<sup>st</sup> defendant's rental income and certifies the amount due to the plaintiffs on the judgment herein to be paid within 14 days from the date of the order , failing which execution to issue;*

*(iii) Future rental income to be paid in accordance with the preliminary decree of 31/10/2019 failing which sequestration of the tenants and the 1<sup>st</sup> defendant's goods do issue.*

2. The application is said to be grounded on the judgment of the court delivered on 31 October 2019 where the court ordered taking of accounts on the 1<sup>st</sup> defendant's rental income accruing from the letting out of the suit premises, received between 1.7.2012 until November 2019. The application is opposed.

3. To put matters into perspective, this suit was commenced by the applicants through a plaint filed on 31 January 2013. The applicants filed suit as administrators of the estates of Tima Ali Bahir and Fatuma Ali Bashir, children of Ali Bashir (deceased). They averred to be the registered owners of 2/3 undivided share in the Plot No. 1738 Section VI Mainland North (the suit property) with the other shares being to Rukiya Binti Soud (as administrator of Soud Ali Bashir) and Mohamed Bin Ali Bashir, each holding a 1/6 share. Their complaint was that the 1<sup>st</sup> defendant/respondent, Idha Marie Ahmed, entered the suit land, fenced it, and assumed exclusive possession. They averred that this act was wrongful and they asked for an order of ejection and damages for unlawful entry and unjust enrichment. It was claimed inter alia that the respondent was using the premises as a parking yard for trucks for good consideration. In the suit, they sought orders for a declaration that they own 2/3rds of the property; general and exemplary damages for trespass and unjust enrichment; an order for an account or an inquiry as to the income accruing to the respondent with directions that the respondent does pay a pro rata (2/3rds) share of all the income accruing from the continued use of the suit premises from 1 July 2012; a permanent injunction to restrain the respondent from entering the suit land; and rectification of the land register.

4. The defence of the respondent was that he purchased the suit land from Rukiya Binti Soud and has occupied the land since the year 2000 without any objection being raised. He in fact had title to the whole of the land. In the alternative he counterclaimed that he has acquired title to the whole land by way of adverse possession.

The case was heard by Omollo J whose judgment dated 22 October 2019 was delivered on 31 October 2019 by Yano J, as Omollo J had been transferred from this station. The judge was not persuaded that the respondent has made out any case for the land through the doctrine of

adverse possession. She also found that the registration of the respondent as the proprietor of the whole land was unlawful as what he purchased was only the 1/6<sup>th</sup> share of Rukiya Binti Soud. The judge declared that the plaintiffs own 2/3<sup>rd</sup> of the suit property and further declared the respondent to be a trespasser on 2/3<sup>rd</sup> of the suit property. The respondent was also permanently enjoined from entering or remaining on 2/3<sup>rd</sup> of the property and was further ordered to restore the said portion to the state that it was at his own expense. There was also an order for rectification of the register to reflect the proper shares of the proprietors. In addition, the judge made the following order which I think forms the basis of this application which was order (c) in the judgment :- *(c) An order for an account or inquiry as to income accruing to the 1<sup>st</sup> defendant with directions that the 1<sup>st</sup> defendant pays over to the plaintiffs a 2/3 pro rata share of all income accruing from the continued use of the suit property from July 1, 2012 until surrender of vacant possession.*

5. The supporting affidavit is sworn by Rishad Abdulrehman Khator. He has deposed inter alia that the respondent has surrounded the entire plot (minus Wafula's house) with a fence and has let out the premises as his own. He has deposed that the occupants of the shed (in the premises) have refused to give copies of documents and thus the court should compel the respondent to do so. He has deposed that in 2012, the respondent operated a garage after removing his goods, and that he used to repair vehicles and undertake panel beating, as well as fabrication of grills and steel doors. It is said that he also used to let the premises to tenants who used it as a garage. He has stated that the garage and fabrication yard has been in existence up until 31 October 2019 when the court pronounced judgment, and that notwithstanding the judgment, the respondent has continued to collect rent hence the need to issue a sequestration order against the tenants and the respondent. He has urged that the respondent has a statutory duty to produce accurate accounts of all dealings he has had at the garage and of any rental income that he has received.

6. The respondent filed a replying affidavit to oppose the motion. He deposed inter alia that the court confirmed that he holds 1/6<sup>th</sup> of the suit property and there is another 1/6<sup>th</sup> share held by Mohamed Bin Ali Bashir who is not party to this suit. He denied occupying the entire suit premises and denied fencing it off to the exclusion of the applicants. He deposed that there is already an existing Swahili house on the land which he neither possesses nor occupies. He has deposed that he has challenged the judgment before the Court of Appeal which appeal is live. He thought that the applicants are basing their claim as if they own the entire property and not just a 2/3<sup>rd</sup> share. He averred that the premises has neither been surveyed nor demarcated and that parties are occupying it without a formal survey to indicate the extent of their respective shares on the ground. He added that the applicants cannot identify the extent of their 2/3<sup>rd</sup> share, or the limit of his 1/6<sup>th</sup> share, without a formal demarcation by the aid of a surveyor. His plea was for a surveyor to go to the ground so as to commence the process of partitioning the respective 2/3<sup>rd</sup>, 1/6<sup>th</sup> and 1/6<sup>th</sup> share of the proprietors, which plea he stated the applicants have rebuffed. He has stated that it is for this reason that the applicants have not taken any steps to enforce the order of injunction against him as their portions are not identified or demarcated on the ground. He argued that if after demarcation and survey, it turns out that he is occupying only a 1/6<sup>th</sup> share, the claim for accounts would fail in totality. He has further contended that if it turns out that the applicant's 2/3rds share does not extend to the portion that he has fenced off and occupies, then the claim for accounts would fail. He has urged that he can only be liable to render accounts if it is determined that he occupies a portion of the applicants' 2/3<sup>rd</sup> share. He has mentioned that the applicants have been harassing his tenant and that they seek to sequester his goods yet the tenant is not part of these proceedings. He has even been charged with an offence of forcible detainer and he feels harassed.

7. The application was argued through both written and oral submissions and I have taken note of the submissions of Mr. S.M. Kimani, learned counsel for the applicant, and Mr. Benjamin Njoroge, learned counsel for the respondent. Mr. Njoroge's position was that without survey, demarcation or partition, there would be no evidence that the respondent has encroached onto the applicants' 2/3<sup>rd</sup> share. He thought that the application for accounts is premature until the actual occupation on the ground is determined. He submitted that there is a preliminary question to be tried, that question being whether the respondent occupies any portion of the share of the applicants, and if so, how much of it. His view was that the solution lies in survey and demarcation of the suit premises, and ultimately partition of the same, which is the solution that the respondent seeks at the Court of Appeal. He asked that the prayer for accounts be rejected until the survey and partition is finalised.

8. Mr. Kimani on his part submitted that under Section 52 of the Civil Procedure Act, the court is empowered to issue a commission to examine and adjust accounts which is returnable to a judge. He also referred to Order 21 Rule 13 which provides for a decree for possession and mesne profits, and Order 28 Rules 9 and 10. He referred me to the procedure in India and England. He submitted that the fact that there is a challenge on appeal is immaterial as there is no stay of proceedings.

9. I have considered all the above.

10. I will start with the judgment itself. There was indeed an order for accounts or inquiry as to the income that has accrued to the respondent from 1 July 2012, and a further direction that the respondent pays to the applicants a 2/3 pro rata share of all income that has accrued. I am aware that the respondent has pointed out that he has appealed the judgment, but since there is no order of stay of execution, I will need to determine this application. The argument of the respondent is that unless and until the premises is surveyed, and the respective portions of the proprietors on the ground determined, then he cannot be held to be in possession of the share of the applicants. I appreciate that argument but I think that it is flawed.

11. We must remember that the proprietorship here is of undivided shares. Bar any agreement by the proprietors regarding the use of the premises, or any portions of it, it means that no party has an exclusive right to the use of any portion of the premises. The share of the parties is virtual and not actual on the ground. Ordinarily such premises are either used by all the proprietors by mutual agreement, or is let out and the rent received apportioned in accordance with the shares of the parties. Challenges can of course arise where the premises is in the hands of one party who does not wish to disclose the income that is being received. Where ownership is joint or is in common, unless the land is partitioned, it may be near impossible to say that one person has encroached onto the share of another and I am not sure how one would be enjoined from the other's share. I also do not see how one may be said to be in forcible detainer of the land. Where there are challenges on proprietorship touching on undivided shares, the best avenue is for the parties to apply to have the land partitioned (if this is possible and it may only be possible if the land is large), or the land sold and the proceeds shared, so that the conflict is resolved. I may not have heard the suit but I think the judge was persuaded from the evidence that the respondent had assumed exclusive use of the premises. That probably was the respondent's case because he made a counterclaim for adverse possession for the whole of the land. That is why the judge ordered the respondent to account to the applicants to the extent of 2/3rds of the income that he has been receiving. She would not have ordered

otherwise if she had not found as much. Thus, it is not so much about demarcating the land on the ground, which by the way will alter the status of the premises from undivided shares to individual ownership of the subdivisions, but is a matter of the respondent tabling accounts of the income that he has been receiving from the premises so that it is shared pro rata according to the shares of the proprietors. That was the order of the court and the respondent needs to comply with it bar any further order that may come from the Court of Appeal.

12. I have considered the argument by Mr. Njoroge that there is a preliminary question to be tried and his reference to Order 20 of the Civil Procedure Rules. Mr. Kimani also thought that Order 20 applies only that the rules under Order 20 are silent on who is to take accounts and the timelines. I would interpret Order 20 as a scenario for an order of accounts before judgment. Indeed if you read Order 20 Rule 3, you will see that such application may be made any time after the time for entering appearance has expired. The accounts herein are being sought in respect of an order in the judgment and I think that it is Order 21 Rule 13 which applies. It provides as follows :-

13. *Decree for possession and mesne profits [Order 21, rule 13.]*

*(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree*

*(a) for the possession of the property;*

*(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;*

*(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—*

*(i) the delivery of possession to the decree-holder;*

*(ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or*

*(iii) the expiration of three years from the date of the decree, whichever event first occurs.*

*(2) Where an inquiry is directed under subrule (1)(b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.*

The court did pass judgment directing an inquiry hence my thinking that it is actually Order 21 Rule 13 above which applies. The mode of inquiry is covered under Rule 17 which provides as follows :\_

*The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised”*

13. In the judgment, the court did not give any special directions on the mode of taking accounts or inquiry. It will be seen from Rule 17 above, that this can be done through a subsequent order. It is apparent that the court has wide discretion on how to go about this taking into account the particular circumstances of the case.

14. In this application, the applicants have asked that the respondent be ordered to file with the Deputy Registrar a complete and accurate statement of rent accounts from 1 July 2017 (must have meant 2012) until vacant possession after which their share can be certified and paid to them within 14 days. They also seek future rent to be paid in accordance with the decree. I see no problem with this request. That is what was ordered in the judgment. I will thus allow prayer (i) of the application. I direct the respondent to file a complete and accurate statement of rent account with an affidavit of verification for the rent received from 1 July 2012 to date. This be done within the next 14 days. After filing, the parties to appear before the Deputy Registrar for the verification of the accounts. Upon verification, 2/3rds of the amount verified be paid to the applicant within 14 days thereof failing which execution to issue. Any future rents also be shared in the same ratio of 1/6<sup>th</sup>, 1/6<sup>th</sup> and 2/3rds.

15. Costs of this application will be to the applicant.

16. Orders accordingly.

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF FEBRUARY 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**