



IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 464 OF 2009

KARIANGO INVESTMENTS LIMITED ::::::::::::::: 1ST PLAINTIFF
HANNAH WAIRIMU NJUGUNA ::::::::::::::: 2ND PLAINTIFF
THANDE NJUGUNA ::::::::::::::: 3RD PLAINTIFF
-VERSUS-

ALI NOOR ABDI ::::::::::::::: 1ST DEFENDANT
STANDARD CHARTERED BANK
OF KENYA LIMITED ::::::::::::::: 2ND DEFENDANT
DANIEL NDUNGU T/A
D. NDUNGU AND CO. ADVOCATES ::::::::::::::: 3RD DEFENDANT

R U L I N G

1. The application before the Court is the Plaintiffs' Notice of Motion dated **6th December 2013** and filed in Court on **9th December 2013**. It is expressed to be brought under **Order 51 rule 1** as well as **Sections 1A, 1B, 3A and 99** of the **Civil Procedure Act**.
2. The application is as a result of the orders made by this Honourable Court in the ruling dated 30th May 2013 ("the said ruling"). It seeks for three main Orders as follows. That an order be made directing the 1st Defendant to furnish to the Plaintiffs and to file in Court within fourteen (14) days of this Order being made the various documents as listed under prayer 1(a) (i) to (vii) of the application. Secondly, the application seeks for orders that Messrs Pata Commercial Agencies, Estate Agents or such other persons as the Court may direct, to immediately take over the management of the suit property. The Plaintiffs pray that whoever is appointed be given the authority to collect all income accruing from the suit property and the same be deposited in an interest-earning account in the joint names of the respective advocates for the Plaintiffs and the 1st Defendant.
3. The third main prayer as sought by the Plaintiffs is that the clerical mistakes and accidental slips contained in paragraph 11 of the said ruling be corrected. The said corrections are to the extent

- that the words “Notice of Motion” be deleted and substituted with the words “Chamber Summons” and that the words “and (d)” be deleted altogether.
4. The application is based on the several grounds as stated in the application and is supported by the affidavit of the 2nd Plaintiff sworn on **6th December 2013**. There is also a Further Affidavit sworn by the 2nd Plaintiff on 30th January 2014.
 5. Briefly, the plaintiffs instituted the current suit on 1st July 2009 vide the plaint dated 30th June 2009. Simultaneously, the Plaintiffs filed the Chamber summons application dated 30th June 2009 seeking orders to preserve the suit property pending the hearing and determination of the suit. The said application was heard before this Court and in the ruling dated 30th May 2013 the various orders sought for in the application were granted pending the hearing and determination of this suit.
 6. Consequently, the Plaintiffs have filed the current application seeking to enforce the said orders of this Court and also to correct two clerical mistakes or accidental slip. It is the Plaintiffs’ case that despite demand being duly made, the 1st Defendant has refused to comply with paragraph 1 (b) at page 3 of the said Order. The said paragraph is in regard to the appointment of a suitable person to take over the management of the suit property. It is therefore the Plaintiffs’ position that it has become necessary for this Court to appoint a suitable person who would carry out the duties and functions spelt out in paragraph 1 (b) of the said Order.
 7. It is also the Plaintiffs’ case that paragraph 11 of the Ruling delivered on 30th May 2013 contains two clerical mistakes or accidental slips which ought to be corrected. The said errors are that the said paragraph states the application dated 30th June 2009 to be a Notice of Motion instead of a Chamber Summons.
 8. The other mistake or accidental slip is the inclusion of prayer 5 (d) in the said paragraph. It is the Plaintiffs’ case that in view of the finding in paragraph 9 of the said ruling that the issue of ownership of the suit property was to be determined at full trial and that the suit property would be preserved pending such determination, inclusion of the said prayer must have been inadvertent.
 9. It is therefore the Plaintiffs’ case that no prejudice whatsoever will be occasioned to the 1st Defendant as the review and correction of the accidental slips aforesaid would set the record straight and result in the true and intended outcome. On the issue of appointment of a suitable person to manage the suit property, it is the Plaintiffs’ case that income derived from the suit property would be preserved in neutral hands pending the determination of the current suit.
 10. The application is opposed. The 1st Defendant filed Grounds of Opposition on **21st January 2014**. There is also a Replying affidavit sworn by the 1st Defendant on **12th May 2014** and filed in Court on even date. The 1st Defendant objects to the current application on grounds that there is an appeal against the ruling, subject matter of this application, in the appellate Court (Civil Appeal No, 267 of 2013) and that there is an application for stay of execution of the said orders. The 1st Defendant avers that the application for stay of execution came up for hearing before the appellate Court on **16th December 2013** and the same was stood over generally. On that basis it is the 1st Defendant’s position that the Court has no jurisdiction to entertain the current application.
 11. It is the 1st Defendant’s assertion that the current application seeks to improve and widen the scope of the Plaintiffs’ earlier Chamber summons application dated **30th June 2009**. It is therefore his position that the current application is *res judicata*. According to the 1st Defendant the Court became *functus officio* after delivery of the ruling on **30th May 2013**. Therefore the Plaintiffs only recourse lies in either review or appealing against the said decision.
 12. With regard to the correction of the alleged clerical mistakes and accidental slips, it is the 1st Defendant’s assertion that the same are incompetent and an abuse of the Court process. It is averred by the 1st Defendant that the order issued by this Court as extracted does not contain the alleged words “Notice of Motion” but that the same contains the words “Chamber Summons”. He further avers that the words ‘and (d)’ sought to be deleted by the Plaintiffs, cannot be a clerical mistake or accidental slip as the same was a prayer in the Plaintiffs’ Chamber Summons application.
 13. It is the 1st Defendant’s case that the current application is misleading in that it was all along for the Court to designate a suitable person to take over the management of the suit property, with

- input from the parties herein. In any case, it is the 1st Defendant's position that he has appealed against the ruling of this Court delivered on **30th May 2013**. It is also the 1st Defendant's case that the current application has been made simply to scuttle the hearing process of the stay of execution application filed in the appellate Court pending the hearing of the appeal.
14. In reply to the 1st Defendant's case, the Plaintiffs filed a further affidavit sworn by the 2nd Plaintiff. The 2nd Plaintiff stated the position of the 1st Defendant's application filed on **22nd October 2013** in the Court of Appeal. It is her assertion that when the said application came up for hearing, the Judges of the Court of appeal were of the view that a consensual position ought to be pursued to settle the said application. This view was informed by the fact that the Plaintiffs were categorical that they had no intention of evicting the 1st Defendant from the suit property as provided for by prayer 5 (d) in the High Court's Ruling dated **30th May 2013**. It was the Plaintiffs' view that the inclusion of the said prayer must have been an accidental slip on the part of the Court.
15. In view of the above, it is the 2nd Plaintiff's position that their Advocates engaged in deliberation with the Advocates of the 1st Defendant to reach a consensual position. The Plaintiffs' Advocates wrote a letter dated **19th December 2013** to the 1st Defendant's Advocates making various proposals with regard to the preservation of the suit property pending hearing but the same were not acceptable to them. (*The said letter and the reply by the 1st Defendant's Advocates is attached to the further affidavit and marked HWN 9 and HWN 10 respectively.*)
16. The application was prosecuted by way of written submissions. The Plaintiffs filed their submissions on **21st May 2014** while the 1st Defendant filed their reply on **26th May 2014**.

ANALYSIS

17. I have considered the application, the Grounds of opposition, the affidavits on record as well as the written submissions by Counsel. Having done so, in my view the main issues for determination are as follows:-
- a. ***Whether this Court has the jurisdiction to determine the current application; and***
 - b. ***Whether the Plaintiffs are entitled to the orders sought in the current application.***
18. The 1st Defendant is of the view that this Court does not have the jurisdiction to determine the current application. The reason being, the ruling, subject matter of the current application is subject of an appeal.
19. It is not disputed that subsequent to the ruling in question the 1st Defendant filed an appeal in the Court of Appeal (Civil Appeal No. 267 of 2013) and also filed an application for stay of execution of the said ruling and further proceedings in this matter.
20. The 1st Defendant did not apply for a stay of execution of the Orders of this Court as provided for under Order 42 rule 6 of the Civil Procedure Rules. It is not in dispute that the 1st Defendant filed for a stay of execution in the Court of appeal. However, there is no evidence of any orders from the Court of appeal staying the execution of the Orders issued by this Court pursuant to the ruling dated **30th May 2013**. The position as given by the Plaintiffs, which is not controverted, is that the Court of Appeal advised the parties to agree on how to settle the application being that the Plaintiffs, for reasons stated in this ruling, did not intend to evict the 1st Defendant from the suit property. I have perused the said application and it was essentially based on the grounds that there was an imminent eviction of the 1st Defendant by the Plaintiffs from the suit premises.
21. In light of the above, it is evident that the Ruling of this Court delivered on 30th May 2013 has not been stayed. Therefore, nothing bars this Court from effecting the orders issued on 18th June 2013 pursuant to its ruling of 30th May 2013. In that case, this Court has jurisdiction to hear and determine the current application.
22. I now turn to the substance of the application which is whether the Plaintiffs are entitled to the orders sought in the current application.
23. It is worthy to note that the prayers sought for in the Chamber summons application dated **30th**

