



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
PETITION NO. 46 OF 2013

IN THE MATTER OF: HIGH COURT CIVIL APPEAL NO. 178 OF 2002 BETWEEN PARK HOUSE LIMITED -VERSUS- MADHAVJI HARJI AND SONS & BEATRICE KABIRU

A N D

IN THE MATTER OF: THE CONSTITUTION OF KENYA AND BILL OF RIGHTS

A N D

IN THE MATTER OF: ARTICLES 3,10,19,20,21,22,23,27,40,50 AND 165 OF CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS ACT CAP 301 LAWS OF KENYA

BETWEEN

BEATRICE KABIRUPETITIONER

VERSUS

PARK HOUSE LIMITED1ST RESPONDENT

THE CHIEF BUILDING INSPECTOR, CITY

MUNICIPAL COUNCIL OF MOMBASA, MOMBASA COUNTY.....2ND RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT MOMBASA.....3RD REPENDENT

R U L I N G

This petition was filed by BEATRICE KABIRU. The petitioner alleges that she was one of the tenants in the building situated on plot No. MOMBASA/BLOCK XXI/280 (The property). That property is registered in the name of PARK HOUSE LIMUTED, the 1ST respondent.

1 The petitioner alleges that the 1ST respondent in connivance with the MOMBASA COURTY

GOVERNMENT, the 2nd respondent lodged proceedings before the Mombasa Magistrate's court the 3rd respondent which resulted in the 3rd respondent issuing demolition orders of the building on the property. By her petition the petitioner seeks the following prayers:

(a) A declaration that the Senior Resident Magistrate's decision in Criminal Case No. M 4579 of 2012 that directed demolition of the building on plot No. MOMBASA/BLOCK XXI.280 is unconstitutional and a nullity for being in violation of Article 10, 40 and 50 of the Constitution.

(b) The process and decision in Criminal case No M 4579 of 2012 be nullified.

(c) A judicial review order prohibiting further implementation/execution of the Senior Resident Magistrate's (3rd respondent) orders in Criminal case No. M 4579 of 2012 directing demolition of the building on Plot No. MOMBASA BLOCK XXI/280.

(d) A mandatory injunction compelling the 1st Respondent by itself, its officers, servants and/or agents to restore the suit premises to its original condition as before the unlawful eviction and demolition and to reinstate the petitioner as tenant therein.

(e) Damages for the destroyed properties, lost business opportunity, inconvenience, including punitive damages for the unlawful acts.

(f) Costs of the petition.

2 The court on 9th September 2013 granted conservatory orders of prohibition restraining the 1st respondent dealing in any manner with the property, and further restraining the 1st respondent from continuing to demolish the building on the property.

3 The court directed that the petition be heard by way of oral and affidavit evidence. Oral evidence began to be tendered by the petitioner on 4th November 2013. The case was from that date heard from time to time on several other dates and parties finally concluded their testimonies on 17.2.2015. since then all parties have filed their written submissions. This case is now at a stage where the parties will either adopt their written submission or further orally submit, then the court will give a date for judgment. Parties were given the 4th may 2015 as date to either adapt or high light their submissions.

4 On 4th May 2015 before the parties advocates could address the court on their submissions two learned counsels, namely Mr Suchak and Mr Oloo address the court seeking that their client who they alleged were also tenants in the property be joined in this petition as co- petitioners. Since there was no formal application before court in that regard the matter was adjourned.

5 The court, by this Ruling, is considering the Notice of Motion filed on 4th May 2015 filed by those who describe themselves as interested parties. They are PATRICK MUTURI IHUNGI t/a EXTREME FASHIONS investments and M/s MADHAVJI HARJI & SONS. These interested parties, seek one order, that is, that they be joined in the proceedings herein as interested parties in this petition. They based that prayer on the following grounds:

(a) That the petitioner herein has brought the instance proceedings as against the respondents by virtue of being a lawful tenant on the shop premises situated on land Title No. Mombasa/Block XXI/280 which premises are leased to Part House Limited (hereinafter'suit property).

(b) That the proposed interested parties herein are similarly lawful tenants on the suit property for a long period of time.

(c) That the 2nd respondent herein commenced criminal proceedings in case No. Mombasa Resident Magistrate's Court M 4579 of 2012 as against the 1st respondent seeking orders to the effect that the

suit property be demolished as the same was deemed to be in a dilapidated state.

(d) That by an order made by Honourable Mr B. M. Ekuhubi SRM on 07.11.2012 and by a further order of the same court on the 23.11.2012, the learned magistrate ordered the demolition of the suit premises.

(e) That the Honourable Mr Ekuhubi SRM had initially ordered that summons be issued to all the tenants in the suit property to attend court and show cause why the demolition order should not be complied with.

(f) That the proposed interested parties herein were not served with either summons and/or any other court document to attend court vis Mombasa SRMC Cr case No. M 4579 of 2012.

(g) That the Honourable B.M. Ekuhubi erroneously determined that service upon tenants had been proven, even in the absence of an affidavit of service and proceeded to issue demolition orders.

(h) That on the 16th and 17th August 2013, some individuals unknown to the proposed interested parties invaded the suit premises, vandalized the windows and removed the doors before boarding the entire suit premises thus effectively ejecting the applicants from the suit property.

(i) That the decision of the subordinate court was subject of a revision Case No. 81 and 82 of 2013.

(j) That the proposed interested parties herein did apply to court vide consolidated Criminal Revision Case No. 81 of 2013 in which Honourable M Muya H delivered a Ruling on 24.10.2013 in which he halted any demolition of the suit property and ordered the Mombasa SRM Cr case No. M 4579 of 2012 be retried as the tenants were not accorded a proper hearing.

(k) That upon application by the petitioner herein, the Honourable M.Kasango J. also granted conservatory orders prohibiting the 1st respondent from dealing in any manner with the suit property and further restrained the 1st respondent from continuing with demolition of the building until further orders of the court.

(l) That Honourable M Muya J. in his said Ruling referred to the instant petition and advised the proposed interested parties herein to canvass any other prayers in the instant petition so as to avoid conflicting decisions between himself and his sister judge.

(m) That it is not in dispute that the proposed interested parties herein are tenants on the suit property who have since been illegally locked out of the suit property just as the petitioner.

(n) That it is similarly not contestable that the petitioner herein legally occupies the same position as the proposed interested parties and that any threatened and/or breach of her fundamental rights and/or freedoms as espoused in the petition are unvariably co-joined with the applicant's prayers.

(o) That it behoves the court to join the proposed interested parties to these proceedings as their presence is crucial for the court to adjudicate upon and reach an informed and final determination of the matters in issue.

6 There is no doubt that allowing parties to jointly litigate on a matter having the same issue ensures that such parties save costs; ensures that the standard set by the Constitution is met, that justice should not be delayed; also ensure that the overriding principle in the Civil Procedure Act is met, that is that there be expeditious resolution of dispute; amongst other positive attributes further, since what is before court is a Constitution Petition the Constitution of Kenya (Protection of Fundamental Rights and Fundamental freedoms) Practice and procedure Rules, 2013 also permits an interested party to be joined in a constitutional matter. **Rule 7 (1) and (2) provided:**

“ 7 (1) a person with leave of the court, may make an oral or written application to be joined as an

interested party.

(2) A court may on its own motion join any interested party to proceedings before it”.

The definition of interested party in Rule 2 is:

“ a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

7 The power therefore exists which can enable this court to order the interested parties be joined in this action. The interested parties allege by their affidavit evidence that they were tenants on the property and that they were adversely affected, business wise, by the demolition of the building on the property. It was submitted by their learned counsel that if they were joined as parties in this action they would not cause any delay in the conclusion of this matter because they intend to rely on the evidence tendered by petitioner in regard to this issue on liability and that they would only adduce evidence on the issue of damages that they seek.

8 In my view interested parties in making the above submission chose to ignore the fact that if they were joined as parties the respondent might wish to interrogate them on the issue of liability. This is so particularly because the 1st respondent in its cross examination and in evidence tendered alleged that the petitioner was not a tenant at the building on the property. It follows that if the 1st respondent wishes to pursue the same line of argument in respect of the interested parties the issue of liability will have to be gone into. What that would mean is that the case would be reopened entirely a fresh. With that in mind it is necessary to remember that the petitioner's case commenced on 4th November 2013 and concluded on 17th February 2015. That is a period of one year and three months.

9 With the above in mind it is important to note that the interested parties knew about the existence of this petition from at least 24th October 2013, since it was mentioned in the Criminal Revision No 81 and 82 of 2013 by Justice M Muya in his revision order of that day.

10 Further the interested parties attend the various hearings of this petition. Rajnikant Madhavji Jethwa, one of the interested parties by his affidavit of 30th June 2015 acknowledge that fact when he deposed:

“.....the interested parties wish to state that even though they may have been occasionally in court when this matter was being canvassed, they never participated in the proceedings however as evinced by the court record on proceedings”.

That deposition was in response to the allegations by the petitioners and the respondents that the interested parties attended the hearing of this petition. Similarly 1st respondent through its property manager SAMSON ADIPO ODUOR deposed that both Mr Suchak and Mr Oloo advocates for the interested parties severally also attended the hearing of this petition, although there was no suggestion that they participated in the hearing. That deposition was not denied.

11 What then we have is parties who knew since late 2013 that this petition had been filed and who from time to time attended its hearing. We also have two very senior advocates who similarly knew of the existence of this petition and attended court when it was proceeding for hearing. That being the case however no explanation was given why the interested parties waited until the hearing of the petition was concluded to move this court for orders to be joined in this matter.

12 With that background the statement made by Justice R Mwongo when he considered an application for joinder in the case WALTER OSAPIRI BARARSA –V- THE CABINET SECRETARY MINISTRY OF INTERIOR AND NATIONAL CO-ORDINATION and 6 OTHERS (2013) e KLR, rings true. He stated:

“ Further the court ought to consider the course of litigation and whether such joinder will lead to delay, impose additional costs or prejudice the parties. As the decision is discretionary, the exercise of discretion will ultimately depend on the facts of the case.”

13 This court has discretion whether or not to allow the interested parties to be joined in this matter. Bearing in mind the above discussion and because the delay in making the application for joinder was not explained I decline to exercise my discretion in favour of the interested parties.

CONCLUSION

14 **The Notice of Motion undated but filed in court on 4th May 2015 is dismissed with costs to the petitioner and all the respondents.**

Dated and delivered in Mombasa this 21st day of August, 2015

MARY KASANGO

JUDGE

21.8.2015

Coram

Before Justice Mary Kasango

C/Assistant-

For Appellant:

For Respondent:

Court

Ruling delivered in their presence /absence in open court.

MARY KASANGO

JUDGE