



No. 303

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 1 OF 2012

SABINA KENYURI MOSETIPLAINTIFF

VERSUS

JARED OSANO ATANCHADEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 3rd February 2012 seeking;
 - a. **A mandatory injunction directing the defendant to demolish all structures on the property known as LR No. Kisii Municipality/Block III/517 (hereinafter referred to as “the suit property”).**
 - b. **Costs of the suit**
 - c. **Interest at court rates.**

Together with the plaint the plaintiff filed an application dated 27th November 2012 under certificate of urgency pursuant to the provisions of order 36 rule 1 (1) (b) of the Civil Procedure rules and sections 3A and 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya seeking an order that summary judgment be entered against the defendant as prayed in the plaint and that a mandatory injunction do issue directing the eviction of the defendant, his agents, servants from the suit property. The plaintiff’s application dated 27th November 2012 came up before me ex parte on 3rd December 2012 when I pointed out to the plaintiff’s advocate Mr. Minda that the application was pre-mature because such application could only be made after the defendant had entered appearance.

2. Mr. Minda agreed with my observation and applied to withdraw the application which application I readily allowed. After the withdrawal of the said application, the plaintiff brought yet another application by way of Notice of Motion dated 4th December 2012 this time round under Order 40 rule 1 of the Civil Procedure Rules and sections 3, 3A and 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya seeking a temporary mandatory injunction directing the eviction of the defendant, his agents or servants from the suit property pending the hearing and determination of this suit. This application that was also brought under certificate of urgency was placed before me on 4th December 2012 for the necessary orders and/or directions. On that day, I certified the application as urgent and ordered that it be served upon the defendant for hearing inter partes on 20th December 2012.

3. On 20th December 2012 only Mr. Minda appeared in court. Mr. Minda informed the court that the application had been duly served upon the defendant and that he had filed affidavit of service in court. After perusing the affidavit of Doricas Gathieri Maoga sworn on 20th December 2012 and filed in court on the same date, I was satisfied that the defendant had been served with the application. In the circumstances, I allowed Mr. Minda to argue the application the absence of the defendant notwithstanding. After Mr. Minda concluded his submissions, I reserved my ruling on the matter to 28th December 2012.
4. On 28th December 2012, I delivered a ruling in favour of the plaintiff in which I gave the following orders;
 - i. Pending the hearing and determination of this suit the defendant be and is hereby directed to demolish all the structures he has put up on the parcel of land known as Kisii Municipality/Block III/517, vacate the said parcel of land and handover possession thereof to the plaintiff within thirty (30) days from the date of service of this order upon the defendant.
 - ii. The plaintiff shall be at liberty to apply in the event of default by the defendant to comply with this order within the prescribed time.
 - iii. The plaintiff shall have the cost of the application.

The orders from the said ruling were duly extracted and sealed with the seal of the court on 2nd January 2013. What followed after this order leaves a bitter taste in the mouth and can make a good case study on abuse of court process. It is clear from what I have stated above that this court neither issued a decree in favour of the plaintiff nor an order for the eviction of the defendant from the suit property. The court only allowed the plaintiff's application for a mandatory injunction and sensing that the same may not be complied with by the defendant, gave the plaintiff the liberty to apply. It is on record that the plaintiff died on 18th December 2012 soon after this suit was filed and before the plaintiff's application for mandatory injunction was argued and orders above granted. The death of the plaintiff notwithstanding, the plaintiff's advocate in a rather brave, rare and unorthodox manner proceeded to file an application herein on 8th February 2013 for execution of "a decree" dated 28th December 2012 in which application, the deceased plaintiff sought the assistance of the court to evict the defendant from the suit property. This application was clearly a circumvention of the orders that I had made on 28th December 2012 that required the plaintiff to apply to court for further orders.