- June 2009** and those in the current application are not necessarily similar. I understand that prayer 1(b) of the current application, is similar to prayer 4 (b) of the Chamber summons application. However, in the current prayer the Plaintiffs have suggested to the Court a particular Estate Agent to be appointed to manage the suit property as opposed to the former application. In essence, the said prayer and the current application as a whole seeks to enforce the ruling of this Court dated **30th May 2013**. Therefore, there is no reason to delve into the issue of whether or not the current application is *res judicata*.
24. It is the Plaintiff's case that the current application is meant to give effect to the ruling delivered on **30th May 2013**. I have no problem with the same. However, it is not clear to me why the Plaintiffs included prayer 1 (a) in the current application requiring that the 1st Defendant to furnish the various documents listed therein. There is no explanation as to how this prayer will give effect to the ruling of this Court of 30th May 2013. It is my view that granting the said prayer will amount to varying the said orders of this Court.
25. As for prayer 1 (b) already mentioned above, the Plaintiffs are seeking for orders that this Court appoint Messrs Pata Commercial Agencies or such other suitable persons as the Court may direct to immediately take over the running and management of the suit property. For the Court to appoint a suitable person, the same has to be suggested and agreed upon by the parties. The 1st Defendant does not dispute that it was upon this Court to designate a suitable person to take over the running and management of the suit property with the input from the parties herein. It seems to be the 1st Defendant's case that they have not made any input towards the same as they are opposed to the ruling of this Court dated 30th May 2013 and they have appealed against the same.
26. However, as I have already stated in this ruling there is no evidence on Court record that the orders of this Court dated 30th May 2013 have been stayed. Therefore, it was upon the parties to take the necessary steps to comply with the ruling dated 30th May 2013. In pursuance of the order of this court dated 30th May 2014, I think this prayer is merited.
27. I will now deal with the issue of clerical mistakes and accidental slips as raised in the application. Under **Section 99** of the **Civil Procedure Act**, , clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.
28. It is the Plaintiffs' case that the Court made a clerical mistake in paragraph 11 of the ruling by referring to a "Notice of Motion" instead of "Chamber Summons". With regard to this mistake, it is the 1st Defendant's position that the order issued by this Court as extracted does not contain the alleged words "Notice of Motion" but that the same contains the words "Chamber Summons". That is the case. However, it is clear that what the Plaintiffs seek to be rectified is the Ruling of **30th May 2013** and not the Order issued by this Court on **18th June 2013**.
29. It is apparent on the face of the ruling that the Court referred to a "Notice of Motion" application instead of a "Chamber Summons" application as was the case. This Court has the power to amend the same under **Section 99** of the **Civil Procedure Act**. The words "Notice of Motion" are hereby replaced with the words "Chamber Summons".
30. It is also the Plaintiffs' case that the said paragraph also contains an accidental slip in which prayer 5 (d) was allowed. The said prayer sought to evict the 1st Defendant from the suit premises. It is the Plaintiffs' case that the same was an accidental slip, the Court having determined that the issue of ownership of the suit property could only be determined in a full trial and that the same was to be preserved pending such determination.
31. I have looked at the said prayer 5 (d) in light of the ruling and it is plain that it was not the intention of the Court to include the same. To evict the 1st Defendant from the suit premises yet the issue of ownership is yet to be determined would obviously amount to an injustice on the part of the 1st Defendant. The Plaintiffs are also clear that they do not intend to evict the 1st Defendant from the suit property. I therefore find that the inclusion of prayer 5 (d) was an error and the same is therefore withdrawn.
32. In view of the foregoing, the Plaintiffs' Notice of Motion dated **6th December 2013** and filed in Court on **9th December 2013** is hereby allowed in the following terms:-

a. ***The clerical mistakes and accidental slips contained in paragraph 11 of the said Ruling be***

corrected to the extent that:-

- i. *The words “Notice of Motion” be deleted and substituted with the words “Chamber Summons”*
 - b. *Prayer 5(d) is withdrawn and therefore the words “and (d)” be deleted altogether.*
 - c. *That Messrs Pata Commercial Agencies, Estate Agents to take over the running and management of the suit property with the authority to collect the net income accruing from the suit property and to deposit the same in an interest earning account to be opened in the joint names of the respective advocates for the Plaintiffs and the 1st Defendant.*
- b. *Each Party to bear their own costs of the application.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Muihuri holding brief for Regeru for Plaintiff

M/s Gathoni holding brief for Machira & Murugara for Defendants

Teresia – Court Clerk