



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT 454 OF 2010

MOHAMED HAMISI NGWADU LEWA

(Suing on their own behalf and also on behalf of 54 others) PLAINTIFF

- Versus -

AKRAM AMRAN MOHAMEDDEFENDANT

RULING

(1) The plaintiff's and the Defendant are engaged in a long drawn struggle over the ownership of land described as L.R No. 851/III/MN (the "suitland"). The dispute has been the subject of two previous court proceedings in which the plaintiffs were Defendants.

(2) Before the court for determination is an application for temporary injunction dated 16th December 2010 in which the plaintiff, in the main, seeks the following prayers.

“(a) That the Honourable Court, be pleased to grant

a temporary injunction restraining the defendant either by himself, his agents and/or servants from executing the lower courts Decree issued in Resident Magistrate Civil Suit No. 1931 of 1992 Mombasa directing the eviction of the plaintiffs from Plot No. 891/II/M.N Mtwapa pending the hearing and determination of this application.

(b) That the Honourable Court, be pleased to grant a temporary injunction restraining the defendant either by himself, his agents and/or servants from executing the lower courts Decree issued in Resident Magistrate Civil Suit No. 1931 of 1992 Mombasa directing the eviction of the plaintiffs from Plot No. 891/II/MN Mtwapa pending the hearing and determination of this application.” (emphasis mine)

The emphasis is to highlight two mistakes apparent on the face of the application. In reality the injunction now sought is to pend the hearing and determination of the main suit. Secondly the subject matter of these proceedings, from the plaint, is LR Plot No. 891/III/MN and not 891/II/MN. More shall be said of these as it was taken up by the Defendant.

(3) The Defendant filed **Mbsa Civil Suit No. 1931 of 1992 Akram Amram Mohamed –Vs- Mohamed Hamisi & Others** (the 1992 suit) against the Plaintiffs seeking, inter alia, the eviction of the Plaintiffs from **Plot No. 891 Section III M.N.** The Defendant succeeded and obtained judgment in his

favour on 6th December 1994. A decree was subsequently extracted and in the relevant portion reads;

“It is ordered that the Defendant & Other trespassers found within the suit premises being Plot No. 891 Section III M.N. situated at Mtwapa do vacate suit premises forthwith, demolish any structures therefrom and pay costs of these proceedings.”

(4) It needs to be said that the 1992 suit was filed when **Mbsa HCC 780 of 1990 Akram Hamrani Mohamed –Vs- Mohamed Hamisi & Others** (the 1990 suit) between the same parties was still subsisting. It would seem that the 1990 suit was in respect to the same subject matter but therein referred to as Plot No. 891/II/M.N. The 1990 suit was determined by order of dismissal for lack of prosecution on 19th June 2010.

(5) The main thrust of the Plaintiffs case herein is that the Defendant cannot seek to execute the Decree obtained in the 1992 suit as it is time-barred by Section 4(4) of The Limitation of Actions Act. For this reason the Plaintiffs seeks the following prayers in the plaint-

“(a) A declaration and/or finding that the defendant cannot lawfully obtain vacant

possession of Plot No. 891/Section III MN Mtwapa and/or execute the judgment of the lower court in RMCC No. 1931 of 1992 (MOMBASA)

(b) Permanent injunction restraining the

defendant by himself, servants and/or agent or any persons acting on his behalf from evicting the plaintiffs’ from Plot No. 891/Section III Mainland North.”

Arguments by the Plaintiffs

(6) The Plaintiffs submit that they have a strong case against the Defendant. Their claim is anchored on Section 4(4) of The Limitation of Actions Act. The Plaintiffs state that the Defendant should be barred from executing a decree he obtained on 6th December 1994 which is more than 16 years ago.

The Defendants reply ---

(7) In response to the suit and the application the Defendant has raised both technical and substantive issues. First is the substance. The Defendant doubts the merit of the suit as he has taken numerous steps over the years to execute the Decree and that those attempts are not time barred. In particular he has drawn the courts attention to the following:-

(a) A court order dated 18th May 2001 directing the OCS Kijipwa Police Station to give security to a Court Bailiff to execute the eviction orders.

(b) A court order issued on 1st March 2004 directing The Attorney General, The District Commissioner (Kilifi District), The District Officer (Kikambala Division), The Commandant (Kilifi Police Division) and the OCS Kijipwa Police Station to assist and ensure the enforcement of the Decree against the Defendants.

(c) A letter dated 15th April 2010 by his Advocates Maranga Maosa & Co. to the Attorney General complaining that the authorities have not acted on the court order of 1st March 2004.

(8) In addition the Defendant asserts that this suit is a non-starter in view of the provisions of Section 34(1) of The Civil Procedure Act which provides as follows-

“All questions arising between the parties to the suit in which the decree was passed, or their

representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

(9) It is argued by the Defendant that the suit is also incompetent as the date of attestation of the affidavit verifying the plaint is not indicated. Secondly paragraph 3 of that affidavit contradicts paragraph 8 of the plaint.

(10) The Defendant also argues that the application is incompetent as it seeks orders in respect to Plot No. 891/II/MN (not 891/III/MN).

(11) In addition to the above, which were contained in the Defendants affidavit of 11th May 2011, the Defendant raised two issues in his written submissions. I will address them as I do not think that the Plaintiff is prejudiced in any way. These are-

(a) That in so far as the application is not for a temporary injunction pending the hearing and disposal of the main suit it is incompetent.

(b) That summons to enter appearance herein have never been filed and so the suit has “abated”.

Findings of the Court

(12) The application before me is for a temporary injunction and must be determined on the principals laid down by **Giella –Vs- Cassman Brown [1973] EA**. As the Defendant has raised several technical objections to the plaint and the application, it would be convenient to start by considering these issues before assessing the merits of the Plaintiffs claim. This is because the application would have to fail if I was to uphold any of the objections.

(13) Let us look at the verifying affidavit. I have noted that the one in the court file has a date of 11th December 2010 as the date of attestation. Even if the date was missing, I would not strike it out. The affidavit was signed by the deponent and sworn before V. N. Nzioki Advocate and Commissioner for Oaths. The execution and attestation are, I think, the critical aspects. The date of attestation may not be in view of the fact that it was filed together with, or accompanying a dated plaint. So it may have been attested before or at the date of the plaint. I am not told of the prejudice that the Defendant could possibly suffer because of this.

(14) Another objection taken is the contradiction between paragraph 8 of the Plaint and paragraph 3 of the verifying affidavit. That this makes the suit incompetent. Paragraph 8 of the plaint reads-

“The Plaintiff’s avers and states that there is no suit pending over the same subject matter or previous proceedings except Civil Suit No. 1931 of 1992 and the High Court Civil Suit No. 780 of 1990 which was dismissed for want of prosecution on the part of the defendant.”

While paragraph 3 of the affidavit reads-

“That there is no other suit pending relating to the subject matter herein or any previous proceedings between the parties herein.”

Of course, the two contradict. Yet I must consider also the contents of paragraph 2 of the verifying affidavit in which the Plaintiff states-

“That I confirm and verify that the averments contained in the plaint are correct and true.”

(15) Order 4 Rule 1(1) of The Civil Procedure Rules 2010 outlines what shall be contained in a plaint, included in this under Sub rule (f) is-

“an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaint.”

Order 4 Rule (2) requires that the verifying affidavit shall verify the correctness of the averment in respect to pending and previous proceedings. My reading of the Rule is that the averment shall be included in the plaint and simply verified in the affidavit as correct. The purpose is to guard against the Plaintiff pleading a falsehood.

(16) In the proceedings before this court, the Plaintiff disclosed the past proceedings being the 1990 suit and the 1992 suit. This disclosure as required by the Rules is contained in the plaint. The averments in the plaint are confirmed to be correct and true by the accompanying verifying affidavit (paragraph 2). The Defendant has himself in the reply to the application acknowledged the existence of these past proceedings. Although paragraph 3 of the affidavit is not in line with the contents of the plaint I do not see this as a deliberate effort to mislead the court. In my view nothing much turns on this objection.

(17) Prayers (3) & (4) of the application are the same and read as follows-

“3. That the Honourable Court, be pleased to grant a temporary injunction restraining the defendant either by himself, his agents and/or servants from executing the lower courts Decree issued in Resident Magistrate Civil Suit No. 1931 of 1992 Mombasa directing the eviction of the plaintiffs from Plot NO. 891/II/M.N Mtwapa pending the hearing and determination of this application.

4. That the Honourable Court, be pleased to grant a temporary injunction restraining the defendant either by himself, his agents and/or servants from executing the lower courts Decree issued in Resident Magistrate Civil Suit No. 1931 of 1992 Mombasa directing the eviction of the plaintiffs from Plot No. 891/II/MN Mtwapa pending the hearing and determination of this application.” (emphasis mine)

(18) It is the argument of the Defendant that the prayers sought in the application are framed in a manner that makes it unhelpful and incompetent. Unhelpful because the orders will lapse at the determination of this application. From a common sense point of view the application was before me for hearing and determination as to whether an order of injunction should issue pending the main hearing and determination. The fact that neither prayer (3) and (4) states that it was pending determination of the main suit must be taken as a typographic lapse. Why else would prayer (3) and (4) be a replica word for word? It is my duty to look beyond such lapses and focus on attaining a just resolution of the dispute before me. The overriding objective of the provisions of Section 1A of The Civil Procedure Act contemplated that temporal lapses are inevitable. I have also considered that the Defendant has put up a robust response as though the application was properly worded.

