



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 576 of 2009

CATHERINE NJERI MACHARIA.....PLAINTIFF/APPLICANT

-VERSUS-

MACHARIA KAGIO.....1ST DEFENDANT/RESPONDENT

HABIBA AHMED MOHAMED...2ND DEFENDANT/RESPONDENT

RULING

The plaintiff filed this suit by way of plaint dated 12th November, 2009 and sought against the 1st and 2nd Defendants a permanent injunction restraining any dealings with title L.R. No. 36/1/871 and further sought an order rescinding and/or revoking any sale agreement and all transfer documents executed in favour of the 2nd defendant by the 1st defendant amongst other prayers.

By a defence filed on 19th January 2010 the 2nd defendant under paragraph 4 averred as follows:

“The suit property was transferred to the 2nd Defendant by an indenture of conveyance dated 19th November, 2008 which was registered on 10th December, 2008. The 2nd Defendant is now the registered proprietor in fee simple of the suit property”.

The plaintiff by a chamber summons application sought an interlocutory injunction against the 2nd defendant pending the hearing and determination of the suit but the 2nd Defendant raised a preliminary objection to the application and the entire suit and the honourable justice A. O. Muchelule heard the preliminary objection and delivered a ruling on the 1st October 2010 holding that the claim of the plaintiff against the 2nd defendant is incompetent and as a consequence struck out the claim with costs.

The plaintiff filed a Notice of Appeal against the ruling by Honourable Justice Muchelule on 1st October 2010 and the appeal is presently pending in the court of appeal. The plaintiff further by a chamber summons Application dated 18th October, 2010 the plaintiff sought an injunction against the 2nd defendant restraining the transfer, selling, leasing or renting of the suit property pending the hearing and determination of the intended appeal.

This injunction application has not been prosecuted and is pending.

In the meantime the 2nd defendant on 5th may 2011 filed a Notice of Motion application seeking an order for the eviction of the plaintiff from the suit property following the striking out of the plaintiff's suit

against the 2nd defendant. This application came before Hon. Justice Muchelule on 6th March 2011 when he directed the application to be served. The application as per the court record was subsequently fixed on several occasions before it was listed for hearing before Hon. Lady Justice Koome (as she then was) on 2nd November, 2011. As per the affidavit of service sworn by Elvis Muthoka and filed in court on 2nd November, 2011 the plaintiff had been served with the application dated 5th May 2011 and the hearing notice for 2nd November, 2011 on 12th October, 2011. The plaintiff did not file a response and neither did she attend court for the hearing on 2nd November, 2011 when the court granted the orders sought in the Notice of Motion by the 2nd Defendant. Consequently an eviction order was issued on 29th February 2012.

It is against the foregoing background that the plaintiff's chamber summons application dated 30th April 2012 and filed in court on 2nd May 2012 is to be seen. The plaintiff's application is silent on the provisions of the law pursuant to which it is made but inter alia seeks the following orders: -

1.
2. That there be stay of execution of the decree in this case pending hearing and determination of this application.
3. That the orders issued on 2nd November, 2011 and the eviction order given on 29th February 2012 be vacated and/or set aside pending the hearing and determination of this application.
4. That the plaintiff/applicant be allowed to prepare and file the intended appeal against the ruling delivered herein by the Honourable Justice Muchelule on 1st October 2010.

The application is supported by the grounds contained in the supporting affidavit sworn by the plaintiff and further on the grounds set out on the face of the application. The second defendant has sworn a replying affidavit in opposition to the plaintiff's application and has also obtained a replying affidavit from the OCS Pangani Police Station affirming that the eviction order issued on 29th February, 2012 was executed.

The plaintiff places blame on her advocate for failure to attend court on 2nd November, 2011 when the prejudicial orders were made against her. The plaintiff has made various applications to be allowed to act in person. The Plaintiff was on 9th November, 2010 granted leave to act in person and it is on 17th May 2012 that the firm of Achach & Company Advocates filed a Notice of Appointment of Advocates by the plaintiff. On 7th June 2011 before Hon. Justice Muchelule the plaintiff appeared in person and she requested and was allowed 14 days to file a response to the 2nd defendant's application. The hearing notice for 2nd November 2011 was served and not any advocates as there were none then on record for her.

The 2nd Defendant for her part states that the plaintiff's application lacks competency for the reasons that the jurisdiction of the court has not been properly invoked that the application is wrongly brought as a chamber summons instead of by way of a notice of motion. Further the 2nd Defendant contends that prayers 2 & 3 in the application cannot be granted since they will be spent upon the pronouncement of a ruling in this application. The 2nd Defendant further contends that this court cannot extend time for filing an appeal from a decision of the High Court as that is the preserve of the Court of Appeal and finally the 2nd Defendant avers that the plaintiff has not exhibited the orders she seeks to be set aside. The 2nd defendant avers that the eviction order having been executed on 30th April 2012 is incapable of being stayed.

On the courts directions the parties filed their written submissions. The 1st Defendant in his submissions contend that the order striking out the plaintiff's suit as against the 2nd Defendant did not direct any

eviction of the plaintiff and that the 2nd Defendant had not counterclaimed for eviction and could therefore not have been entitled to an eviction order arising from the court ruling of 1st October, 2010. The 1st Defendant support the plaintiff's application on the basis that the eviction order was obtained unlawfully and illegally.

The Plaintiff's submissions is that the eviction order was obtained due to the failure on the part of here advocate to attend court. The plaintiff states that she still is in possession and the allegation that the eviction order was executed was not correct. She submits that unless the execution of the eviction order is stayed she stands to suffer irreparable loss and damage that cannot be compensated by damages. The plaintiff further submits she has an arguable and meritorious appeal and that the balance of convenience would be in maintaining the status quo. It is her contention that since the 2nd Defendant has never been in possession she would not suffer any prejudice if the status quo is maintained.

The 2nd Defendant for her part submits that failure by the applicant to annex the orders she seeks to set aside or be vacated rendered the application unmaintainable. The 2nd Defendant further submits that he wording of prayers 2 and 3 of the plaintiffs application restricts the court to grant the orders sought up to the time this application is determined meaning that upon the determination of the application the orders would become spent. Prayer 4 of the plaintiff's application more or less is seeking extension of time from this court to prepare and file her intended appeal against the ruling delivered by Hon. Muchelule on 1st October 2010. In regard to this specific prayer this court has no jurisdiction to extend time for filing appeals to the court of appeal. That is the preserve of the Court of Appeal pursuant to rule 4 of the Appellant Jurisdiction Act. Upon consideration of the plaintiff's application the affidavits in support and the affidavits in response to the said application and the parties filed submissions I am not persuaded that I should exercise my discretion in favour of the plaintiff to set aside the orders of 2nd November, 2011 and 29th February 2012.

Firstly I find the plaintiff's attempt to blame her lawyers (who she does not name) for failure to attend court on 2nd November, 2011 when the order for eviction was made to be unfounded. The plaintiff had prior to 2nd November, 2011 sought and obtained leave to act in person and had on 7th June 2011 appeared in person before Hon. Justice Muchelule and was granted leave of 14 days to file her response to the 2nd Defendant's application. The filed return of service shows she was personally served with the hearing notice for the application on 2nd November 2011. In the circumstances the plaintiff cannot blame anybody but herself. No explanation has been given as to why the plaintiff did not comply with the court's directions of 7th June 2011 to file a response to the application. In these circumstances the court was perfectly in order to proceed with the hearing of the 2nd Defendant's application on 2nd November, 2011 *ex parte*.

Secondly, I have considered the prayers sought by the Plaintiff's application and as regards prayer No. 4 I have already stated that this court lacks the jurisdiction to grant an order extending the time to lodge an appeal in the court of appeal as that is the preserve of that court. As relates to prayers 2 and 3 in the plaintiff's application I agree with the submissions made by the 2nd Defendants counsel that indeed such orders would lapse upon the court making its ruling in this application. It would be superfluous to grant such orders. The prayers have respectively sought orders to stay execution of the decree pending the hearing and determination of this application and that the orders issued on 2nd November, 2011 and 29th February 2012 be vacated and/or set aside pending the hearing and determination of this application.

It would be futile to grant such orders as they would expire immediately a ruling is pronounced in the matter. I accept and approve the holding by Hon. Justice Lesiit in **HCCC No. 329 of 2003 ANO SHARIFF MOHAMMED VS. ABDULKADIR SHARIFF ABDIRAHIM** and Hon. Justice Fred Ochieng in **HCCC No. 2047 of 2000 WILFRED O. MUSINGO VS. HABO AGENCIES LTD** where my colleague judges were faced with applications seeking prayers similar in wording as in the instant application by the plaintiff. Justice Lesiit rendered herself as follows in the case referred to:

“The prayer seeks a stay of execution of decree pending the hearing and determination of this application. The issue is that once the application is heard and determined then what. I do not think the prayer is worded correctly as the stay of execution should be prayed pending something other than the application itself. Considering this prayer and the manner it is worded, it is my view that the entire application is spent and that there remains nothing for me to stay”.

For his part Hon. Justice Ochieng rendered himself thus: -

“Now I revert to the orders sought by the Defendant. First it seeks an order of stay of execution pending the hearing and determination of this application. In other words the very moment the court will have heard and determined the application dated 27th September, 2005 there would be no orders for stay of execution. Therefore even if I were to grant prayer 2 as prayed, it would lapse as soon as I finish reading this ruling. As on 28th October, 2005, I had already given an order staying execution until today.

I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given”.

The situation that Hon. Justice Ochieng was ruling on was not dissimilar to the current situation in the present application where we have an order of stay extended up to the date of this ruling.

The 1st Defendant in supporting the plaintiffs application contended that he orders of 2nd November, 2011 and 29th February 2012 were illegal and invalid and therefore ought to be set aside and/or vacated for being unlawful. It is my view that in the absence of any other grounds the fact that a party considers any orders issued by the court to be unlawful or illegal would not constitute a sufficient ground to review or set aside such an order.

If a court misconstrues the purport of a statute and/or other provisions of the law that cannot be a ground for review. In the instant case the Hon. Lady Justice Martha Koome exercised her discretion to grant the eviction order. If she reached the decision on wrong appreciation of the law that should be a ground for appeal but not for review. The Court of Appeal in Civil Appeal No. 211 of 1996 National Bank of Kenya Ltd vs. Ndungu Njau considered when a review of an order would be available when it held thus:- ***“... it will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that he court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing of a statute or other provisions of the law cannot be a ground for review”.***

Finally he 2nd Defendant contends that the eviction order issued on 29th February 2012 was executed on 30th April, 2012 and consequently there is nothing to stay and the application by the plaintiff has been over taken by events. The 2nd Defendant obtained a sworn affidavit by Alloys N. Orioki the OCS Pangani Police Station that the eviction order was indeed executed on 30th April 2012 in the preserve of a contingent of 6 police officers led by inspector Samuel Koimu, Deputy OCS Pangani Police Station. The OCS further depones that it was not possible to abide by the court order of 4th May 2012 staying the eviction order as the latter eviction order had already been executed.

The plaintiff however disputes that she was evicted and states she is still in possession together with her tenants. It is clear and apparent that the Auctioneer who had been allocated the eviction orders for execution applied to Pangani Police Station for hire of police officers for purposes of executing a court order on 13th April 2012 and 6 constables were allocated after the request was approved. I am in the premises inclined to accept that indeed the plaintiff was evicted from the premises and if she is still in occupation/possession she must have forced her way back possibly after she obtained an order staying execution of the eviction order on 4th May 2012.

For all the above reasons I hold that the plaintiffs application dated 30th April 2012 lacks any merit and

order the same dismissed with costs to the 2nd Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant