



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC NO 198 OF 2012
CONSOLIDATED WITH
CIVIL SUIT NO.206 OF 2012

VERONICA WANJIRU NGIBUINI.....1ST PLAINTIFF

IRENE N. KAGENI2ND PLAINTIFF

AMY KUMICINSKI3RD PLAINTIFF

JOHN KUMICINSKI4TH PLAINTIFF

- VERSUS -

REAH MARIE GITHAIGA AND 16 OTHERS..... DEFENDANTS

RULING (NO.3)

1. I have before me two notices of motion: The first is dated 27th August 2012 and presented to court on the same date by the 1st, 3rd and 4th defendants; the other is the plaintiffs' motion dated 24th August 2012 but presented to court on 31st August 2012. The motion by the defendants seeks a stay of the order of court made on 31st July 2012 for appointment of an estate manager pending the hearing and determination of an intended appeal. The plaintiffs' motion is two pronged: It seeks an order appointing an estate manager over the suit property; or that the net rental proceeds be held by the plaintiffs' advocates as stakeholder pending judgment.

2. On 31st July 2012, I dismissed two cross applications for injunction by both parties. In the pertinent part, I ordered as follows;

“This court is enjoined to do substantial justice to the parties by article 159 of the constitution as well as sections 1A and 1B of the Civil Procedure Act. The property cannot be left in limbo despite the loss of the cross motions. Pending the hearing of the suit, and to ensure preservation of the property, I further order that both the counsels for the plaintiffs and for the 1st, 3rd and 4th

defendants shall within 21 days appoint a manager for the property. Any rent less the maintenance and managerial fees shall be deposited in both counsels' joint interest earning account or in court. In default of agreement on a manager, the court shall appoint one”.

3. The period granted for appointment of a manager over the property has passed. There is no agreement between the parties. That is why the plaintiffs pray that the court do appoint an estate manager. On the other hand, the defendants, being dissatisfied with the order, have lodged a notice of appeal to the Court of Appeal. The defendants pray for stay pending that appeal.

4. I will deal first with the defendants' motion which was filed first in time. It is predicated on the provisions of order 41 of the Civil Procedure Rules 2010 as well as sections 1A, 1B and 3A of the Civil Procedure Act. The defendants relied on a deposition sworn by Reah Githaiga on 27th August 2012. It is deponee that the court failed to state who would pay the costs of the manager. As the defendants' case is that they own the property, the court order burdens them with unnecessary costs of a manager. Counsel for the defendants also submitted that earnings of rent as a profit would be outside the objects or memorandum of the ministry known as Stars for Jesus. Fundamentally the defendants take up cudgels on the order of court as a violation of their property rights. It would also, in their view, sanction their “violent and illegal eviction” from the property.

5. To my mind, the defendants are primarily seeking a stay pending appeal. The motion has however been expressed to be brought under order 41 which deals with receivers generally. I find it inappropriate in the circumstances. The impugned court order was not appointing a receiver as known under order 41 or the Companies Act, but an estate manager to hold the property in trust. The reason is that none of the disputants has a title to the property. The issue of ownership is the true province of the trial court as tested evidence. I think the defendants' motion should have been anchored under section 63 of the Civil Procedure Act or order 42 of the Civil Procedure Rules. But the defendants have also invoked the inherent jurisdiction of the court and the overriding objective set out at sections 1A and 1B of the Civil Procedure Act. I will thus disregard the technicality.

6. The defendants have filed a notice of appeal annexed to the affidavit marked “RMG 1”. For purposes of order 42 of the Civil Procedure Rules 2010, that would constitute an appeal. Rule 6 provides as follows;

“For purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”.

To that extent, I can entertain the application for stay.

In the case of Butt vs Rent Restriction Tribunal [1982] KLR 417 the learned Judge, Madan JA (as he then was) quotes with approval the views of Brett L.J. in Wilson vs Church (No 2) 12 ch D [1879] 454 AT 459:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

7. Again the court will grant a stay if special circumstances of the case dictate so. See Attorney General Vs Emerson and others 24 QBD [1889] 56 at page 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. These general principles were also stated in Madhupaper International Limited vs Kerr [1985] KLR 840. See particularly page 846.

8. The application by the defendant was presented to court on 31st August 2012. The delay was for 27 days and is not unreasonable. No draft memorandum of appeal has been annexed. I cannot tell from the affidavit whether the applicant has an arguable appeal that would be rendered nugatory. What I have are written submissions stating that the impugned ruling did not state who was to pay the manager. But the ruling was clear that both parties were to agree on a manager in 21 days. I would have imagined that that

agreement would deal with the liability to the manager and investment of rent. It was not for the court to micromanage that. And after all, the court did not make a specific appointment of the manager. The applicants says the order will have the effect of unlawfully evicting them or by force. But the applicants in their submissions state as follows;

“Further the applicants have stated before that the premises were being used to house their offices and they have had to look for other premises running an additional cost”.

9. I stated earlier that none of the parties has a formal title to the property. The passage in the submissions above concedes that the defendants are not in possession. What then would be the substantial loss? The defendants submitted further as follows;

“The order therefore is bound to inflict on them damage bearing in mind that the court diary is such that a delay of disposal of this matter is most likely more so as the court did not direct that the matter be expeditiously disposed off (sic)”.

10. There is no such fact deposed in the affidavit. But even if one takes it to be a true statement, it does not show substantial loss. The property is not being alienated. It remains intact. The applicants have thus failed to meet the key conditions for grant of stay set out by order 42 rule 6 of the Civil Procedure Rules. The order complained of was meant to ensure that the suit property is not wasted before judgment. As none of the disputants has clear title, a manager would preserve the property and ensure that the rent is invested. The applicants state that such rent would be a profit falling outside the objects of the trust. Again that is a statement from the written and oral submissions by counsel. It is not borne out by any deposition.

11. In the end, I am unable to say that the defendants have established a case for grant of stay of the order of 31st May 2012 pending appeal. I would dismiss the defendants’ motion.

12. That brings me to the plaintiffs’ motion dated 24th August 2012. The plaintiffs pray that the court do appoint a manager to preserve the suit property. Since the time set for the parties to make the appointment has lapsed, and there is no agreement, the court is being asked to enforce its order of 31st May 2012. I do not think there is an alternative. The order was clear that if 21 days passed without agreement by the parties, the court was at liberty to appoint a manager. The plaintiffs have in their submissions suggested that the court picks one of four managers: Lloyd Masika Limited, Tysons Limited, Oak Properties Limited or Crystal Valuers Limited. I did ask the defendants’ counsel to suggest the name of a manager. She declined but suggested that the property be placed under guard by G4S Security Limited. But I take judicial notice that G4S is a security company providing guarding, courier and cash-in-transit services.

13. The plaintiffs’ motion has been brought under the Judicature Act and sections 1A, 3A and 63 (e) of the Civil Procedure Act. The reasons for appointment of a manager were laid out in the ruling of 31st May 2012. I do not wish to belabor them. I am disinclined to grant the alternative prayer for deposit of rent with the plaintiffs’ counsel as a stakeholder. I am persuaded that a reputable estate agent should manage the property, collect the rents and deposit net proceeds in a trust account or in court pending the hearing of the suit. I thus appoint Tysons Limited or failing which Lloyd Masika Limited to take possession and management of the property known as Land Reference 15460 Nairobi (I.R 57288) and to collect rent therefrom. The proceeds of rent less the management costs and outgoings shall be deposited in an interest earning account in a reputable bank in the names of both counsels for the parties as earlier ordered pending the hearing and determination of the suit. In the event of difficulty, and in the alternative, the proceeds shall be deposited in court pending the hearing and determination of the suit.

14. As the issue of ownership of the property is still in contest, I order that costs shall abide the final judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of January 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Kyalo for Ms Mbulu for the Plaintiffs.

Ms Muigai for Mrs. Madahana for the 1st, 3rd and 4th Defendant.

No appearance for the 8th Defendant.

Mr. Collins Odhiambo Court clerk.