5. With all due respect to the deceased's plaintiff's advocate who filed the purported application for execution, that application could not by any imagination be equated to the application that I had in mind in my order of 28th December 2012. In any event, the order I had given was an injunction a breach of which could attract sanction in the form of imprisonment for contempt of court. It follows therefore that if the plaintiff's advocate was acting in good faith, the application that could have been expected from him was one seeking the committal of the defendant to civil jail for contempt of court but not that for the execution of a nonexistent decree. The intention was obvious; the whole scheme was intended to avoid scrutiny by the court. The plaintiff was deceased and any formal application would have required an affidavit from the plaintiff who was no more. An eviction had to be obtained at any cost!
6. Following the filing of the said application for execution, the deceased plaintiff caused a notice to show cause to be issued for service upon the defendant. Again, I do not know on what basis this notice to show cause was issued. In the purported application for execution, the plaintiff never applied for a notice to show cause to be issued and on the court record, there is no order either by the court or the Deputy Registrar for such notice to issue. The notice to show cause was nevertheless taken out and purportedly served upon the defendant who as usual never appeared in court on 30th May 2013 to show cause why eviction orders should not be issued against him. On 30th May 2013 Mr. Minda appearing for the deceased plaintiff persuaded the Deputy Registrar to issue an order for the eviction of the defendant from the suit property an order which was not part of the orders that I had issued on 28th January 2012.
7. After securing the said eviction order on behalf of a deceased person, the plaintiff's said advocate

through their appointed auctioneers, Pave Auctioneers moved with speed with the assistance of police officers from Central Police Station to evict the defendant and his tenants from the suit property on Saturday 20th July 2013. I do not know what influenced the choice of Saturday as the day for carrying out the said eviction. The only guess that I can make arising from what I have narrated above is that the eviction was carried out on that day to ensure that the defendant has no access to the court from which he would have readily obtained an order of stay of the said eviction. From the material I have on record, the defendant's business premises were completely destroyed and the defendant forcefully evicted from the suit property. The defendant has estimated the damage incurred through the said unlawful eviction at Kshs. 4,405,500/=. When the defendant was being evicted on 20th July 2013, the deceased plaintiff was not even the registered owner of the suit property. The suit property had been transferred on 17th July 2013 to the plaintiff's son one, Alloys Mataya Moseki who thereafter handed over the property vacant through sale to one, Primal Kumar Bhagwanji Chanderia on 22nd July 2013. That marked the unjust end to the defendant's occupation of the suit property.

8. On 1st August 2013 just about ten (10) days after the defendant's forceful eviction, the defendant brought an application by way of Notice of Motion dated 1st August 2013 seeking to set aside the order that this court had made on 28th December 2012 on the plaintiff's application for mandatory injunction dated 4th December 2012 that led to the defendant's eviction. The application was brought on the ground that the plaintiff was deceased when the said order was made and executed and that the application was not served upon the defendant. In a brief affidavit in reply sworn on 30th September 2013 and filed in court on the same day, Mr. Cyrus Minda advocate stated that the plaintiff on whose behalf he conducted this suit died on 18th December 2012 and as such he had no further instructions on the basis of which he could respond to the defendant's application. If that was not enough, Mr. Minda who did not give any indication in his affidavit as to when he came to know of the death of the plaintiff stated in reference to the orders sought by the defendant that a court of law cannot give orders against a dead person. Sensing that Mr. Minda was out to drop what has been his baby in life and in death, the defendant brought a second application dated 4th October 2013 seeking among other orders an order that the firm of Minda & Company Advocates be restrained from ceasing to act in this matter on behalf of the deceased plaintiff pending further orders and/or directions by the court.
9. The defendant also sought an order that this application be consolidated with the defendant's earlier application dated 1st August 2013. This second application was brought on the grounds that the orders sought to be set aside were obtained by the firm of Minda & Company Advocates while purporting to act on behalf of the plaintiff who was then deceased and that the said firm of advocates had abdicated its statutory and professional duty to the court and as such it was necessary for the said firm not to be discharged from the record while the court is investigating its conduct in the matter. The application was opposed by the firm of Minda & Company Advocates. In affidavit sworn on 16th October 2013 by Cyrus Minda advocate, the said advocate denied any wrong doing in this matter. Mr. Minda stated that he notified the court of the death of the plaintiff as soon as that information came to his possession. He stated further that the court cannot be called upon to tie him to a matter where his instructing client is deceased. Mr. Minda termed the defendant's application a desperate attempt to embarrass, besmirch, taint and tarnish his name.
10. On 20th January 2014, I directed that the defendant's applications dated 1st August 2013 and 4th October 2013 be heard by way of written submissions. The defendant's advocates filed their submissions on 3rd February 2014 while the plaintiff's advocate filed their submissions on 4th October 2014. I have considered the two (2) applications by the defendant together with the affidavits filed in support thereof. I have also considered the affidavits filed by Mr. Cyrus Minda advocate in opposition thereto. Finally, I have considered the written submissions by the defendant and the plaintiff's advocates together with the authorities cited therein. It is not disputed that the plaintiff in this suit is deceased and that she died on 18th December 2012. It is also not in dispute that no application has been made under Order 24 of the Civil Procedure Rules to substitute the deceased plaintiff with her legal representative.
11. It follows from the foregoing that pursuant to the provisions of Order 24 rule 3 (2) of the Civil

Procedure Rules, 2010, this suit abated on 18th December 2013. The plaintiff being deceased and this suit having abated, the court cannot make any orders against the plaintiff. This does not mean however that the court cannot make any order at all in this matter. This court has powers under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Section 13 (7) of the Environment and Land Act, 2011 also gives this court the power to make any order and grant any relief as the court deems fit and just. There is no dispute that when Mr. Minda advocate appeared before me on 20th December 2012 to argue the plaintiff's application dated 4th December 2012 the plaintiff was deceased. No application could therefore be prosecuted on her behalf. This fact was not brought to the attention of the court and as such the court allowed Mr. Minda to prosecute the said application. On 28th December 2012 the court made a ruling on the plaintiff's application dated 4th December 2012 in which the court ordered the defendant to vacate and handover possession of the suit property to the plaintiff. Mr. Minda, advocate appeared personally to take the ruling.

12. Again, the court was not informed that the plaintiff was deceased. Just as Mr. Minda had argued and rightly so that no order can be made against a deceased person the same is true for orders in favour of a deceased person. It is elementary law that a deceased person cannot seek, obtain and execute court orders. It follows from the foregoing that the orders issued herein in favour of the plaintiff on 28th December 2012 are null and void. These orders were issued in error which error is now apparent on record. As was stated in the case of **Macfoy –vs- United Africa Co. Ltd [1961] 3 ALLER 1169**, when an act is void it is in law a nullity and there is no need for an order of the court to set it aside. It was stated further in the said case that any proceeding founded on a null and void act is also bad and incurably bad as you cannot put something on nothing. Since the orders made on 28th December 2012 were null and void the same having been made in favour of the plaintiff when she was deceased, the subsequent orders made to facilitate the execution of the said orders and the actual act of execution thereof were equally null and void. A court of law has an inherent power to review and set aside an erroneous order. An order obtained by a deceased person cannot be allowed to stand even after a suit in which the order was issued has conveniently been left to abate more so when such order has been used by third parties to perpetuate injustice. The order can be set aside by the court even of its own motion.

13. The upshot of the foregoing is that defendant's application dated 1st August, 2013 is well merited. I hereby set aside the orders of this court made on 28th December 2012 and all subsequent orders made and actions taken in execution thereof. I do not think that the court can compel an advocate or a firm of advocates to continue acting in a matter. The defendant's application dated 4th October, 2013 seeking an order to restrain the firm of Minda and Co. Advocates from ceasing to act on behalf of the deceased plaintiff herein cannot therefore be granted. The same is accordingly declined. I was invited by the defendant's advocate to condemn the firm of Minda & Company Advocates to pay the costs of the applications herein. I have already expressed my deep feelings concerning the manner in which this case was handled by the plaintiff's advocates. I do not wish to say more on the conduct of the firm of Minda & Company Advocates because they will not have an opportunity to respond. Anyway, on the issue of costs raised by the defendant's advocates, my view is as follows. Mr. Minda as I have stated above has denied any wrong doing in this case. If I understood him well, his contention is that he was not aware that the plaintiff herein died on 18th December, 2012 until August, 2013 when he was served with the defendant's application seeking to set aside orders of 28th December, 2012. I have no material before me that disproves Mr. Minda's assertions. In any event, if there was any wrong doing on the part of Mr. Minda that may give rise to civil liability, such liability cannot be determined in this suit which has abated and in which Mr. Minda is not a party. The defendant is at liberty to pursue such claim through a separate suit. That being my view of the matter, there shall be no order as to costs of the two applications.

Delivered, signed and dated at KISII this 7th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Ondicho h/b for Mose for the defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE