



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELC CIVIL SUIT NO. 278 OF 2013**

GHALIB KARA ..... PLAINTIFF/APPLICANT

**VERSUS**

1. ALI ISHRAT HUSSAIN JAFFRI ..... 1ST DEFENDANT
2. NAHID ZAHRA JAAFRI ..... 2ND DEFENDANT
3. FATMA MUSTAQ GULAMHUSEIN ..... 3RD DEFENDANT/RESPONDENT

**RULING**

1. The Plaintiff has brought his notice of motion under sections 1A, 1B, 2, 3A 38(a) , 63 , 64, 80 and 91 of the Civil Procedure Act and Orders 50 rule 1 45 rule 1, 2 and 3, 21 rule 9, 8, 10 and 11 and Order 22 rule 7, 9, 10,13,18,19, 25,50,51,52,53 and 80 of the Civil Procedure Rules and all enabling statutes seeking the following orders;
  - 1) Spent
  - 2) Spent
  - 3) The Court do set aside the orders and or warrant to give possession dated 17th December, 2014 and re-instate the plaintiff/applicant to the possession of the suit property.
  - 4) The Court do order the release of all the monies deposited in Court by the applicant and or his advocates as security in respect of the notice of motion application dated 27th November, 2013.
  - 5) This Court do order the 3rd defendant to compensate the applicant for all the loss suffered in respect of the eviction carried out on him pursuant to the warrants dated 17th December, 2014.
  - 6) The 3rd Defendant/respondent do pay costs of this application.
2. The motion is supported by six grounds on the face of it and the affidavit deposed to by the applicant. The motion was supported further by the oral submissions presented by his advocate on record. The motion is opposed by the 3rd defendant/respondent who executed the Order

complained of. She deposed inter alia that the eviction was regular and was not forceful as the order of 10th December, 2013 required the plaintiff to deposit rent in the sum of Kshs. 200,000/= in Court monthly in default the applicant be evicted from the premises. That the applicant has admitted default and the explanation that rent could not be paid was an excuse. The 3rd respondent's case besides facts deposed in the affidavit is also anchored by the oral submissions made by her advocates on record.

3. In submissions, Mr. Abubakar for the applicant relied on the grounds on the face of the motion and the supporting affidavit on record. He submits that the application for execution was illegal as what was issued on 10th December, 2013 was an order not a decree. That there was no decree extracted in accordance with order 21 rules 7, 8, 9 and 10. Further the order executed ceased to exist after 5th March, 2014 after the application was heard. Mr. Abubakar submits that if there was any breach then it ought to have been dealt with at that time. He also avers that on 4th September, 2014, an injunction order was issued against the eviction yet the execution process commenced on 11th December, 2014, therefore wrong. He also averred that the execution was made after one year without taking out notice to show cause. The applicant denied the deposit made in Court was rent but acted as security.
4. The applicant's submissions continued that the execution done by the 3rd defendant in person in breach of order 9 as she did not serve the applicant with notice to act in person. The applicant wondered why the execution application was supported by an affidavit. The applicant submitted that once the entire amount was paid, it was wrong for the execution process to be carried out as the eviction orders interfered with preservation orders issued in the Criminal proceedings. He also stated he was using the premises for business. He urged the Court to allow the orders sought.
5. Mr. Asige for 3rd respondent began by stating that he relied on the affidavit in reply. In opposing prayer 5, he said there is no evidence of proof of loss suffered and the same can only be determined by a suit commenced by way of an originating process. In response to prayer 3, he submitted there are no orders capable of being set aside as what was issued were warrants dated 17th December, 2014. The warrants have been acted upon, eviction carried out and completed. The suit property has also not been disclosed hence creating ambiguity. Further that the order of 10th December, 2013 was capable of execution without having to be made a decree. Mr. Asige continued that ground 1(b) as pleaded cannot invalidate the order issued on 10th December, 2013. He also submitted that the order of 4th September, 2014 was not exhibited and what sought of injunction it was.
6. On computation of time, he submitted the application was made exactly within one year. On the notice to act in person though not served, the 3rd Respondent submits was a procedural lapse which does not go to the roots of the case and does not invalidate a regularly issued warrant. It is their argument that the Kshs. 200,000/= was rent not security. No preservation order was annexed from the criminal proceedings as pleaded in the supporting affidavit and that the applicant conceded in paragraph 5(vi) that there was an eviction order available to the respondent. Mr. Asige submitted further that the applicant never complied with the order of 10th December, 2013. He submitted that only the 1st deposit was made in time therefore the right to execute became available to the 3rd Respondent. The money deposited in Court should not be released to the applicant as it was rent since he was in occupation of the suit premises. He urged the Court to dismiss the application with costs to the respondent.
7. The order the subject of this application issued on 10th December, 2013 read thus;

***“1. That the plaintiff shall deposit Kshs. 200,000/= in Court every month with effect from 31st December, 2013 and thereafter each and every succeeding month until these applications are heard.***

***2. That the copies of deposit slips shall be sent to 3rd Defendant on the 5th of every month. If the plaintiff fails to do so, the defendants shall be at liberty to evict the plaintiff from the premises on***

***application to Court.***

***3. The applications dated 27th November, 2013 and 5th December, 2013 be heard on 26th February, 2014”.***

On 26th February, 2014, parties opted to file written submissions which they highlighted on 5th March, 2014 and the Court reserved its ruling for 11th June, 2014 although the ruling was delivered on 4th September, 2014.

8. It is not in doubt that the plaintiff/applicant was evicted from the suit premises being parcel Nos. 812-820 Mombasa Block XI. The question for this Court to answer is whether this eviction was pursuant to the order of 10th December, 2013 and therefore lawful or otherwise. In clause 1 of the order, the applicant was required to make deposits until the applications were heard. There is no evidence that he made payments on 31st January, 2014 which he seemed to have paid on 3rd February, 2014. There is also no evidence of payment on 28th February, 2014 for the month of February. In my understanding of the meaning of the order, this was the time it was open to the 3rd Respondent to apply to Court to be allowed to evict the applicant. She did not take such steps. Once the application was heard on 5th March, 2014, the order of 10th December, 2013 was thus spent as regards eviction in default of compliance.
9. Subsequent events after 5th March, 2013 is the ruling on the two applications delivered on 4th September, 2014. This ruling is annexed as GK 11 in the applicant's affidavit. In page 6 of 7 paragraph 8, the learned Judge stated thus,

***“The plaintiff is depositing Kshs. 200,000/= each month in Court to cater for the rent and other incidentals for the premises. If the 3rd defendant will be the eventual winner of the case, he shall collect his lumpsum from the Court”.***

In paragraph 9, the judge found for the plaintiff and allowed the application dated 27th November, 2013 as prayed and dismissed the application by the 3rd defendant dated 5th December, 2013.

10. The essence of the Judge's finding resolves the matter of the deposit. The applicant asked that it be released to him as it was security. The Judge clearly stated it was security but for rent so that should the 3rd respondent be the eventual winner at the conclusion of this case, she can collect it. The suit is yet to be determined. Prayer 4 is not available at this stage of the proceedings. The second limb of the finding also marked the order of 10th December, 2013 as spent if in the view of the 3rd respondent that order was still existing. In the application dated 27th November, 2013 which was allowed
11. The ruling in my view were final orders made by the Court which could only be varied as provided under Order 40 rule 7 or at the determination of this suit. It is my finding that there were no orders available to the 3rd respondent on 11th December, 2014 that she could execute to evict the plaintiff/applicant. It is thus obvious that the eviction Order extracted were illegal and void as non was available. The consequent execution of those orders were equally unlawful. This Court finds
- a) That the eviction of the applicant was indeed illegal, unlawful and without any support from the Order of the Court and consequently allow prayer 3 of the motion.
- b) Prayer 4 is declined for the reasons that the money is rent to be released only at the determination of this suit.
- c) Prayer 5 also fails as there was no evidence of loss suffered that was made available to this Court. Such evidence can only be adduced in a trial and not through an inter-locutory application.

12.The application is successful in terms of prayer 3 only. The parties to bear their respective legal costs of this application.

**Ruling signed and delivered at Mombasa this 22nd day of July, 2015.**

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**A. OMOLLO**

**JUDGE**

**In the presence of:-**

Learned Counsel for the Plaintiff/Applicant Mr. Abubakar

Learned Counsel for the 3rd Defendant/Respondent Mr. Asige

Court Assistant Jescah