(19) There is then the issue of the unserved summons. The purpose of the court issuing summons under Order 5 of The Civil Procedure Rules 2010 is to require the Defendant to appear within the time specified therein. The firm Maranga Maosa & Associates filed a Notice of Appointment to act on behalf of the Defendant on 3rd March 2011 before any adverse step had been taken against the Defendant. Subsequently the Defendant participated in the proceedings by filing a replying affidavit on 12th May 2011. From then on the Defendant has been represented by counsel in court upto the point the application was argued by way of written submissions. For what reason would the Defendant be complaining about non-service of summons? With respect this is splitting of hairs. I find no merit in the objection.

(20) There is yet another objection. The application is framed as seeking an injunction in respect to 891/II/MN and not 891/III/MN. In the plaint the land in dispute is 891/III/MN. The crux is that the Plaintiff is seeking to restrain the Defendant from executing the decree issued in the 1992 suit. This is evident from the wording of the application. The Applicants seek an order of injunction-

“restraining the defendant by himself, his agents and/or servants from executing the lower courts Decree issued in Resident Magistrate Civil Suit No. 1931 of 1992 Mombasa directing the eviction of

the Plaintiffs from Plot No. 891/II/MN.” (my emphasis)

That decree is in respect to LR No. 891/III/MN. Even from the Defendants replying affidavit the land in contention is 891/III/MN and not 891/II/MN. I have in mind annexures AAM2, AAM9 and AAM10 to that affidavit all of which refer to LR No. 891/III/MN. The mistake in citing the wrong parcel number is, again, a lapse that I am willing to overlook in order that substantial justice can be attained. I would have held otherwise if this error would have caused real prejudice to the Defendant.

(21) Let me now exam the substance of the application and the Defendants response.

(22) Is this suit properly before court? It helps to repeat the provisions of Section 34(1) of The Civil Procedure Act;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

It is the submission of the Defendant that the suit was a nullity from the word go as the questions raised here should have been raised for determination before the court executing the decree and in the 1992 file.

A similar argument was raised in **Civil Appeal No. 124 of 2003 M’rinkanya & Another –Vs- M’mbijiwe [2008]1 EA 200**. At page 209 the court resolved it as follows-

“Mr. Opolu submitted that the suit was a nullity ab initio because by Section 34(1) of the Civil Procedure Act, any objection to the execution of the decree should be determined by the court executing the decree and not by a separate suit. Mr. Opolu is not, with respect, correct. The issue raised in the suit was not merely a procedural issue about the execution, discharge or satisfaction of a decree. It was a substantive issue of law whether recovery of the suit premises was barred by the Limitation of Actions Act and whether the court had jurisdiction to issue eviction order.” (my emphasis)

In my view this court is properly seized of the suit and application before it.

(23) Section 4(4) of The Limitation of Actions Act provides as follows-

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

(24) The dispute herein revolves around post judgment proceedings and this court accepts that “all post judgment proceedings including original proceedings and interlocutory proceedings for execution of judgment are statute-barred after 12 years (**M’rinkanya & Another –Vs- M’mbijiwe**).

(25) It is not in debate that the Defendant is desirous of executing the Decree in the 1992 case. It is also not in dispute that the decree/judgment was made in 6th December 1994. This was about 16 years prior to the filing of the present suit. It has also been demonstrated by the Defendant that it made efforts in 2001 and 2004 to have the decree executed. These were in 7th and 10th year of the decree and clearly within the 12 years limit set up by Section 4(4) of The Limitation of Actions Act.

(26) The Pivotal issue, however, is whether the Decree obtained on 6th December 1994 can be executed after 6th December 2006 (when 12 years lapsed). The order of court of 1st March 2004 directed the authorities to assist in the enforcement of the decree of 6th December 1994. Unfortunately for the

Defendant even this last order did not bear fruit. An issue that will confront the trial court is whether the Defendant can rely on the order of 7th March 2004 without first complying with the provisions of Order 22 Rule 18 of The Civil Procedure Rules. That rule requires that a Notice to Show Cause must issue on the person against whom execution is applied for where an application for execution is made more than one year after the date of the decree and, as here, the last application for execution was made more than one year ago. Should the court find that compliance to Order 22 Rule 18 is required then it will have to decide whether it is not too late in view of the statutory limitation on time.

Conclusion

(27) The conclusion I reach is that the issue raised by the plaintiff is not frivolous and that the Plaintiffs have in fact established a prima facie case. The Plaintiffs deserve to remain in possession of the suitland until this suit is heard and determined. I therefore grant an order of injunction restraining the Defendant either by himself, his agent and/or servants from executing the lower courts Decree issued in RMCC No. 1931 of 1992 directing the eviction of the Plaintiffs from Plot No. 891/III/MN Mtwapa pending the hearing and determination of this suit.

(28) The presentation of the application was less than elegant. It had too many clerical mistakes. For this reason I will not make any award of costs in favour of the Plaintiff. Each party shall bear its own costs.

Dated and delivered at Mombasa this 28th day of May, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Okanga for Plaintiff

No appearance for the Defendant

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**